

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 October 2023

Public Authority: Cornwall Council
Address: New County Hall
Truro
TR1 3AY

Decision

1. The complainant requested information relating to a decision to install bollards at a specific location. Cornwall Council (the "council") withheld the information under the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the council was entitled to withhold the requested information under regulation 12(5)(b) and that it issued its internal review response in accordance with regulation 11(4).
3. The Commissioner does not require the council to take any steps.

Background

4. The council has stated that in April 2021 fixed bollards were placed in the vicinity of the complainant's property. The council confirmed that the complainant, along with other residents, raised complaints about the installation of the bollards. The council confirmed that the complainant and others have claimed that they have private vehicular rights of access to an area obstructed by the bollards and advised that they would be taking legal action to remove them.
5. The council confirmed that it subsequently sought legal advice in relation to these matters. The complainant's request seeks this information.

Request and response

6. On 5 January 2023 the complainant requested the following information from Cornwall Council (the "council"):

"Please supply all the written information that you hold, which I am entitled to receive under the Freedom of Information Act 2000, in any form of written file, record, email or contemporaneous note mentioning information regarding the Chynance bollard installation. Specifically, this includes:-

- The initial complaints & the considerations leading to the installation of the fixed bollards at Chynance in April 2021, from approximately April 2020 on.
- Information relating to the Chynance bollards between myself & other complainants & Highways/Cormac (from April 2021 to January 2023).
- Information about any other complaints relating to the Chynance bollards to the local County Councillor.
- Any other relevant records of Council meetings.
- Any written information between the local County Councillor (currently D Crabtree) & Highways (between 2021 and 2023) that mention any representations about the bollards.
- Communications between Highways and Legal departments, including attachments (between April 2021 & January 2023) concerning any deeds of transfer or information about rights of way.

- Communications between Highways & Legal departments that dispute or are evidence counter to the rights of way that are shown on the deeds of transfer for the beachfront properties – that is odd number of Chynance 23 to 39 (between April 2021 & January 2023).
 - All communications from or to the Legal department showing consideration or advice about of the rights of way of the Chynance Houses numbers 23 to 39 (between April 2021 & January 2023).”
7. The council responded on 6 February 2023 and confirmed that it considered that the request was manifestly unreasonable under the terms of regulation 12(4)(b) of the EIR on the grounds that compliance would impose an unreasonable burden on resources. The council advised the complainant that narrowing the scope of their request might facilitate compliance and advised the complainant how they might they might do this.
 8. On 10 February 2023 the complainant submitted the following revised version of their request:

“...all communications, including attachments, between Highways & Legal, relating to the Chynance bollards & rights of way for Chynance properties, odd numbers 23 to 43, between April 2021 & September 2021. These are the last 3 points in my original FOI request but with significantly reduced date range. If time limits allow, I would then like to receive the information on the initial complaints & considerations leading to the installation of the fixed bollards in Chynance from approximately April 2020 to April 2021.”
 9. The council responded on 1 March 2023 and confirmed that it was withholding the information under the exemption for legal professional privilege - section 42 of the Freedom of Information Act 2000.
 10. On 12 March 2023 the complainant asked the council to carry out an internal review of its handling of the request.
 11. On 11 May 2023 the council provided an internal review response. This confirmed that it had reconsidered the request under the EIR and that it was withholding the requested information under the exception for the course of justice - regulation 12(5)(b). This remains the council’s final position.

Scope of the complaint

12. On 20 June 2023 the complainant submitted a complaint to the Commissioner about the council's handling of their request.
13. The Commissioner has considered whether the council handled the revised request in accordance with the legislation and whether it was entitled to withhold the requested information under the exception for the course of justice (regulation 12(5)(b)).

Reasons for decision

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

14. This reasoning covers whether the council is entitled to rely on 12(5)(b) to refuse provide the requested information. The council has confirmed that all information it holds falling within the scope of the request has been withheld under regulation 12(5)(b), including any information relating to CORMAC, which it confirmed was part of the council.
15. Regulation 12(5)(b) allows a public authority to refuse to disclose information if 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.
16. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP, it may still fall within the scope of the exception if its disclosure would have an adverse affect upon the course of justice or the other issues highlighted.
17. The council has explained that, as set out in "Background" above, once the bollards were placed, the council received a number of complaints, the requestor's being one of them. It confirmed that the legal advice requested was in relation to whether there were vehicular rights of access and whether residents could remove the bollards. It explained that clarity was requested around land ownership.
18. The council has confirmed that, whilst some of the withheld information does not constitute specific requests for advice and advice provided by a solicitor, they contain information that was sent to legal services for the purpose of seeking and obtaining legal advice. Therefore, as they constitute as part of the request for advice and advice provided, the council considers this to be covered by LPP.

19. Having considered the withheld information the Commissioner is satisfied that it contains confidential communications between a client and a professional legal advisor, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
20. The council has confirmed that none of the communications seeking legal advice or providing legal advice (with the addition of email chains and attachments) have been made public or provided to a third party without restriction. Therefore, the council's position is that the information continues to be subject to LPP.
21. As all the withheld information forms part of the continuum of the seeking of and provision of legal advice, it follows that disclosing the withheld information would reveal the strengths and weaknesses of the council's position, and thus risk unbalancing the level playing field under which legal proceedings are meant to be carried out. The Commissioner is satisfied that a disclosure of the information would risk undermining the level playing field in such proceedings should a challenge to its decisions be made.
22. The Commissioner notes that the withheld information relates to a dispute around land law which remains live and the Commissioner is satisfied that there is a potential for legal challenges to be made in the future due to the nature of the complaints made to the council about the positioning of the bollards.
23. The Commissioner is therefore satisfied that disclosure of the requested information would have an adverse effect on the course of justice. He has therefore decided that the exception at Regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest in disclosure

24. The council has acknowledged that disclosure would increase transparency and give a better understanding of why the council took a particular course of action.
25. The complainant has confirmed that they are seeking the information to understand why the council has installed the bollards, which have had an impact on their personal circumstances.
26. The Commissioner agrees that there is a public interest in creating transparency on issues regarding the restriction of access, and more widely, how the council goes about determining the situation in cases where that comes into question.

Public interest in maintaining the exception

27. The council has argued that there is significant public interest in maintaining the right of clients to seek and obtain advice from legal advisers so that they can make fully informed decisions to protect their legal rights.
28. The council confirmed that the requestor's dissatisfaction with the bollards has been taken into account, however, the council does not believe that this outweighs the public interest in maintaining legal professional privilege. The council has also suggested that the requestor has exercised their right to make a formal complaint about the substantive issue, which has exhausted the council's complaints process. The council considers that the appropriate remedy for this concern is for the complainant to submit a complaint to the Local Government & Social Care Ombudsman.

Balance of the public interest

29. The Commissioner considers that there is a strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the legal system. The ability to do so provides informed decision making and ensures that local authorities make legally robust decisions.
30. The Commissioner recognises the complainant's genuine interest in the substantive matter, however, he does not consider that the redress of their grievance is contingent on the information being disclosed. He considers that there are remedies available to the complainant for raising and addressing their concerns which do not rely on information subject to LPP being placed in the public domain.
31. The Commissioner accepts that, where a council decision affects a significant number of people, or where there is evidence of unlawfulness, an argument can be made for there to be proportionate transparency, which might include the disclosure of information subject to LPP. In this case, the Commissioner has no evidence that the matter is of interest to the wider public or that there has been impropriety. Conversely, he considers there is a strong interest in allowing the council to seek legal advice in support of its broader statutory responsibilities without this being undermined.
32. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, including not prejudicing legal disputes. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors,

such as clear evidence of unlawful activity or negligence on the part of the council, or the absence of any means of addressing concerns. However, no such arguments appear to be present.

33. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the council was not obliged to disclose the requested information.
34. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

Procedural matters

Regulation 11 – internal review

35. Regulation 11(4) requires that an authority receiving a complaint about its handling of a request should send a complainant the outcome of its internal review "...no later than 40 working days after the date of receipt of the representations."
36. The complainant has raised concerns that the council failed to meet this deadline in this case.
37. The Commissioner notes that the complainant submitted their request for internal review on 12 March 2023 and that the council provided its response on 11 May 2023.
38. The Commissioner calculates that the council's response was provided 40 working days after the request was received. He, therefore, finds that the council complied with regulation 11(4).

Right of appeal

39. 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

40. 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.
41. 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

Christopher Williams
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