

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 27 November 2012

**Public Authority:** Cambridgeshire County Council  
**Address:** Shire Hall  
Castle Hill  
Cambridge  
CB3 0AP

**Decision (including any steps ordered)**

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1. The complainant has requested copies of records relating to a dispute between Cambridgeshire County Council ("the Council") and an external contractor about the completion of the Guided Busway Scheme; a scheme engineered by the Council with the aim of improving public transport services. The Council informed the complainant that part of the requested information was obtainable from the Technology and Construction Court. For the remainder, the Council advised that the information was subject to the exceptions provided by regulations 12(5)(b) (course of justice), 12(5)(d) (confidentiality of proceedings) and 12(5)(f) (voluntary supply) of the EIR. The Commissioner has found that regulation 12(5)(b) of the EIR is engaged and that in all the circumstances of the case the public interest favours the withholding of the information. He does not therefore require any steps to be taken as a result of this notice.

**Request and response**

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2. On 20 September 2011 the complainant wrote to the Council and requested information in the following terms:

*"Please send me copies of all correspondence and documents, relating to the Cambridgeshire Guided Busway, between you and the adjudicator dealing with the dispute with BAM Nuttall or between you or any other adjudicator, arbitrator, tribunal or court."*

*Please also send copies of all correspondence and documents you have received from BAM Nuttall which you understand to have been also sent or disclosed to any adjudicator, arbitrator, tribunal or court."*

3. The Council responded on 18 October 2011. It explained that no matters relating to the Busway dispute have been referred for arbitration or to a tribunal. The Council did confirm, however, that the Busway dispute had been the subject of four adjudications and an application had been made to the Technology and Construction Court in terms of legal proceedings.
4. In respect of the Court application, the Council informed the complainant that its submission could be obtained from the Court directly upon payment of a fee. For those records relating to the adjudications, the Council explained that the information it held comprised –  
  
*"[...] BAM Nuttall's referral, our response, witness statements from both sides and supporting evidence."*
5. The Council did not consider it was obliged to disclose this information, citing regulations 12(5)(b), 12(5)(d), 12(5)(f) and 13 of the EIR as its basis for doing so.
6. Following confirmation of the complainant's dissatisfaction with its response, the Council provided the outcome of its internal review on 19 December 2011. This upheld its original decision to refuse to release the adjudication information although it decided, on reflection, that regulation 13 of the EIR had been misapplied and therefore withdrew its reliance on this exception. As asked for by the complainant, though, the Council did clarify the reference number of the case lodged with the Technology and Construction Court.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 17 January 2012 to complain about the way his request for information had been handled by the Council. In particular, he challenged the Council's decision to refuse the disclosure of information under regulations 12(5)(b), 12(5)(d) and 12(5)(f) of the EIR.
8. The Commissioner has therefore only considered the Council's position under the EIR in respect of its application of these regulations to the records relating to the adjudications described by the Council (see paragraph 4) and not to any other part of its response.

## Reasons for decision

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9. The Council has decided that the information requested by the complainant represents environmental information and therefore the appropriate access-regime is the EIR rather than FOIA.
10. The complainant has not voiced any disagreement with the Council's decision to process the requests under the EIR. Similarly, the Commissioner is satisfied that the EIR applies, considering that the requested information is on a measure, namely the development of a transport corridor, which will ultimately affect the state of the elements of the environment. As such, it falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR. The determination that the EIR applies also corresponds with the Commissioner's previous decision, case reference FER0347465<sup>1</sup>, in which he considered a separate request made to the Council for information relating to the Busway dispute.
11. The Commissioner has therefore gone on to consider whether the Council's decision to withhold the requested information was in accordance with the provisions of the EIR.

### Regulation 12(5)(b) – course of justice

12. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

*“the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”*

13. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met; (1) the withheld information relates to one or more of the factors described in the exception, (2) disclosure would have an adverse effect on one or more of these factors, and (3) the public interest in maintaining the exception outweighs the public interest in the release of the information. When considering the public interest arguments, a public authority must take account of the express presumption in favour of disclosure that exists in the EIR. The Commissioner addresses each of these three conditions below.

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<sup>1</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fer\\_0347465.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fer_0347465.ashx)

14. It has been accepted in previous decisions of the Commissioner and the Information Tribunal that regulation 12(5)(b) of the EIR shares common ground with section 42 of FOIA, in that both will cover any information which attracts legal professional privilege. However, where Regulation 12(5)(b) is concerned, a public authority must be able to show that disclosure of the legally privileged information would adversely affect the course of justice. The fact that the exception refers to the "course of justice" rather than limiting itself only to legal professional privilege also indicates that it is potentially far broader than the exemption set out at section 42 of FOIA. On this this point, the Commissioner has reminded himself of the Information Tribunal's comments in *Rudd*<sup>2</sup>, in which it considered that the exception 'denotes a more generic concept somewhat akin to the "the smooth running of the wheels of justice"'.
15. By way of background, the Busway dispute broadly relates to issues connected to the handing over of the transport scheme by BAM Nuttall, the contractor, to the Council. Claims and counterclaims have been made over the delays associated with the project and the costs attendant to the failure to complete the project within the agreed timeframe.
16. BAM Nuttall and the Council initially sought to manage the dispute through an adjudication process, with the parties entering into four separate adjudications at various times during 2009. The Commissioner has been informed by the Council that an adjudication produces a decision that is binding on the parties and will be enforced by the Court unless and until the Court (or arbitrator) decides the same issue differently. The four adjudications in 2009 included hearings in private before a QC adjudicator with counsel representing each party, incorporating evidence given by signed written statements containing statements of truth.
17. It is apparent that the adjudication process was not wholly successful. In August 2011 the Council commenced formal legal proceedings in the Technology and Construction Court for the recovery of money that it considered was still owed by BAM Nuttall in respect of the Cambridgeshire Guided Busway. These proceedings were ongoing at the time the request was made.
18. The Commissioner has been provided with copies of the disputed information by the Council. The Commissioner notes that the information comprises a wide range of material, ranging from witness statements to photographs of land associated with the Guided Busway.

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<sup>2</sup> Para 29, *Rudd v IC and The Verderers of the New Forest* ([EA/2008/0020](#))

Some of these records, it is fair to say, can be considered as being relatively anodyne when considered in isolation.

19. In this case the Commissioner considers that one indication that a record is likely to be covered by the exception will be where it is protected by legal professional privilege. Put simply, the concept of legal professional privilege is a key ingredient of the course of justice; allowing parties space in which to seek advice on their respective position under law and the accompanying powers and obligations. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. The category of privilege which the Council considers applies is litigation privilege.
20. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
21. In his guidance on section 42<sup>3</sup> of FOIA, the Commissioner observes that where a record existed before litigation was contemplated or before it was considered possible that legal advice might be needed, legal professional privilege will not usually apply to it. There is, however, one important exception to this rule. That is when a lawyer uses his or her skill and judgement to select pre-existing documents that were not already held by the client, for the purposes of advising their client or preparing for litigation, then legal professional privilege can apply.
22. For illustrative purposes, the Commissioner imagines in his guidance a scenario which concerns instructions sent to counsel to ask for advice about liability following a road traffic accident. In that scenario, the Commissioner decided that car service records would not be subject to privilege, in contrast to a medical expert's report and witness statements which would attract privilege.
23. The Council in this case has pointed out that the witness statements, expert reports, response documents and referral notices were all specifically created for use in contemplated litigation. This was in readiness for the adjudication hearings, the outcomes of which would decide whether litigation was required. The Commissioner is satisfied that at the point the information was prepared there was a real possibility that the dispute between the parties would lead to legal action, as in fact it did. On this basis, the Commissioner accepts that this information attracts litigation privilege and is therefore subject to regulation 12(5)(b) of the EIR.

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<sup>3</sup>[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/legal\\_professional\\_privilege\\_exemption\\_s42.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx)

24. As stated, however, regulation 12(5)(b) differs from section 42 of FOIA in that the exception will not be automatically engaged solely on the basis that information attracts legal privilege. Instead, a public authority must next consider whether there would be an adverse effect as a result of the disclosure of this information.
25. The threshold to justify non-disclosure is a high one; a position that corresponds with the findings of the Information Tribunal in *Benjamin Archer v the Information Commissioner and Salisbury District Council* (EA/2006/0037)<sup>4</sup>.
26. Firstly, as the Tribunal identified, it is not enough that disclosure should simply have an effect, the effect must be adverse to the factor described in the exception. Secondly, refusal to disclose is only permitted to the extent of that adverse effect. Thirdly, it is necessary for the public authority to demonstrate that disclosure 'would' have an adverse effect, not that it could or might have an effect. In other words that the adverse effect is more probable than not.
27. It has been recognised by the Upper Tribunal that in principle an adverse effect upon the course of justice can result from any act of disclosure of legally privileged information. This is because the action itself would undermine the concept of legal privilege. However, the Upper Tribunal has also acknowledged that there is the potential that this will not always be the case.
28. The most obvious example of such an exception is where information subject to legal professional privilege is 'stale'. In other words, the information no longer has any currency in the existing state of affairs with the result that there could be no detriment to a party through the release of the information. However, in the Commissioner's view, this is patently not the case here. This is because the information was still being relied upon by parties that had entered into legal proceedings at the time the request was made.
29. For this reason, the Commissioner has accepted that there would be an adverse effect directly arising from disclosure. In coming to this view, the Commissioner has also been alive to the fact that because information once attracted privilege it does not mean that this privilege remains in perpetuity. Notably, privilege may fall away where a client has shared privileged information with third parties, thereby stripping it of its confidential nature.

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<sup>4</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i23/Archer.pdf>

30. The records in question form part of bundles, the contents of which have been seen by the parties to the dispute and an adjudicator. A question could then arise as to whether any confidence attached to the information had been lost. The Commissioner is, however, satisfied that the disclosure was to a limited audience, rather than to the wider world, with the adjudication process itself placing restrictions on the further use of the information. Thus, the information would remain confidential from the public at large, meaning that it has retained its legally privileged status.
31. For different reasons, the Council has also gone on to suggest that the remaining records covered by the request, namely those not produced in preparation for litigation, are also protected by litigation privilege. This is by virtue of them being included in the bundles submitted to the adjudicator, chosen to support specific points and arguments included in the witness statements and reports that were created for contemplated litigation. In essence, the Council is attempting to argue that the selection of these documents for inclusion in the bundle betrays the trend of the legal advice.
32. The Commissioner, however, respectfully disagrees with this analysis. In doing so, the Commissioner considers that the argument advanced by the Council does not apply where the selection is made from the clients own documents; the claim only having force where a selection is made from public records or documents, such as a selection of case law. All other documents falling outside of this description are not privileged.
33. Had this information been considered under section 42 of FOIA, which only concerns itself with information attracting legal professional privilege, it would then be necessary to conclude that the exemption is not engaged. However, the Commissioner has reminded himself that regulation 12(5)(b) of the EIR is potentially far broader than section 42 of FOIA. In effect, the wording of the exception allows for documents that are not subject to legal professional privilege to still be covered as long as the disclosure would adversely affect the course of justice. The Commissioner has therefore considered the cogency of the arguments which state that the remaining information could engage the exception even where he had found that it was not privileged.
34. It is understood that the disputed information forms part of a mechanism by which, starting with the adjudications and leading into the legal proceedings, the parties have sought to answer the question of whether contractual terms had been satisfactorily fulfilled. This mechanism effectively allows parties to seek an impartial judgement where a dispute has arisen; a key component of the course of justice.
35. Taking an overarching view of this process, the Commissioner has perceived that the non-privileged information forms an important part of

the positions adopted by the Council and BAM Nuttall. This is evidenced by the fact that the same information carried through the adjudications into the subsequent legal proceedings; in short, it was not considered by either party that any of the records should be discarded when entering into the legal proceedings.

36. In the Commissioner's opinion the contribution that the non-privileged information had, and continued to have at the time of the request, in these proceedings demonstrates its connection with the course of justice. This finding is consistent with the Commissioner's guidance, in which he comments at paragraph 25 that regulation 12(5)(b) is wide enough to "cover an adverse effect caused by the disclosure under the EIR of court records and information held for the purpose of an inquiry or arbitration." The Commissioner has therefore concluded that both the privileged and non-privileged information is capable of falling within the exception if the public authority can demonstrate that an adverse effect on the adjudication or subsequent proceedings in this case or in future cases would occur as a result of disclosure.
37. The next question that must be considered by the Commissioner is therefore whether the public authority has demonstrated that an adverse effect would arise as a result of the disclosure.
38. Much like the notion of legal professional privilege, the Commissioner observes that the 'course of justice' exception is designed to ensure that proceedings which have the aim of resolving a dispute can go forward unhindered. In many cases, this will mean affording a party room in which to consider and manage the submissions they plan to rely on in proceedings.
39. The complainant has argued that at the time of the request – which was only made after the adjudication process had been effectively concluded – neither party could be disadvantaged through disclosure. This is because the release of the information would not reveal details of either party's position beyond that which is already known to those parties. Therefore, to the complainant's mind, no adverse effect could arise through disclosure.
40. The Commissioner accepts that in principle this argument does have some weight. However, he has been conscious that the dispute remains live despite the completion of the adjudications. In the Commissioner's view the closing of the adjudication hearings in this case can be seen as only the first stage of the dispute process, rather than a separate part of that process. This will only be discharged when either one, or both, parties withdraw or it terminates by way of a legal judgment.
41. To the Commissioner's mind, the act of sharing information as part of the adjudications shares a resemblance with the advance order for



disclosure made in civil or criminal cases. Such disclosure requires a party to disclose on a restricted basis the documents on which they rely. This concept is meant to allow parties the opportunity to know of, and consider, the position taken by their opponent in preparation for the hearing due to take place. The fact that this disclosure is only on a restricted basis evidences the importance that is placed on this process being confidential.

42. The Commissioner believes that similar considerations apply here. Just as information shared during a civil or criminal case does not automatically lose its confidential nature so there will be an expectation that the confidentiality of information presented before an adjudication will extend into legal proceedings. Disclosure in this case would weaken the expectation of confidentiality leading into proceedings. The Commissioner sees no reason to doubt that both parties entered the adjudication process in good faith, with the common understanding that information shared in the adjudication would be kept confidential at least until a resolution had been achieved. This confidentiality is meant to ensure that both parties can conduct themselves without fear of outside criticism while the dispute was still live. Drawing out this analysis, the Commissioner believes the consequences of disclosure are two-fold.
43. Firstly, it presents the real risk that parties will be less willing in the future to enter into voluntary systems designed to resolve disputes, such as adjudications, which have both time and cost benefits.
44. Secondly, and arising from the first point, the Commissioner considers it reasonable to conclude that even if a party did agree to participate in a process intended to resolve a dispute, it will not be as candid in submitting information to a hearing, such as an adjudication, or would generally be less cooperative if they considered that this information would be subject to disclosure.
45. In support of this view is the realisation that an adjudication process is one in which parties can submit evidence 'without prejudice'. This will be as part of negotiations on a settlement of a dispute, designed to encourage attempts at informal resolution. The concept of 'without prejudice' is to reassure parties as to the confidentiality of information which features as part of negotiations; protection that will continue after a settlement is agreed. In disputes of a commercial nature, such as here, the Commissioner considers that the effect of disclosure would be to deter parties from presenting information that would harm their commercial interests. The corresponding detriment would, the Commissioner accepts, be real and significant.
46. Not only does this general argument have traction in relation to future events, the Commissioner also considers that it applies to the specific

circumstances of this case as they stood at the time of the request. In particular, the Council has informed the Commissioner that both parties would have had the intention of introducing new material into the legal proceedings following the conclusion of the adjudication process. As such, disclosure at such a critical time would make the parties less free and frank in the extant proceedings. Again, the harm associated with this outcome would be significant.

47. It follows then that the repercussions of both of the above points would be to weaken the wider administration of justice. Using this logic the Commissioner is prepared to accept that not only would disclosure have an effect on the course of justice, this effect would be adverse. As the Commissioner has therefore found that the exception is engaged, he must next consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure.

### **Public interest test**

#### *Arguments in favour of disclosure*

48. As stated, the EIR contains an express presumption in disclosure. This emphasis reflects the potential importance of environmental information to the public. Further, the Commissioner will always attach some weight to the general principle of transparency and the promotion of accountability that arises from this principle. Ultimately, giving the public greater access to information may help them trust, and participate in, the decisions taken by a public authority.
49. The nature of the Busway dispute, however, also means that the public interest in disclosure goes beyond the wider attractiveness of transparency. As the Council has pointed out, the Guided Busway is a major infrastructure project which required the considerable investment of taxpayer money. This, by itself, would lend weight to the public interest arguments in favour of disclosure.
50. This weight is further augmented by the realisation that the public have a legitimate interest in knowing more about the problems attendant to this project, the delays that ensued and the Council's attempts to recover a substantial amount of money that it contends it is owed. Reports have placed the Council's claim as reaching £55 million, with Bam Nuttall issuing its own £43 million counterclaim subsequent to the date of the request<sup>5</sup>.

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<sup>5</sup> <http://www.nce.co.uk/news/transport/atkins-drawn-into-dispute-over-cambridgeshire-guided-busway/8629750.article>

51. Disclosure would allow the public to better understand the reasons and circumstances for the dispute. It would also help inform the public about any concerns that exist about the way the Council has acted in this matter or alternatively stimulate debate in this regard. It is clear that the engagement of the public in such a significant, and controversial, area should not be overridden lightly.

*Arguments in favour of maintaining the exception*

52. Inherent in regulation 12(5)(b) is the argument which says that the course of justice should be allowed to play out, away from the hindrance of outside comment and interference.
53. The Council recognises that the significance of the project and the subsequent dispute lend weight to the arguments in favour of disclosure. Yet, it has also been argued that the fact of this significance actually places a greater weight on the arguments in favour of maintaining the exception. This is because of the potential jeopardy that disclosure would have both on this, and future, proceedings. This stems from the consequences described previously in respect of the adverse effect of disclosure.
54. Ultimately, it is the Council's view that the benefit of increasing transparency at this stage in the process does not sufficiently outweigh the harm that could be caused. Not only this, the act of disclosure would also have the unwelcome effect that parties would be less willing to participate, or otherwise be as free and frank in, future negotiations designed to resolve disputes outside of legal proceedings.
55. It has also been found that some of the disputed information attracts litigation privilege, the disclosure of which would result in an adverse effect. Recognising the importance which is invested in the protection afforded by legal professional privilege, the Commissioner would accept that the public interest in maintaining the exception is enhanced in respect of this particular set of information.

*Balance of the public interest arguments*

56. The Commissioner considers that the critical issue in this case is the one of timing. In particular, he is keenly aware that the request was made when legal proceedings had commenced. Accordingly, the issue of the Busway dispute was still very much alive.
57. There is no doubt that the information relating to the Busway dispute attracts considerable public interest, which goes far beyond mere curiosity. This is because of the amount of public funds involved and the

weight attributable to the possibility of holding the Council accountable not only for its decision to enter into the Guided Busway project in the first place but also for its actions relating to the dispute connected with the completion of this project.

58. However, the Commissioner recognises that the aim of the legal proceedings taken by the Council is to recover public funds. It is therefore vital that the Council should be given every chance to mount a successful case. Any action that could therefore upset the proceedings, which includes distracting the Council from its main objective, would not be in the public interest.
59. In saying this, the Commissioner acknowledges that the public interest is particularly finely balanced in this case. However, he agrees with the Council that the potential value of transparency at the time of the request suffers in comparison with the harm that could occur as a result of disclosure.
60. For this reason, the Commissioner has decided that the Council correctly applied regulation 12(5)(b) of the EIR to the requested information. In light of this finding, the Commissioner has not gone on to consider the Council's reliance on regulations 12(5)(d) and 12(5)(f) of the EIR.

## Right of appeal

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61. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

62. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jo Pedder**  
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