



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2020/0049

**Decided without a hearing
On 12 January 2022**

Before

**JUDGE HAZEL OLIVER
ALISON LOWTON
ANNE CHAFER**

Between

ANDREW LANCASTER

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is upheld in part

SUBSTITUTE DECISION NOTICE

The Information Commissioner's decision was not in accordance with the law in the following respects:

1. Western Power Distribution was not entitled to rely on Regulation 12(4)(e) to withhold internal communications within the scope of the appellant's requests which took place prior to July 2018.
2. Western Power Distribution was not entitled to rely on Regulations 12(5)(e) and 12(5)(f) to withhold advice, plans, emails and any other communications with its contractors

within the scope of the appellant's requests, except where this consists of information about quotes, costs and invoices.

Western Power Distribution is to provide a fresh response to the appellant which does not rely on these exceptions for these categories of information by 18 February 2022.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 7 January 2020 (FER0839491, the "Decision Notice"). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about the proposed construction of a wall on the appellant's land requested from Western Power Distribution ("WPD").

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. WPD is a power distributor. It owns and operates the electricity distribution network for the Midlands, South West and Wales. It is not disputed that WPD is treated as a public authority under EIR.

4. This issue arises from dealings between the appellant and WPD relating to work on and next to his property. WPD own some land to the rear of the appellant's property. This land contained an electricity substation. In order to access this land and substation, WPD have a right of way over the appellant's property. This right of way runs along the border with one of his neighbours. Work started to replace the sub-station in 2016. There was a dispute between the appellant and WPD about alleged damage to his land, removal of material and operation of heavy plant during this work.

5. In 2017 and 2018 there were discussions about WPD building two new retaining walls on the appellant's property. This was as part of discussions about settling their dispute. One wall was to replace a dry-stone wall to the rear of the appellant's property that had been removed by WPD. The other wall was to be on the boundary between the appellant's property and his neighbour, along the right of way (the "boundary wall"). Plans were produced by independent contractors engaged by WPD. The first wall was built by WPD. The boundary wall was not built. In April 2018, WPD informed the appellant that they would be removing the sub-station. This was removed, and WPD offered to sell the land to the appellant for a nominal price.

6. There were ongoing discussions with the appellant and his neighbour about the boundary wall. In July 2018, the appellant's neighbour withdrew consent for WPD to carry out any further work on their land. There was further correspondence between the appellant and WPD about construction of the boundary wall. WPD said that the Party Wall Act would apply due to the depth of the foundations, and it was not possible to build the wall close enough to the appellant's property to avoid these provisions without expensive temporary works to protect the

property's foundations. WPD said that for these reasons they would not be able to complete the work as previously discussed. The boundary wall has not been built by WPD.

The requests

7. On 5 December 2019, the appellant wrote to WPD and requested the following information:

"The works to level the land at the side of my property and allow vehicular access were something I started prior to the issues that have arisen between us in the past three years, and are something that I intend to complete. I have approached a number of contractors to build a retaining wall between mine and the neighbouring property and several have provided quotations and have indicated that they see no reason why any such wall cannot be constructed. They are understandably reluctant to commit to any works until clarification is provided on the issues that prevented your contractors from being able to build it. The only information I have been given is:

"Western Power has a number of very competent civil engineering contractors on its framework and the position of Western Power's engineers and the contractors is that significant temporary works would be required to your property in order to protect it against the risk of movement during the temporary works phase. Some of Western Power's contractors are not even prepared to take that risk."

I have shown this advice to them and am told that it does not assist them in determining what the issues that need to be overcome are. I am thus in the impossible position of not being able to progress with the works because of the associated risks, nor can I continue to suffer indefinite postponement if the obstacles are within my means to overcome.

I can see no legitimate reason why you would not be willing to furnish me with this information. I therefore feel that I have no other option than to formally request that Western Power Distribution release to me all the information that you hold in relation to me and my property, and so please consider this a subject access request under the General Data Protection Regulations. I expect this information to include the information that relates to the risks on site which relate specifically to my property and so relate to me also.

Another issue that has recently come to my notice is that works would not be able to proceed while WPD has cables on my land. Given that the sub-station has now been removed in its entirety I would be grateful if you could clarify if any of the cables that remain on my land are still connected to the supply network and are still live (this information is vital in order that exploratory excavations can be completed safely.)"

8. WPD treated this as a subject access request under the Data Protection Act 2018, and provided some information to the appellant on 7 January 2019.

9. On 10 January 2019, the appellant wrote to WPD and requested the following information:

"I own the property at [redacted], behind which, until recently, stood a local electricity sub-station. Renewal of the apparatus became necessary and in order to access the site safely with heavy plant WPD agreed to construct a retaining wall between my property and my neighbours. WPD have since refused to construct this wall and have stated that the reasons are both because of safety concerns on site relating to the ground conditions,

because of the proximity of the proposed structure to my property and because of the depth of the foundations of my neighbours' home.

I have repeatedly asked for details of these concerns in order that they can be taken into consideration as I still plan to build a structure to satisfy my needs. As a consequence of the repeated refusals I have contacted the Information Commissioner's Office (ICO) and have been advised that this information should be disclosed under the Environmental Information Regulations 2004.

These are matters that relate to the development of land and to the state of human health and safety, including the conditions of built structures. I would also like to be furnished with the predicted costs of construction of each of the different types of design considered by WPD and its contractors for the retaining wall between my property and that of my neighbour in order to be sure that the prices I have been quoted for the works are reasonable....

.... I therefore respectfully request that all information held by or on behalf of Western Power Distribution and relating to the construction of any structure on my land be disclosed."

10. In summary, these two requests asked for the following which falls under EIR:
- a. All information held by WPD in relation to the appellant's property, including relating to the risks on site.
 - b. Clarification of whether WPD cables remained on his property, were still connected, and were live.
 - c. The predicted costs of construction of each of the different types of design considered by WPD and its contractors for the boundary wall.
 - d. All information held by or on behalf of WPD and relating to the construction of any structure on the appellant's land

11. WPD responded on 19 February 2019 and provided some information within the scope of the requests. WPD withheld other information under the following exceptions in EIR: 12(4)(e) (internal communications), consisting of internal deliberations and decisions; 12(5)(b) (the course of justice, based on legal advice privilege), consisting of emails and advice between WPD and its solicitors in September and October 2018; 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(f) (interests of the information provider), consisting of advice, plans and emails between WPD and its contractors; and 13(1) (personal data), consisting of correspondence with or relating to third parties. The appellant requested an internal review. WPD responded on 18 April 2019 and upheld its original decision.

12. The appellant complained to the Commissioner on 26 April 2019. During the Commissioner's investigation, WPD confirmed that it did not hold any information about safety concerns or risks from building the boundary wall. The Commissioner says that the appellant accepted this position. We note that the appellant says that this request was satisfied in his email to the Commissioner during the investigation at page D422 of the open bundle.

13. The Commissioner decided:

- a. Regulation 12(5)(f) was engaged in relation to information to/from WPD's contractors, and the balance of public interest favours maintaining the exception. It was not necessary to consider regulation 12(5)(e) separately.
- b. Regulation 12(4)(e) was engaged in relation to internal deliberations and decisions regarding proposals for the wall, including drafts of correspondence to the appellant, and the balance of public interest favours maintaining the exception.
- c. Regulation 12(5)(b) was engaged by legally privileged correspondence between WPD and its solicitors, and the balance of public interest favours maintaining the exception.
- d. Regulation 13 was engaged by information that relates to and identifies third parties, and disclosure is not necessary to meet the appellant's interests in transparency.
- e. In assessing the public interests in disclosure, the Commissioner took the view that the information is of limited public interest as it relates to a specific dispute involving the appellant and WPD.

The Appeal and Responses

14. The appellant appealed on 4 February 2020. His grounds of appeal are lengthy and contain a considerable amount of background information. His specific points in relation to each exception are considered in the discussion below. In summary, the appellant argues that all of the exceptions were applied incorrectly by the Commissioner:

- a. The decision incorrectly focussed on the fact he is the requester seeking information in pursuance of a dispute, instead of being applicant and motive blind.
- b. The public interest test in favour of disclosure has been incorrectly applied as there is a suggestion of wrongdoing or dishonesty.
- c. Regulation 13 was wrongly applied to withhold environmental information contained in documents that also contain personal data.
- d. Regulation 12(5)(f) was incorrectly applied as this relates to voluntary supply of information by third parties, not information shared by contractors.
- e. The Commissioner failed to consider information held under regulation 12(5)(e).

15. The Commissioner's response maintains that the Decision Notice was correct. The response makes brief points about each exception which are considered in the discussion below.

16. WPD has not been joined as a party to the proceedings, but provided written submissions. These submissions contain lengthy factual details in response to the background information in the appellant's grounds of appeal. WPD also makes some submissions about the application of the exceptions and the public interest test, supported by an Appendix which reproduces WPD's answers to questions from the Commissioner during her investigation. These are considered in the discussions below.

17. The appellant submitted a lengthy reply to each of the responses from the Commissioner and WPD. Again, we consider relevant points in the discussion below.

Applicable law

13. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) ...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(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;

.....
5(1) ...a public authority that holds environmental information shall make it available on request.

.....
5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

.....
12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

.....
(e) the request involves the disclosure of internal communications.

.....
12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

.....
(b) the course of justice;

.....
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided that information where that person-
(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any public authority is entitled apart from these Regulations to disclose it; and

(iii) *has not consented to its disclosure.*

.....
13(1) *To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if— (a) the first condition is satisfied...*

.....
13(2A) *The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations— (a) would contravene any of the data protection principles...*

14. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

15. **Regulation 12(4)(e)** (internal communications). This is a class-based exception, meaning it is engaged automatically for information that consists of internal communications without the need for to show that disclosure would cause harm. It is still subject to the public interest balancing test. The concept of “internal communications” is broad, and covers information intended to be communicated to others. The purpose of the exception is to preserve the public authority’s private thinking space, which is particularly relevant when a matter is live.

16. **Regulation 12(5)(b)** (the course of justice). Legal professional privilege (“LPP”) protects the confidentiality of legal communications. It has two parts – legal advice privilege, and litigation privilege. Legal advice privilege concerns confidential communications between lawyer and client. It applies to communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal advice or assistance in a relevant legal context (***Three Rivers District Council v Governor and Company of the Bank of England (no 6)*** [2004] UKHL 48). Waiver of privilege occurs where there is a loss of confidentiality in the privileged information, by making it available to the public or a third party without restriction. This includes where part of the content of the document or advice has been disclosed, as the beneficiary of the privilege cannot “cherry pick” parts of a privileged document for disclosure and withhold others.

17. Unlike under the exemption for privileged material in FOIA, LPP is not specifically covered by an exception under EIR. However, it is well established that disclosure of material which is subject to LPP can be refused under Regulation 12(1)(b) EIR on the basis of an adverse effect on the course of justice.

18. The application of LPP in relation to EIR cases and the adverse effect on the course of justice was considered by the Upper Tribunal (“UT”) in ***DCLG v Information Commissioner & WR*** [2012] UKUT 103 (AAC). The UT considered that the Tribunal “*can and must take into account the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisers will not be subject to disclosure*”, as well as the “*adverse effects on the course of justice in the particular case, such as that it would be unfair to give the requester access to the public authority’s legal advice, without the public authority having the corresponding benefit.*” (paragraphs 51 and 54). The exception is to be applied on a case-by-case basis, and is only engaged if the course of justice “would” be adversely affected, meaning more probable than

not (paragraph 54). The UT decision in ***GW v Information Commissioner and others*** [2014] UKUT 130 (AAC) confirms that the mere fact that LPP attached to advice did not automatically mean that the disclosure of that advice would adversely affect the course of justice. It is for the public authority to identify and establish any adverse effect on the course of justice that it relied on, in its particular circumstances.

19. This exception is subject to the public interest test, meaning if information falls within this exception, it can be withheld if the public interest in maintaining the exception outweighs the public interest in disclosing the information. It has been accepted in numerous cases that there is a strong public interest built into legal privilege, based on the interest in public bodies being able to receive frank legal advice in order to assist them to make appropriate decisions. This was confirmed by the High Court in ***DBERR v O'Brien and IC*** [2009] EWHC 164 (QB) in relation to the equivalent exemption in FOIA – “*The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.*” (Wyn Williams J at paragraph 53).

20. **Regulation 12(5)(e)** (commercial confidentiality). This is not limited to information provided by a third party. The information in question must be commercial or industrial. The information must be subject to confidentiality provided by law. An obligation of confidence can be implied, and the three-stage test in ***Coco v A N Clark (Engineers) Ltd*** [1969] RPC 41 applies: (1) the information must have the “necessary quality of confidence”, in that it is not publicly accessible and is more than trivial; (2) the information must have been imparted in circumstances that implied an obligation of confidence, whether this is explicitly or implicitly; and (3) disclosure of the information must be unauthorised. The confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. Finally, it must be shown that the disclosure of the information would adversely affect the confidentiality.

21. **Regulation 12(5)(f)** (interests of the information provider). This exception only applies where the person providing the information was not under, and could not have been put under, any legal obligation to supply it – meaning the information must have been provided purely voluntarily.

22. **Regulation 13(1)** (personal data). Section 3(2) of the Data Protection Act 2018 (“DPA”) defines “personal data” as “*any information relating to an identified or identifiable living individual*”. The “processing” of such information includes “*disclosure by transmission, dissemination or otherwise making available*” (s.3(4)(d) DPA), and so includes disclosure under EIR.

23. The data protection principles are those set out in Article 5(1) of the General Data Protection Regulation (“GDPR”), and section 34(1) DPA. The first data protection principle under Article 5(1)(a) General Data Protection Regulation (GDPR) is that personal data shall be: “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”. To be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) GDPR. These include where “*the data subject has given consent to the processing of his*

or her personal data for one or more specific purposes” (Article 6(1)(a)). It also includes where “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.” (Article 6(1)(f)).

24. This involves consideration of three questions (as set out by Lady Hale DP in **South Lanarkshire Council v Scottish Information Commissioner** [2013] UKSC 55):

- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and GDPR. This should now reflect the words used in the GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

Issues and evidence

25. The issues are:

- a. Is regulation 12(4)(e) engaged by the withheld information and, if so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- b. Is regulation 12(5)(b) engaged by the withheld information and, if so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- c. Is regulation 12(5)(e) engaged by the withheld information and, if so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- d. Is regulation 12(5)(f) engaged by the withheld information and, if so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- e. Is Regulation 13 engaged in relation to personal data of third parties and, if so:
 - i. Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
 - ii. Is the processing involved necessary for the purposes of those interests?
 - iii. Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?

26. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents, including the appeal, response from the Commissioner and appellant’s reply.
- b. A closed bundle of documents containing the withheld information.
- c. Written submissions from WPD and the appellant’s reply (contained in the open bundle)

- d. A witness statement from the appellant (contained in the open bundle).
- e. Written final submissions from the appellant.

Discussion and Conclusions

27. We have assessed the exceptions relied on by WPD by considering the representations of the parties, the submissions from WPD, and the content of the closed bundle which contains the withheld information.

28. **Regulation 12(4)(e)** (internal communications). All internal communications in the withheld information automatically engage this exception. However, the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosure.

29. We start with the public interest in disclosure. The appellant says that there is a strong public interest in disclosure, based on allegations of wrongdoing against WPD. He says that WPD have acted contrary to statute, with disregard for third party property owners. He says this is of public interest because the vast majority of the supply network exists under, on or over land owned by third parties. He complains about the way the work was carried out on his property and alleges damage was caused by WPD. He also says that WPD entered into an agreement to build the boundary wall with him and a neighbour, but then acted unsafely in removing the sub-station while they had access to his land and provided incorrect reasons for going back on the agreement to build the wall. The appellant has also provided a witness statement, which provides evidence about a telephone conversation between the appellant and an employee of the contractor engaged by WPD. The employee is recorded as saying there were not any safety concerns with building the boundary wall, and this contractor never had a contract to build the wall. The appellant says this shows WPD had no intention of completing the boundary wall. He alleges that they used the agreement to build the wall as a reason to enter his property and complete their own works, and then attempted to deceive him and his neighbour as to the reasons for not building the boundary wall by claiming their contractors had raised safety concerns of such magnitude that the contractors were unwilling to accept the risk.

30. WPD's position is that this is a private dispute about a small piece of land, which is of no wider environmental impact or interest. The Commissioner also took this view, having considered the withheld information. We have considered the appellant's representations and witness statement on this point, alongside the withheld information itself. There is clearly a dispute between WPD and the appellant about the work to remove the substation, access to his property, and the building of the boundary wall. This is primarily a private interest, involving a small piece of private land. We note the appellant's point that WPD has to deal regularly with third party property owners. If there is evidence of potential wrongdoing or dishonesty in the way WPD deals with third parties, this would be of public interest. However, having viewed the withheld information, there is nothing in closed bundle to indicate actual wrongdoing, dishonesty or other matters of wider public concern. We do not find that the allegations in the appellant's witness statement about dishonesty by WPD are correct.

31. We therefore find that the public interest in disclosure of the information is limited. There is a general interest in transparency and openness in relation to decision-making by public authorities. We also accept that there is some public interest in how WPD deals with members of the public when working on their land. However, the detail of the dispute between the

appellant and WPD is essentially a private matter between, the appellant, WPD and his neighbours, and is not a matter of great public interest in the absence of evidence of wrongdoing. The appellant has made the point that the EIR is applicant and motive blind. This is correct, in that disclosure of information should generally not be refused based on the identity of the requester or the reasons behind the request. But, the reasons for requesting disclosure may be relevant to the public interest test balancing, as in this case. It is necessary to show that there is a public rather than a private interest in disclosure.

32. Turning to the public interest in maintaining the exception, WPD says the internal communications contain deliberation over options and requests from the appellant. WPD says disclosure would have a chilling effect on openness and their ability to deliberate and make decisions such as this. The appellant says WPD's deliberations are concluded and the issue is no longer live, as it came to an end in October 2018 when WPD said they would no longer build the boundary wall. He says that arguments about safe space for deliberations and the chilling effect should have little weight.

33. We have considered these arguments in the context of the withheld information itself. WPD has relied on this as a blanket exception for all internal communications. We do not agree with the appellant's position that this matter in its entirety is no longer live. As noted by the Commissioner, the appellant himself says that he has lodged a complaint with WPD after this date (paragraph 214 appeal grounds). The requests for information were in December 2018 and January 2019, and the final review decision was provided by WPD in April 2019. There was ongoing correspondence between the appellant, WPD and its solicitors about work on the appellant's property and proposals to settle their dispute until December 2018. WPD takes the position that there is still a live dispute, which has the potential to lead to litigation. We accept that the dispute about what had happened with the appellant's property and the refusal to build the boundary wall was still live at the time of the requests and review decision. We accept that it would significantly undermine the safe space for internal deliberations on these matters if they were to be disclosed to both the appellant and the world at large during the dispute. Individuals within WPD would be inhibited about holding honest internal discussions. This would not be in the public interest, and this is sufficient to outweigh the limited public interest in disclosure.

34. However, the position is different with earlier internal communications which do not relate to the current dispute. Some of the withheld information is internal communications about the actual work on the appellant's property and the building of the boundary wall, as opposed to communications about the ongoing dispute. The work itself was not live at the time of the requests. The need for a safe space is reduced when a matter is no longer live. WPD have referred generally to a chilling effect on openness and deliberations for "decisions like this". We do not accept that this general argument about a chilling effect has significant weight. WPD has not explained why disclosure of old deliberations on one matter would inhibit future deliberations by professional staff about a different matter. The public interest in maintaining the exception for these communications is limited. The public interest in disclosure is similarly limited. Applying the presumption of disclosure under the EIR, this means that WPD cannot rely on this exception for internal communications about historic work on the appellant's property.

35. Consent from the neighbours to build the boundary wall was withdrawn in July 2018. The appellant sent a written complaint to WPD on 27 July 2018, which referenced recourse through the courts. The dispute about why the wall had not been built, which was ongoing at the time

of the requests, was triggered in July 2018. We therefore find that this exception can be applied to internal communications from July 2018 onwards. Prior internal communications are about historic matters and this exception does not apply.

36. **Regulation 12(5)(b)** (the course of justice). WPD relies on legal advice privilege in relation to correspondence with its solicitors. We are satisfied that this material is covered by legal advice privilege – it is communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal advice or assistance in relation to the situation involving the appellant’s property. As stated by WPD, the solicitors are providing advice on the Party Wall Act and other property law issues.

37. WPD says that they have disclosed the advice confidentially to another law firm, but not to any other third parties. The appellant has argued in his final submissions that that legal privilege has been waived by WPD, as WPD sent him letters on 31 July and 16 August 2018 which refer to legal advice. This does not amount to a waiver of privilege. Simply revealing the fact advice has been provided does not waive privilege in that advice. Neither does confirmation that a report or approach is based on legal advice. Waiver requires so much information about privileged advice to have been provided that it loses its confidentiality. We have taken account of guidance provided in **Brennan v Sunderland City Council** [2009] ICR 479 (EAT) – legal advice privilege is an extremely important protection and waiver is not easily established, and something more than the effect of the advice must be disclosed before any question of waiver can arise (paragraph 66). Applying these principles, we find no waiver in this case.

38. The next question is whether disclosure would have an adverse effect on the course of justice. WPD says that the correspondence relates to a potential dispute, and disclosure would damage its position in any future legal proceedings. WPD says that the ongoing dispute is reasonably capable of proceedings to litigation. They also say that disclosure would undermine their lawyers’ capacity to give full and frank advice, and potentially discourage WPD from seeking legal advice. These are both matters that can be taken into account in accordance with **DCLG v Information Commissioner**.

39. The appellant has argued that the matter was not “live” at the time of his requests and the review decision, as WPD had already told him they were not going to build the wall. We do not agree. The requests for information were in December 2018 and January 2019, and the final review decision was provided by WPD in April 2019. There was ongoing correspondence between the appellant, WPD and its solicitors about work on the appellant’s property and proposals to settle their dispute until December 2018. At the time of the requests and review, the dispute had not been resolved and there may well have been litigation. We note that the appellant referred to seeking recourse through the courts in his original complaint letter to WPD of 27 July 2018. We therefore find that disclosure, at that time, would have had an adverse effect on the course of justice, by prejudicing WPD’s position in the ongoing dispute and potential litigation.

40. The next issue is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. It would clearly not be in the public interest for WPD to be disadvantaged in any ongoing dispute with the appellant or future litigation. We also note the guidance in **DBERR v O’Brien and IC** that the in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight, and the underlying public interests which favoured disclosure

must be of equal weight at the very least. There is a general public interest in transparency in relation to how public authorities make decisions. The appellant argues that there is public interest in disclosure on the basis of potential wrongdoing by WPD. However, as discussed above, we do not find that this argument has any significant weight. On balance, the public interest in maintaining the exception has greater weight.

41. We therefore find that WPD was entitled to rely on this exception to withhold correspondence with its solicitors. To be clear, this includes drafts of letters to the appellant, but not the final version of letters to the appellant which he has already received and are personal data under the DPA.

42. The appellant says that WPD have stated the withheld information relates only to communications between it and Geldards LLP from September to October 2018, and any communications outside of those dates or with other solicitors should be disclosed. The closed bundle does contain correspondence with solicitors outside these dates – in July 2018, August 2018, and December 2018. It is clear from the spreadsheet provided to the Commissioner (page D398 onwards in the open bundle) that WPD is relying on this exception for these documents as well, and we are satisfied that they fall within the same analysis. The July and August correspondence relates to the same issues of dispute, and the December correspondence relates to the appellant's data subject access and EIR requests, which remain an issue of dispute in these proceedings. The same exception applies and this information can be withheld on that basis.

43. **Regulation 12(5)(e)** (commercial confidentiality). WPD has withheld a set of documents which consist of communications and related documents with the independent contractors who were engaged to carry out work on the appellant's property. The majority of the withheld information falls into this category.

44. We are satisfied that this information is commercial in nature – it consists of plans, discussions and other communications about proposed work, which the contractors were engaged to carry out under a commercial contract. We also find that the information is confidential, applying the relevant tests. The information is not publicly accessible, as it relates to a private commercial contract, and is more than trivial. The information was imparted in circumstances that implied an obligation of confidence, again because it was in the context of a private commercial contract. As far as we are aware, the contractors involved have not given consent to disclosure, meaning disclosure of the information would be unauthorised.

45. The next part of the test is that the confidentiality must protect a legitimate economic interest, which would, on the balance of probabilities, be harmed by disclosure. WPD says that the information contains details about the contractors' expertise and knowhow, and also pricing.

46. In relation to expertise and knowhow, WPD says that release of the information would lead to loss of revenue for the contractors, as it would be disclosing information about work that the contractors were to be paid for under a private contractual relationship. We do not agree. The work prepared and carried out by the contractors involved plans for a small and very specific piece of work – building a wall on a particular piece of residential land. It seems very unlikely that this work would be replicated. We do not agree that the plans and other discussions relating to the work involved expertise or knowhow that would be used by others elsewhere and deprive the contractors of future paid work. It is for WPD to show that the exception is engaged, and they have not done so in relation to plans, discussions and other

communications about the work on the appellant's property. We find that disclosure of these items would not, on the balance of probabilities, harm the contractors' legitimate economic interests.

47. In relation to quotes, costings and invoices relating to the work, we take a different view. We accept that disclosure of this information would, on the balance of probabilities, harm the contractors' commercial bargaining position by revealing the costs quoted for this type and size of project. The contractors have a legitimate economic interest that quotes and costings will not be shared publicly. Although the detail of this building project is unlikely to be replicated elsewhere, competitors could use knowledge about the contractors' pricing to out-compete them in future projects. The final part of the test is that the disclosure of this information would adversely affect the confidentiality. We find that it would - the confidentiality would be adversely affected by a public disclosure that would harm the contractors' economic interests.

48. The next issue is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information on quotes, costings and invoices. We find that it does. Disclosure of information that damages the commercial bargaining position of contractors who engage with public authorities is not in the public interest. This will deter contractors from providing the best price to WPD or other public authorities, or deter them from engaging at all because of the risk that confidential quotes and discussions about pricing will be disclosed. It will undermine the ability of public authorities to get value for money through confidential tendering exercises. This is clearly not in the public interest, as it would prevent public authorities from saving public money on building projects and working with the best contractors.

49. As explained above, the public interest in disclosure of the requested information is limited. The appellant argues that the work involved considerable amounts of public money. We agree that there is a general public interest in transparency of costs spent by public authorities on building work. However, this does not involve significant sums of money, and we note that the work on the boundary wall was not actually carried out. In the circumstances, the public interest in maintaining commercial confidentiality outweighs the public interest in disclosure.

50. We therefore find that all information relating to quotes, costings and invoices from any contractor can be withheld, but the exception has not been applied correctly to the rest of the withheld information.

51. **Regulation 12(5)(f)** (interests of the information provider). The appellant says that this exception is about provision of voluntary information to third parties, and is not intended to cover information provided to and from paid contractors. He says that information is not provided "voluntarily" if it is provided under a commercial arrangement. There is limited legal authority on this exception. We agree that it is not clear the exception is intended to apply to information provided to a public authority by a paid contractor. The Commissioner took the view that it did. However, we note that none of the examples give in the Commissioner's guidance on this exception refer to information provided during a commercial relationship (see paragraphs 12 to 14). The underlying purpose of the exception is to ensure that individuals or organisations can share environmental information voluntarily with public authorities, without being damaged by disclosure of that information. It is not clear that this is intended to cover information provided by a contractor during paid-for building work, particularly once a contract is in place.

52. Even if this exception does apply in these circumstances, we find that it would produce the same outcome as Regulation 12(5)(e). Disclosure of quotes, costings and invoices would adversely affect the interests of the contractors who supplied this information, and the public interest in maintaining the exception outweighs the public interest in disclosure for the same reasons as explained in paragraphs 48 and 49 above. Disclosure of the other material that has been withheld under this exception would not adversely affect the contractors' interests.

53. **Regulation 13(1)** (personal data). This relates to correspondence with or about third parties. Having reviewed the withheld information, we are satisfied that there are a number of items which fall within this category, in particular correspondence and other documents referring to the appellant's neighbours from which individuals can be identified. These documents are personal data of those third parties. The appellant has argued that names and addresses could be redacted and the remainder of the documents disclosed. We do not agree. The nature and context of the documents means that the third parties could be identified even if names or addresses were removed.

54. This means that the information that consists of personal data can only be disclosed if that would be fair and lawful processing of the data. The processing condition that is most relevant in this case is Article 6(1)(a). The relevant questions are as follows:

- a. ***Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*** We accept that the appellant has a legitimate interest in obtaining information about matters affecting his property, including where that involves his neighbours.
- b. ***Is the processing involved necessary for the purposes of those interests?*** The issue is whether disclosure is reasonably necessary for those purposes. WPD says that it is not, because the appellant could use other legal mechanisms for obtaining disclosure of documents. We do not agree, as it is unclear whether the appellant would be able to obtain all of this information in another way. It may be that third party information would need to be disclosed as part of any legal proceedings, but the appellant has an interest in obtaining information about his property without needing to bring a legal claim. We find that disclosure is reasonably necessary for the purposes of the appellant obtaining information about matters affecting his property.
- c. ***Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?*** We find that they are. The information relates to the data subjects' private life, including in particular their property and relationship with both WPD and the appellant. The data subjects would have a reasonable expectation that this information would not be disclosed to the world at large in response to an EIR request. We note that there is a potential dispute between the appellant and his neighbours. Disclosure of this personal data under EIR would cause the data subjects distress and inconvenience, and potentially affect any relationship or dispute they have with the appellant. These considerations override the appellant's interests in obtaining the personal data. They also override any limited wider public interest in the information.

55. We find that WPD was entitled to rely on this exception to withhold correspondence with or about third parties, in particular that relating to the appellant's neighbours.

56. These findings mean that we disagree with part of the Commissioner's decision. WPD was not entitled to rely on Regulation 12(4)(e) (internal communications) 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(f) (interests of the information provider) in relation to some of the withheld information. WPD were entitled to rely on these and other exemptions in relation to the remainder of the withheld information. WPD is to provide a fresh response to the appellant which does not rely on these exceptions for certain types of information, as set out in the Substitute Decision Notice.

Other matters

57. The appellant has raised the adequacy of searches and whether more information is held in his final submissions. The appellant appears to be saying that information containing his personal data (which he has received under the DPA) should also have been disclosed under EIR. This is a misunderstanding of the law. Under Regulation 5(3), the EIR does not apply to information which consists of the appellant's personal data. We agree with the Commissioner that the appellant's name and address cannot simply be redacted in order for this information to be disclosed under EIR, as the information could still identify him. Disclosure under EIR is disclosure to the world at large, and this is why Regulation 5(3) applies as an absolute exception to protect personal data from disclosure. If the appellant is saying that searches were generally inadequate and further information is held which is not personal data, this was not an issue raised in the Commissioner's decision (apart from the record at paragraph 8 that the appellant was content that information was not held about risks or concerns on site) or detailed in the appellant's grounds of appeal. We have limited this appeal decision to matters dealt with in the Commissioner's decision.

58. The appellant also says in his appeal that the Commissioner applied too narrow a definition of environmental information, by limiting it to the safety of built structures. Having seen the withheld information, we do not find that the response to the requests was limited in this way.

59. The Tribunal was concerned to see that unredacted information about third parties was included in the open bundle, including about the same third parties whose personal data is being withheld under Regulation 13. The open bundle has so far only been considered by the parties and the tribunal, but will need to be redacted appropriately if it is released to the public for any reason.

60. Our decision may require WPD to disclosure further information under EIR. In doing so, they should check that no other exceptions apply, particularly in relation to third party personal data. We note that the closed bundle contained a number of documents where more than one exception could apply.

61. We uphold the appeal in part and issue the Substitute Decision Notice set out at the start of this decision.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 19 January 2022
Promulgated: 20 January 2022