

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 April 2022

Public Authority: Cumbria County Council
Address: Cumbria House
117 Botchergate
Carlisle
CA1 1RD

Decision (including any steps ordered)

1. The complainant has requested information held by Cumbria County Council (the council) relating to a particular planning case.
2. The council provided some information to the complainant in response to the request; however, it advised that it was withholding certain information under regulation 12(5)(b) – the course of justice, of the EIR.
3. The Commissioner has found that part of the withheld information provided for his consideration either did not fall within the scope of the request, or has already been disclosed by the council. With regard to the information contained within the one remaining document that does fall within the scope of the request, it is the Commissioner's decision that the council has failed to demonstrate that the exception at regulation 12(5)(b) is engaged.
4. Furthermore, the Commissioner has found that the council has breached regulation 5(2) of the EIR, as it failed to provide its response to the complainant's request within 20 working days.

5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the letter dated 13 April 2018, received by the council from the planning applicant's representative.
6. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

7. On 26 August 2020, the complainant wrote to the council and requested information in the following terms:

'Planning Application 1/18/9012: Kingmoor Energy from Waste Facility

I am writing to you under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 to request the following information in relation to the above.

1. Please provide all correspondence and meeting minutes of the pre-application discussions between Cumbria County Council and the applicant concerning the 1/18/9012 planning application.
 2. Please provide any covering correspondence included with the 1/18/9012 planning application.
 3. Please provide any attachments or enclosures included with the 1/18/9012 planning application that are not available for public download on planning.cumbria.gov.uk under 1/18/9012.
 4. Please provide copies of all correspondence and meeting minutes of any post-application discussions between Cumbria County Council and the applicant concerning 1/18/9012. Please include all correspondence and meeting minutes both before and after the granting of planning permission. In order to reduce the amount of information that needs to be sent, any information provided under FOI-5683-2020 in relation to the proposed non-material amendment to 1/18/9012 can be omitted.'
8. On 31 October 2020, the complainant contacted the council to raise concerns about the time it was taking to provide a response to the request, and they asked for an internal review.
 9. On 23 December 2020, the council provided its response to the request, releasing some information to the complainant.

10. The council advised the complainant that the names and contact details of third parties had been redacted from the information provided under regulation 13 of the EIR. It also confirmed that correspondence relating to legally privileged information had been withheld under regulation 12(5)(b) of the EIR. The council then went on to explain the reasons why it believed that the public interest lay in favour of withholding this information.
11. On 29 December 2020, the complainant requested an internal review, alleging that the information provided was incomplete; the complainant also queried how information between the planning applicant and the council could be subject to legal professional privilege (LPP).
12. On 23 February 2021, the council provided its internal review response. It answered each of the fourteen points of concern set out in the complainant's internal review request. It advised that some additional information had now also been identified, which it provided to the complainant. The council also confirmed that some of the requested information was not held.
13. With regard to the withheld information, the council once again advised the complainant that correspondence seeking legal advice between an investigating officer and a solicitor/legal team falls within the legal professional privilege exemption. However, the council now stated that such information had been withheld under section 42 of the FOIA. It also confirmed to the complainant that it was to now provide copies of those emails within the relevant email trails which did not consist of legal advice.
14. The complainant then contacted the council again, setting out in some detail why he was concerned that certain information had been withheld on the basis that it was legally privileged. In response, the council confirmed that the next stage of the process would be for the complainant to raise his concerns with the Commissioner.

Scope of the case

15. The complainant contacted the Commissioner on 3 March 2021, to complain about the council's handling of their request.
16. The complainant has raised concerns about the council's decision to withhold certain information on the basis that it is subject to LPP.
17. The Commissioner will therefore consider whether the council was entitled to withhold any information on the basis that it was subject to LPP. He will also consider certain procedural matters.

Reasons for decision

Is the requested information environmental?

18. Information is 'environmental' if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect the elements of the environment listed in regulation 2(1)(a) will be environmental information.
19. The request is for information that is held that relates to a planning application for the development of an Energy for Waste plant in Carlisle. The Commissioner considers that the information relates to an activity that will affect, or be likely to affect, the state of the elements listed in regulation 2(1)(a). The Commissioner therefore considers that the withheld information is environmental.
20. The council's original response to the complainant advised that some of the requested information was to be withheld under regulation 12(5)(b) of the EIR, and it went on to confirm its consideration of the public interest test.
21. At the internal review stage, the council then advised that it was withholding the information under section 42 of the FOIA.
22. The council has confirmed in its representations to the Commissioner that the information which it has identified as being relevant to the request has been withheld under regulation 12(5)(b) of the EIR, and it has set out the public interest test arguments that it considered when making this decision. The Commissioner therefore intends to consider this as the council's formal position.

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

23. Regulation 12(5)(b) provides an exception from the obligation to disclose environmental information which 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.
24. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to LPP, and information about investigations or proceedings carried out by authorities.
25. Part of the withheld information provided for the Commissioner's consideration consists of internal correspondence sent between officers

at the council. It is the Commissioner's opinion that such information does not fall within the scope of the request.

26. The complainant was explicit, both in his original request, and his subsequent representations to the council, that he was asking for correspondence sent between the planning applicant (and their agents) and the council.
27. As a result, it is the Commissioner's view that some of the withheld information provided for his consideration does not fall within the scope of the complainant's request, as it is not information sent between the planning applicant (or their agent) and the council. Such information may very well relate to, or have been formed, directly as a result of correspondence sent between the two parties, but this does not mean it is captured by the request.
28. The Commissioner has identified one letter dated 13 April 2018, and two emails dated 5 March 2018 and 8 March 2018, within the withheld bundle which are relevant to the request.
29. The Commissioner notes that the two emails have already been released in response to this request. He would also add that he has found that certain other internal email correspondence included as part of the withheld bundle (but which fall outside the scope of the complainant's request), have also already been released into the public domain by the council.
30. The Commissioner therefore intends to only consider whether the council is entitled to rely on regulation 12(5)(b) as its basis for refusing to release a copy of the letter of 13 April 2018.
31. The council states that regulation 12(5)(b) provides an exemption for information which is protected by LPP, i.e. information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The council has also said that LPP is a fundamental principle of English law and protects confidential communications between lawyers/legal advisors and clients.
32. The Commissioner is not persuaded that the information contained within the letter of 13 April 2018 (which is the only information he is considering) is subject to LLP, as claimed by the council. The letter may have been authored by a legal adviser (on behalf of the planning applicant); however, it is material that was sent by that legal adviser to a third party, rather than a confidential communicate between the legal adviser and a client.
33. It is therefore the Commissioner's decision that the withheld information does not meet the definition of material that is subject to LLP.

34. However, even if information is not subject to LPP, this does not necessarily negate it from being captured by the exception at regulation 12(5)(b).
35. The wording of the exception has a broad remit encompassing any adverse affect on the course of justice generally; this allows for information that is not subject to LPP to still be covered by regulation 12(5)(b), as long as disclosure would adversely affect the course of justice.
36. In this case, the Commissioner has found that the arguments presented by the council focus solely on why all the information which it had identified as being relevant to the request should be withheld on the basis that it is subject to LPP.
37. The Commissioner has already determined that the withheld information is not subject to LPP. Given that the council has not provided any additional, or broader, arguments in support of the application of regulation 12(5)(b), and why disclosure would adversely affect the course of justice, the Commissioner concludes that the exception is not engaged. As a result, it is not necessary to consider the public interest test in this case.

Procedural matters

Regulation 5(2) – time for compliance

38. Regulation 5(2) of the EIR states that information should be made available as soon as possible, and within 20 working days of receipt of the request.
39. The complainant submitted their request on 26 August 2020. The council only provided copies of information relevant to the request on 23 October 2020.
40. As a result, the council has failed to comply with the requirements of regulation 5(2) of the EIR.

Right of appeal

41. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF