

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

**Decision notice**

**Date:** 22 January 2014

**Public Authority:** Shropshire Council  
**Address:** Shirehall  
Abbey Foregate  
Shrewsbury  
Shropshire  
SY2 6ND

**Decision (including any steps ordered)**

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1. The complainant has requested correspondence relating to a previous request for information. The council has applied Regulation 12(4)(e) (internal communications) and Regulation 12(3)(personal data).
2. The Commissioner's decision is that Shropshire Council was correct to apply Regulation 12(4)(e) to the information and that the public interest rests in the information being withheld. However he has decided that the authority did breach Regulation 14(3)(b) in that it did not specify the arguments and factors it considered when carrying out the public interest test. The Commissioner has also decided that the council was correct to apply Regulation 12(3) to the information. Again however the authority did not comply with the requirements of Regulation 14(3)(b) when providing its refusal notice to the complainant.

**Request and response**

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3. On 16 September 2012 the complainant wrote to Shropshire Council and requested information in the following terms:

*"I request copies of all emails and letters sent or received within Shropshire Council or in correspondence with the Information Commissioner or with anyone else in relation to this matter. Please may I also have a copy of all notes made? This request in made under*

*the Data Protection Act 1998, the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.*

*On 07.06.12, [officer's name redacted] admitted: 'It has caused...the Council...considerable time and effort to deal with this issue'.*

*I request a breakdown of the time spent per individual involved at Shropshire Council from 24.01.10 until 17.05.12, together with the cost to the taxpayer. Please also provide a total of time and cost.*

*Please let me know if any information is being withheld and the reason."*

4. The council responded to some parts of the request on 25 October, 15 November, but on 23 November 2012 it wrote to the complainant and applied the exceptions in Regulation 12(4)(e) and Regulation 12(3) to the remaining information it held.
5. The complainant requested an internal review in 18 December 2012. He included a request that the council specified details of the information which was being withheld.
6. Following an internal review the council wrote to the complainant on 15 February 2013. It stated that it recognised that its initial response was out of time but that it had initially made a mistake about the information which he was seeking. It confirmed that it was refusing the request on the grounds previously stated. It also said that the Regulations did not require it to create an inventory of each piece of information which it was withholding. It did provide the complainant with the redacted copies of the documents, arguing that this established where information falling within the scope of his request had been withheld.

## **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request had been handled. The arguments submitted by the complainant relate to the fact that the council failed to provide him with information in response to his first request when it should have. He argues that the information held by the council may include discriminatory comments about him and that the council was biased and sided with the third party as regards the issues he had with his property. The complainant also considered that the council was wrong not to list the information it was withholding from him in response to his request.
8. The complainant therefore considers that the information he has asked for should have been disclosed to him. He also asked the Commissioner

to consider whether the council was correct when it refused to provide him with a list itemising each piece of information which it was withholding.

9. The complainant did not raise an issue as regards his request for information on time and costs expended by the council, (third paragraph of the request). The council also clarified that it had responded to that part of the request stating that it did not hold that information. The complainant also did not provide evidence that he had raised this with the council in his request for a review. The Commissioner has not therefore considered this aspect of his request further in this decision notice.

## **Reasons for decision**

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### Regulation 12(4)(e)

10. Regulation 12(4)(e) states that information can be exempt from disclosure where the request involves the disclosure of internal communications.
11. A communication Regulation 12(4)(e) means a document that conveys information. It could take any form, including a letter, report, email, memo, photograph, note of a conversation, or an audio or visual recording.
12. A document does not actually need to be sent for it to count as a communication for this purpose; a document that has been prepared to convey information, but is still on its creator's file, is still a communication. Communications might include draft documents prepared with the intention of putting them before a legal adviser, even if they are not subsequently sent to the adviser. An example might be a witness statement that was prepared, but not actually sent to a solicitor.
13. In this case the information is communications between a council solicitor and its client department. It also includes a solicitors hand written notes on the case. These notes and communications have not been disclosed outside of the council.
14. The Commissioner has considered the withheld information and is satisfied that the exception is engaged.
15. The Commissioner has therefore carried out a public interest test as required by Regulation 12(1)(b). When doing this he has taken into account the presumption towards disclosure specified in Regulation 12(2).

16. The test set out in Regulation 12(1)(b) is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. If the public interest in maintaining the exception does not outweigh that in the information being disclosed then the exception cannot be applied. Regulation 12(2) also provides a presumption towards the disclosure of the information.

### The public interest

#### The public interest in the exception being maintained

17. The Commissioner is limited to considering the public interest factors which relate to this particular exception. Although the council is correct that the information is subject to legal professional privilege the Commissioner must limit his public interest considerations to the purposes behind the exception in Regulation 12(4)(e) rather than any other exception. Public interest arguments under this exception must be focused on harm to internal deliberation and decision-making processes. Broader arguments about the principle of legal professional privilege will not carry any inherent weight under this exception. The course of justice exception in regulation 12(5)(b) is likely to be more appropriate for legal advice.
18. The central public interest in Regulation 12(4)(e) relates to creating a 'safe' space for public authorities to discuss, deliberate and seek advice about issues prior to making decisions. There is also a public interest in allowing free and frank discussions to take place in private in order to prevent a chilling effect occurring. The Commissioner has firstly considered the safe space arguments.
19. In relation to a previous request from the complainant the council withheld information under Regulation 12(5)(f). The Commissioner upheld the council's decision however this was subsequently overturned by the First-tier Tribunal. Much of the information therefore relates to the council's decision making in relation to this previous request, together with its discussions and preparation as regards the subsequent tribunal hearing. Other matters relate to earlier issues with the complainant. The complainant had an issue with neighbours as dry rot was spreading to his property from a neighbouring property owned by a business. The complainant wished the council to take formal action for statutory nuisance against the owners of the neighbouring business. The council had become involved but had not taken formal action against the business but sought to deal with it informally. The complainant considers this led to delays in the dry rot in his property being sorted.

20. The Commissioner notes that the majority of the issues which the council would have required safe space for had been decided by the time of this request. The issue regarding the dry rot had presumably been resolved as at the time of the request this had occurred a number of years in the past. The previous complaint to the Commissioner had been resolved by the First-tier Tribunal.
21. The Commissioner considers that the public interest in protecting a 'safe space' become a much weaker once the situation is no longer 'live'. In this case a tribunal hearing had taken place and an independent decision had been made in favour of the complainant.
22. The next question is whether a disclosure of the information would be likely to have had a chilling effect upon the council's discussions and debates. There is the potential that if this were to be disclosed the authority would be cautious about recording such advice in the future. It would feel restricted about recording and potentially seeking such information in writing. Similarly, with the solicitors preparatory notes there would be a likelihood that that information would either not be recorded or would be destroyed once the work on preparing any advice had been completed.
23. Again there is a question about how much weight these arguments hold once the issues which the information is about have been resolved. It is however possible that the complainant may be able to take civil action against either party for the damages he suffered as a result of the dry rot intrusion and the delay in resolving this issue. A disclosure of the information would therefore remain relevant and 'live' in such circumstances. The Commissioner asked the council whether the issues were still live as regards potential litigation being taken against it or the third party however the council said that it was not aware.
24. Historically there is considered to be a very strong public interest in information subject to legal professional privilege being protected from disclosure. This has to do with the rights of every person to be able to have free and frank discussions with their legal advisors without fear that those discussions will subsequently be disclosed, thereby potentially weakening their position in any subsequent litigation which takes place. Such arguments are not directly relevant to the reasons behind this exception, however some arguments relating to the thinking space required to consider, create and provide advice do obviously carry across to this exception as do arguments surrounding the potential chilling effect which would occur should such information be disclosed.
25. Given that the information contained in the minutes is protected by legal professional privilege an enhanced level of protection would be expected and this must be taken into account when considering the weight of

public interest in maintaining the exception. Where information is subject to legal professional privilege there is likely to be an ongoing issue about the confidentiality of that information even once the decisions have been taken. Clearly a disclosure of legal advice, or the disclosure of solicitor's notes is likely to disclose information which the authority considers confidential and which may be damaging to the authority if it is disclosed. The advice may contain full and frank discussions about the legal robustness of an authority's position and analyse the weaknesses in its position. It may consider tactics or strategies to manage any risks associated with this. A disclosure of this sort of information may be particularly damaging to an authority.

26. Although the Commissioner would not expect disclosure to mean that the council's legal advisers would stop giving full and frank advice, he accepts that it would not be in the public interest if the quality of internal discussions were to deteriorate because a public authority was deterred from seeking or recording legal advice for fear that that advice might subsequently be disclosed. This is a chilling effect.
27. Additionally it is clear that lawyers need to make notes as they work their way through cases, and there is a public interest in allowing them to consider and make notes on their thinking without fear that these notes may subsequently be disclosed. Clearly the initial thinking of lawyers may be markedly different to the advice which they finally provide or the decisions they finally make. There is a strong public interest in allowing this safe space in order for them to assess and map out their thinking before producing their final decisions on a matter.

#### The public interest in the information being disclosed

28. The central public interest in the disclosure is to create greater transparency on the decisions taken by the council which led to a situation wherein information which should have been disclosed to the complainant was not. This then required the complainant to make a complaint to the Commissioner and from there to the First-tier Tribunal.
29. The central issue behind the requests was the damage occurring to the complainant's property. The council sought to deal with the leak in a semi-informal way. The complainant considers that it was too slow to react and to force the neighbouring business to rectify the issues which had caused the leak. He considers that the council was under a duty to take action as the dry rot amounted to statutory nuisance. He considers that the council's failure to take enforcement action compounded the problems he was having and delayed the resolution of the issue.
30. The Commissioner is satisfied that there is a public interest in the information being disclosed as it would provide a greater understanding

of the council's actions and inactions as regards the situation. There is a public interest in creating greater transparency on the decisions it took and in this case its decisions ultimately led to the tribunal finding against it and overturning its decision to withhold the information in the complainant's previous request. Clearly the delays which ensued as a result of the refusal, and the time, resources and public money spent as a result of taking the case to the tribunal would have impacted upon the council's resources as a whole.

31. The public interest in the information being disclosed also relates to damage which was caused to a listed building, and the public interest in protecting public health. The complainant's building is a listed building. Despite his complaints the dry rot was damaging the fabric of the building the council tried to argue that the dispute was essentially a civil dispute between the parties and should be dealt with under the Party Wall Act.
32. Additionally the complainant argues that he had had to remove his kitchen sink to aid repelling the dry rot but this had resulted in him being required to wash food and pots in his bathroom sink. This situation when on for a number of months. He argued that this raised health concerns about the state of his property but the council had still not taken formal action nor considered the situation to be statutory nuisance.

### Conclusions

33. The Commissioner has considered the above arguments. Whilst the complainant has raised issues about personal issues relating to the removal of the sink and the state of his kitchen these are essentially private concerns rather than public health issues – only he would be affected by this situation.
34. Whilst the complainant may be aggrieved that the initial decision taken by the council was to withhold the information in response to his previous request, and not to take direct action against his neighbours it explained its reasons for doing this to the complainant. Although the Tribunal did not agree with the decision to withhold information as regards his previous request there are often differences of opinion as regards the application of the law and the Commissioner has seen no evidence of any bias or discrimination by the council or its officers.
35. A stronger argument is the damage which was being caused to a listed building, and the lack of direct enforcement action being taken to rectify the situation by the council. The council did however take action, and the Tribunal considered that it had made clear to the neighbouring business that it was under threat of an abatement order being issued

against it should the situation not be rectified. Although the council sought to argue that the situation was essentially a private civil affair between the parties the Tribunals decision reflected the threat and the legal potential for an abatement order to be issued. The council had therefore addressed and considered the issue, and had taken action to pursue a remedy albeit that it had not reached a point where it considered that formal enforcement was necessary.

36. Whilst the Commissioner considers that the majority of the arguments surrounding the inherent public interest in maintaining legal professional privilege do not fall within the factors inherent in maintaining this exception (and cannot therefore be taken into account), he considers that both the chilling affect arguments and the safe space arguments are applicable when considering the application of the exception. He considers that the nature of the information does play a part in that consideration as there would be a high expectation in the confidentiality of the information and a significant loss of confidence in the ability to have discussions in private in the future if there information were to be disclosed.
37. Although the inherent arguments in legal professional privilege are not specifically applicable, clearly if any of the countering arguments generally considered strong enough to overturn privilege are present then this will significantly strengthen the case for disclosure.
38. The Commissioner has already addressed the fact that whilst the direct situation may no longer be 'live' it may be possible that the complainant might be able to seek recompense or damages from one of the parties in the future. This is not however an overriding issue in this case but the lack of evidence presented by the council that the issues are still live do weaken its arguments in this respect. However the Commissioner considers that the fact that the complainant is still seeking information in respect of these occurrences at this time is itself an indicator that he considers that matters are still live, at least in some respects.
39. The Commissioner considers that the arguments in support of the information being disclosed in this case do not fall within the remaining, limited arguments which have in the past been recognised as providing sufficient public interest weight to outweigh the public interest in protecting privileged information.
40. These are where the issues affect a large amount of people or where the issues relate to large amounts of public money. Neither is the case in this case, although the Commissioner does recognise a strong public interest in the protection of listed buildings for the benefit of the public in the future.



41. Privilege has also be overruled previously where there has been a lack of transparency as to the advice received by an authority, such as where there has been a misrepresentation of the advice which was received. Again this is not applicable in this case.
42. Finally the Commissioner reiterates that he has seen no evidence of any discrimination or bias as regards the actions of the council in respect of the complainant. The council is entitled to make a decision based upon the facts and the circumstances of the case, and to stand by that decision until that decision is legally overturned. Decisions are often a matter of interpretation and opinion, and the tribunal can often disagree with an authority's (or the Commissioner's) decision in this respect. The fact that the complainant, and the Tribunal disagreed with its decision does not of itself provide a public interest argument in favour of this information being disclosed.
43. The Commissioner's decision is that the public interest lies in the exception being maintained in this instance.

#### Regulation 12(3)

44. A very small amount of information has been redacted by the council on the basis that it is the personal data of third parties. This effectively amounts to small sections from 2 emails. The issues relate to a specific property and only one person is identified, an agent presumably working on behalf of the owners of the property. The property itself is also identified and so its owner could be identified from personal knowledge by some individuals or other means such as the electoral role.
45. Regulation 12(3) states that information which is the personal data of third parties can be withheld where its disclosure would breach one of the principles of The Data Protection Act 1998 (the DPA). The relevant data protection principle in this case is the first data protection principle. This states (amongst other things) that information should only be processed (i.e. in this case disclosed) fairly and lawfully.
46. The question which the Commissioner considers is of primary relevance in this case is whether a disclosure would be fair for the purposes of the first data protection principle. This question surrounds the expectations of the individuals concerned. It also takes into account any wider 'public' need for that information to be disclosed.
47. The Commissioner is satisfied that the information relates to the third parties. The third parties are individuals acting in their working roles on behalf of a business and relate to activities being carried out on a separate property to those affected by this issue.

48. The individuals concerned have not consented to the disclosure of their personal data to the complainant. They would have no expectation that their information would be disclosed to the whole world.
49. The Commissioner must therefore consider whether there is a wider public need for that information to be disclosed which might override the expectations of the individuals. The first-tier tribunal has spoken in the past of whether there is a 'pressing social need' for the information to be disclosed.
50. The relevant information does not appear to directly relate to the issues which the complainant and the business had with their properties. From this information alone there would be no apparent reason why there would be a pressing social need for that information to be disclosed.
51. The Commissioner is therefore satisfied that there is no pressing social need for the information to be disclosed. The Commissioner's decision is therefore that a disclosure of the information would breach the first data protection principle and so the exception in Regulation 12(3) is therefore applicable.

#### Regulation 5(3)

52. The information relates in part to the complainant and where that is the case it is personal data relating to him which is caught within the scope of The Data Protection Act 1998 (the DPA).
53. Regulation 5(3) excludes information which is the personal data of the applicant from being provided to him under the Regulations. This is because an applicant will already have rights to that information (subject to exemptions) under section 7 of the DPA.
54. Individuals have stronger rights to access personal data held about them under the DPA than the general rights of access under the Act or the Regulations. Clearly as the information relates to them specifically their rights to know what information is held about them is generally stronger and the exemptions against disclosure significantly narrower.
55. The Commissioner has therefore carried out a separate assessment as regards this information under the DPA which will be provided separately to the parties concerned.

#### The council's refusal to specify what information was being withheld

56. The complainant has made an additional complaint to the Commissioner. He considers that the council should have specified exactly what information was being withheld from disclosure to him.

57. Whilst individuals do have a right to ask for withheld information to be provided to them in a specific form or manner there is no such provision as regards the manner of the refusal notice. The obligations as regards this are specified within Regulation 14. The relevant sections of this provide that:

***"Refusal to disclose information***

*14. - (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation...*

*(3) The refusal shall specify the reasons not to disclose the information requested, including -*

*(a) any exception relied on under regulations 12(4), 12(5) or 13; and*

*(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*

58. Regulation 14 does not therefore require an authority to specify in inventory form (or any other form) what information it is withholding from disclosure. What is required is that the authority specifies whether or not it is holding the information which has been requested (unless an exception to this also applies), and that the authority stipulates the reasons for its decision to exempt the information when refusing the request.
59. The Commissioner has considered the refusal notice issued by the council in response to this request and he is satisfied that the council's response did not meet with the requirements of the Regulations. Although the council did outline which exemptions applied it did not stipulate the public interest factors which it had taken into account when reaching its decision. It merely stated that it had considered the public interest and found that it rested in the information being withheld. This does not meet with the requirements of Regulation 14(3)(b).
60. As regards the application of Regulation 12(3) the council did not stipulate on what grounds it was relying upon the exception other than to say that the information was the personal data of the a third party. Again this does not meet the requirements of Regulation 14(3)(b).
61. The Commissioner has therefore decided that the council breached the requirements of Regulation 14(3)(b) as regards the above points.

## Right of appeal

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62. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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 .....**

**Andrew White**  
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