

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

Date: 6 June 2019

Public Authority: Gwynedd Council

Address: foi@gwynedd.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about a particular right of way. The Council stated that as it had previously provided information in response to an earlier request in 2015 it would only consider information which had been produced since the previous request. The Council provided some information and withheld other information under sections 40(2) and 42 of the FOIA. During the course of the Commissioner's investigation the Council acknowledged that the request should have been considered under the EIR and disclosed some additional information. The Council maintained that the remaining information held relevant to the request was exempt under regulations 13 and 12(5)(b) of the EIR. The Commissioner's decision is that the Council has correctly applied regulations and 12(5)(b) and 13 to the remaining withheld information. She does not require any steps to be taken.

Request and response

2. On 12 January 2018, the complainant wrote to the Council and requested information in the following terms:

"For a damages claim for failure to remove obstructions along [name of right of way redacted], blocking access to my property, we now request the full file corresponding to the events from 1996 to 2017 that you hold within your office.

We were given partial number of documents from your file in 2015 but now request the full file with no documents removed”.

3. The Council responded on 28 February 2018 and stated that, as it had previously provided information about the matter up to 2015 in response to an earlier freedom of information request from the complainant it would only consider information held which had been produced since that request. The Council provided some information but withheld other information under sections 40(2) and 42 of the FOIA.
4. On 9 April 2018 the complainant wrote to the Council and requested an internal review of the Council’s handling of the request. He also indicated that he was seeking disclosure of *“the ‘complete file’ for the dates between 1996 and 015 on **PDF Encrypted Format** for [name of right of way redacted]”*.
5. The Council provided the outcome of its internal review on 16 July 2018 and disclosed some additional information relevant to the request, but maintained that the remaining information held was exempt under sections 40(2) and 42 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 18 July 2018 to complain about the way his request for information had been handled.
7. In his complaint to the Commissioner the complainant raised a number of different issues, some of which fell outside the remit of the Commissioner. For example the complainant raised concerns that some of the documents he had previously received from the Council in response to earlier requests did *“not have any proof where they came from”*, allegations that the Council had tampered with the definitive matter and created forged documents.
8. The Commissioner wrote to the complainant and explained the scope of her powers and what issues fell within her remit to consider. Following exchanges with the complainant it was agreed that the scope of the Commissioner’s investigation into this complaint is to determine whether the Council should disclose the information it had withheld in response to the request.
9. During the course of the Commissioner’s investigation the Council agreed that the request should have been considered under the EIR as opposed to the FOIA. The Council reconsidered the request and

disclosed information held pre 2015 which was not subject to an exception. The Council maintained that the remaining information held relevant to the request was exempt under regulations 13 and 12(5)(b).

Reasons for decision

Is the information environmental?

10. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

“any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.

11. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “any information...on” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
12. The information requested by the complainant relates to an investigation into the status of an unclassified road near to the complainant’s property and a bridleway connecting the unclassified road with the complainant’s property. The information also refers to access along the road in question and obstructions on it. The Commissioner is of the view that issues relating to how land is registered and information held relating to it is likely to affect the use of that land and thus have a direct effect on it. The Commissioner therefore considers that the information requested in this case falls under the definition of Environmental Information set out in the EIR.

Regulation 13 – the exception for third party personal data

13. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.

Is the requested information personal data?

14. In order to engage regulation 13 the information sought must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:

- from that data,
- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

15. The request in this case relates to an unclassified road running across a property owned by particular individuals, who will be referred to throughout the remainder of this notice as Individuals A. The Commissioner understands that there has been an ongoing dispute and considerable local concern about access along the road in question since 1996. The complainant lives near to the road in question. There have been a number of issues associated with the road in question including the status of it – ie rights of way issues, ownership and concerns around 'obstructions' along it, ie gates and fencing.

16. The information that the Council has withheld under regulation 13 comprises primarily of correspondence exchanges between the Council and Individuals A and representatives acting on behalf of Individuals A. The withheld information also includes correspondence between the Council and residents in the local area in connection with the road in question and the Council's investigations in respect of it, including rights of way and ownership matters relating to Individuals A.

17. The Commissioner has considered the information and is satisfied that it is personal data relating to the individuals involved. The individuals are referred to by name and/or address throughout the withheld information. The Commissioner notes that the subject matter concerns a very local dispute in a fairly small, rural village. In light of this, the Commissioner considers that the individuals referred to in the withheld information could be fairly easily identified from the information even without direct reference to their names or addresses. The Commissioner is therefore satisfied that the withheld information is personal data.

Would disclosure breach one of the data protection principles?

18. Having accepted that the withheld information constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

19. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

The Council's position

20. The Council contends that the individuals concerned would have had no reasonable expectation that their correspondence and communications regarding matters relating to the road in question would be disclosed into the public domain. The Council also confirmed that it consulted with Individuals A, the primary focus of the withheld information, who objected to their personal data being disclosed.

21. The subject matter has been a matter of significant local concern amongst local residents. It has also given rise specific complaints from local residents, including the complainant, to the Council. The Council provided some background information about the matter to the Council. Issues around the road in question have been ongoing since 1996 when Individuals A installed a gate on the route. Much of the withheld information is therefore many years old. The Council considers that disclosure would be likely to resurrect issues relating to the subject matter which could cause distress to the individuals concerned, and in particular to the primary focus of the withheld information, Individuals A.

22. The Council does not consider that there is a "*legitimate interest in disclosure of the personal data, nor would such disclosure be necessary in the public interest, and the disclosure would probably cause unwarranted harm*" to the individuals.

The Commissioner's position

23. When considering what information third parties should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to the third party's public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). In this case, it is clear that the withheld information relates to the individuals' private lives.
24. It is clear to the Commissioner that the local dispute about the subject matter of the right of way and associated access concerns has been a sensitive and emotive matter. As such the Commissioner considers there would be a reasonable expectation on the part of the individuals concerned that their correspondence exchanges with the Council about the issue would be used by the Council to investigate the matter in question but that they would not be disclosed to the public at large.
25. The Commissioner recognises that the subject of rights of way generally is an emotive one and one which has the potential to provoke a vigorous response from local residents concerned about any impact the matter may have on their homes and lives. The Commissioner considers that in this case disclosure could lead to potential conflict, or worse, between members of the community and would resurrect matters relating to the issue, which date back many years. She accepts therefore that disclosure has the potential to cause unwarranted distress to the individuals in question.
26. The complainant pointed out that the subject matter associated with the request relates to the public's entitlement to use a Public Rights of Way. He advised the Commissioner that the information he was seeking access to would "*not to be shared publically at all*". The information was required "*for a legal representative of my choice to initiate proceedings to restore the route and make a case for Special Damages due to Public Nuisance on a Public Right of Way*". During the course of her investigation the Commissioner advised the complainant that the FOIA/EIR was a public disclosure regime. As such, the consideration was whether any information should be placed into the public domain as opposed to being disclosed to an individual for a specific purpose.

27. The complainant also suggested that the Council had committed criminal acts against his "*right to free access to my property*", including false land ownership claims and tampering with the definitive map and other historic rights of way maps. The Commissioner advised the complainant that she was unable to investigate the accuracy, veracity or legal provenance of information disclosed in response to a request. She also confirmed that she would be unable to investigate concerns around the way that the Council has handled matters in relation to the subject matter of the request.
28. The Commissioner considers that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties. Disclosure in this case would promote accountability and understanding in the Council's decision making process relating to the matter. The Commissioner also accepts there is a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.
29. The Commissioner is mindful that disclosure under the EIR is a disclosure to the world at large. In a case such as this one, the decision for the Commissioner is whether the information requested should be placed in the public domain. The Commissioner recognises that the complainant has personal reasons for making the request in this case, as he considers that decisions taken by the Council about the matter have had a direct effect on him and his property. However, neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant because the EIR is about disclosure to the public and public interests and not any private interests.
30. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release their personal data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in matters relating to the right of way, but she does not consider that any legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy. The Commissioner has therefore decided that the Council was entitled to withhold this information under the exception at regulation 13(1).

Regulation 12(5)(b) – Legal professional privilege

31. 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').

32. The success, or not, of an 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?
33. 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.
34. 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.
35. The withheld information in this case comprises exchanges between the Council's solicitors and the relevant client department for the purposes of seeking legal advice regarding possible enforcement action. The Council considers the information to be subject to legal advice privilege. However, the Council explained to the Commissioner that the complainant in this case has indicated that he is currently considering legal action against the Council in relation to the subject matter of the right of way, ownership and access concerns along the right of way.
36. The Commissioner is satisfied that the withheld information consists of communications that, at the time they were made, were confidential;

were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice to assist with litigation. The Commissioner is therefore satisfied that the withheld information is therefore subject to LPP.

37. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request, and there is therefore no suggestion that privilege has been lost.

Would disclosure have an adverse effect on the course of justice?

38. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of the legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
39. In consideration of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the withheld information would adversely affect the course of justice and she is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information. She has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

40. The Council has not provided any arguments in favour of disclosure of the withheld information.
41. The Commissioner considers that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties. Disclosure in this case would promote accountability and understanding in the Council's decision making process relating to the public right of way. The Commissioner also accepts there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.
42. As mentioned in paragraphs 26 and 27 of this notice the complainant considers there is a public interest in this case as the request relates to the entitlement of the public to use a right of way. The complainant also has a personal interest in this matter as he lives near to the right of way

and has experienced difficulties with access along it to his property. The complainant has also confirmed that he requires the information to initiate proceedings for a damages claim against the Council.

Public interest arguments in favour of maintaining the exception

43. In this case, in relation to the public interest in favour of maintaining the exception, the Council put forward the following arguments:

- The importance of 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.
- There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts, in light of which the Council is of the view that there would need to be strong considerations to override this public interest against disclosure.
- The Council requires legal advice for the effective performance of its operations and that advice must be given by lawyers who are fully apprised of the facts of the case. Without comprehensive advice decision making could be compromised as it will not be fully informed.
- Legal advisers must be able to present the full picture to his or her clients, which includes arguments in support of any final conclusions as well as counter-arguments. The nature of legal advice often sets out possible arguments for and against a particular view and weighs up their relative merits. This means that legal advice obtained will often set out the perceived weakness of the client's position.
- Disclosure of legal advice could expose the legal position of the Council in any future proceedings or litigation which would adversely affect its ability to protect and defend its legal interest
- Even if litigation is not in prospect, there is a risk that disclosure of legal advice could prejudice the Council in future litigation - "*legal advice connected with one department could have wider implications for other departments*".

44. The Council pointed out that the legal advice in this case relates to an ongoing dispute with the *complainant* "*in relation to the operation of statutory powers*", and litigation cannot be ruled out, in light of the ongoing correspondence with the complainant.

Balance of the public interest arguments

45. The Commissioner appreciates that there is always a general public interest favouring the disclosure of environmental information. Such disclosures inform public debate on the particular issue that the information relates to. The Commissioner considers that there is a public interest in promoting transparency and improving public understanding about rights of way in the Council's area. Disclosure would also allow for greater transparency and accountability in how the Council dealt with issues associated with the right of way. The Commissioner understands that the issue of public rights of way is one that is of interest to the public, particularly those living near to it or wishing to use it.
46. The Commissioner appreciates that the complainant in this case has a personal interest in the subject matter as he lives in a neighbouring property. She notes that the complainant has made allegations against the Council regarding its handling of the matter in question and indicated that he requires the information in order to pursue legal action against the Council. The Commissioner notes that there are other legal remedies available to parties with grievances against public authorities, for example, allegations of maladministration can be referred to the Public Services Ombudsman for Wales. In addition, the Commissioner does not consider that the purpose of the EIR is to provide a remedy for disputes between individuals and public authorities or, where they are available, to bypass other channels, such as court disclosure rules, which might be more appropriate.
47. 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.
48. In the Commissioner's previous decisions, she has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
49. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the

public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

50. Where a public authority is engaged in any form of legal action of its own initiation or is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
51. 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 inspection of the withheld information, the Commissioner could see no sign of unlawful activity, evidence that the legal advice received has been misrepresented or evidence of a significant lack of transparency.
52. The Commissioner is satisfied that, in this case, the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. She has therefore 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

53. 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

54. 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.
55. 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

Joanne Edwards
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