

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 May 2018

Public Authority: Test Valley Borough Council
Address: Beech Hurst
Andover,
Hampshire.
SP10 3AJ
legal@testvalley.gov.uk

Decision (including any steps ordered)

1. The complainant has requested from Test Valley Borough Council (the Council) information on a report it obtained in relation to its options for taking legal action against a private individual.
2. The Council has withheld the information under Regulation 12(5)(b) of the EIR.
3. The Commissioner's decision is that the Council has correctly applied Regulation 12(5)(b) and therefore does not require it to take any steps to ensure compliance with the legislation.

Request and response

4. On 15 December 2017 the complainant wrote to the Council and requested information in the following terms:

"The information I require is a copy of the report from [redacted] relating to the trees, state of the gardens and rat infestation at [redacted] that was commissioned by the Council as a result of [redacted] request the council do something as badly affecting [redacted] as immediate [redacted] and [redacted] property well as tge [sic] community. Under the Pest ControlmAct [sic] and The Anti Social Behaviour Act 2014 uodate [sic] giving councils stronger powers to deal with such mattere [sic]"
5. The Council responded on 17 January 2018 and stated it was neither confirming nor denying that it held the information.

6. On 22 January 2018 the complainant requested an internal review.
7. Following an internal review the Council wrote to the complainant on 15 February 2018 and stated it was neither confirming nor denying that it held the requested information under Section 42(2) of the Freedom of Information Act 2000 (the FOIA).

Scope of the case

8. The complainant contacted the Commissioner on 18 February 2018 to complain about the way her request for information had been handled. In particular, she expressed her dissatisfaction with the Council's decision to refuse her request for information.
9. On the 20 April 2018 the Commissioner contacted the Council and invited it to consider whether the information requested was 'environmental' within the meaning of the EIR and if so, which exception or exceptions it wished to apply.
10. The Council responded to the complainant direct (with a copy to the Commissioner) on 23 April 2018. Having reconsidered its position it accepted that the information was environmental and decided to apply Regulation 12(5)(b) of the EIR.
11. The Council also provided the Commissioner with a copy of the withheld information.

Reasons for decision

Is the information requested environmental?

12. The Council has dealt with the complainant's request under the EIR on the basis that the requested information is 'environmental'.
13. Under Regulation 2(1) of the EIR environmental information is defined as:

'any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment such asland, landscape and natural sites including wetlands...biological diversity...(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a), (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or

likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements'.

14. The Commissioner accepts that the information would constitute a 'measure' affecting or likely to affect the state of the elements of the environment, namely land and landscape.

Regulation 12(2) - Presumption in favour of disclosure

15. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

The Exceptions

16. The Council has applied the exception under Regulation 12(5)(b) of the EIR to the request.

Regulation 12(5)(b) of the EIR – adversely affect the course of justice

17. Under this exception, a public authority can refuse to disclose information to the extent that 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
18. The success, or not, of the application of Regulation 12(5)(b) in terms of LPP will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?
19. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Legal advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.

20. In order to attract LPP, the information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
21. The withheld information in this case comprises a report or legal opinion provided to the Council by an external barrister on the prospects and tactics for taking legal action against a private individual.
22. Having considered the withheld information and the Council's representations, the Commissioner is satisfied that it represents a communication that, at the time it was made, was confidential; was made between a client and a professional legal adviser acting in their professional capacity; and was made for the sole or dominant purpose of obtaining legal advice about proposed or contemplated litigation.
23. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of any previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
24. It is clear from the email correspondence the Commissioner has seen that the Council informed the complainant regarding the existence of the withheld information. However, there is no evidence to suggest that it informed anyone else.
25. As far as the Commissioner has been able to establish, the withheld information was not publicly known at the time of the request and there is therefore no suggestion that confidence has been lost. As such, the Commissioner is satisfied that the withheld information is subject to LPP.
26. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. She considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information, the fact that it is still live and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and

she therefore finds that the exception at Regulation 12(5)(b) is engaged.

Public interest test

27. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested Information

28. The Council acknowledges that there is a public interest in transparency and openness in the working of a public authority.
29. The complainant considers that the public interest is balanced in favour of disclosure as the withheld information would reveal the evidence and matters the Council considered in deciding whether to take legal action and if so, the details of any such action.

Public interest arguments in favour of maintaining the exception

30. In this case, the Council considers that there is an inherent public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice.
31. The Council stated there would be prejudice to the carrying out of its functions and in particular, its ability to obtain legal advice it considered necessary and appropriate, if the withheld information was disclosed.

Balance of the public interest test

32. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, she has taken account of the presumption in favour of disclosure as set down by Regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.
33. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances the transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. She believes that this is especially the case where the public authority's actions have a direct effect on the environment.
34. The Commissioner notes that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following her inspection of the information, the Commissioner could see no evidence that substantial amounts of money would be involved or significant numbers of individuals would be affected, no sign of unlawful activity, no evidence that the Council had misrepresented any legal advice it has received nor any evidence of a significant lack of transparency.
35. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight in this case, in her view there are stronger public interest arguments in favour of maintaining the exception. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain legal advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. This would lead to advice that is not informed by all the relevant facts, and could result in poorer decisions being made because the Council would not have the benefit of thorough legal advice.

36. In summary, the Commissioner has concluded that the public interest in maintaining the exception at Regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Right of appeal

37. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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

**Deborah Clark
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**