

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 January 2020

Public Authority: Western Power Distribution
Address: Avonbank
Feeder Road
Bristol
BS2 0TB

Decision (including any steps ordered)

1. The complainant has requested information from Western Power Distribution ("WPD") relating to the proposed construction of a wall on his land. WPD refused to provide the requested information, withholding it under regulation 12(4)(e)(internal communications), regulations 12(5)(b)(the course of justice), 12(5)(e)(confidentiality of commercial or industrial information), 12(5)(f)(interests of the information provider) and 13(1)(personal data). Subsequently, WPD confirmed that it did not hold part of the requested information.
2. The Commissioner's decision is that WPD has correctly withheld the information under the exceptions at regulations 12(4)(e), 12(5)(b), 12(5)(f) and 13(1). However, the Commissioner finds that WPD breached the legislation by not responding to the complainant within 20 working days and by failing to confirm that part of the information was not held.
3. The Commissioner requires the public authority to take no further steps.

Request and response

4. On 5 December 2018 the complainant made a subject access request from WPD as follows:

"I therefore feel that I have no other option than to formally request Western Power Distribution release to me all the information that you hold in relation to me and my property...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..."

"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 so are still live (this information is vital in order that exploratory excavations can be completed safely)"

As WPD held information relating to the property that it did not consider to be personal data (the personal data was responded to separately by WPD), it responded under the EIR.

On 10 January 2019 the complainant made a specific EIR request:

"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 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."

5. WPD responded on 19 February 2019 and provided some information within the scope of the request but refused to provide the remainder, citing the following – regulation 12(4)(e), regulation 12(5)(b), regulation 12(5)(e), regulation 12(5)(f), and regulation 13(1)(a).

6. The complainant asked for an internal review on 25 February 2019 and this was provided on 18 April 2019. WPD maintained its original position and set out what information had been withheld -
- Emails and advice between WPD and its solicitors from September and October 2018 (regulation 12(5)(b));
 - Advice and plans along with emails between WPD and its independent contractors relating to plans regarding the proposal to build a wall on the complainant's property (regulation 12(5)(f) and/or regulation 12(5)(e));
 - Internal communications (regulation 12(4)(e)); and
 - Emails and other information comprising WPD's correspondence with or relating to third parties (regulation 13(1)(a)).

7. The review also addressed an issue the complainant raised regarding WPD's summary of his request:

'In particular, you state that WPD's summary did not include your request for "information in relation to the concerns that have been raised preventing the construction of [the] wall". In your first request (dated 5 December 2018), you refer to that category of information as "information that relates to the risks on site".'

The reviewer stated that the scope of WPD's search was so broad that any information would have been retrieved under those headings. WPD did not specifically state that it did not hold this information. Some clearer copies of information that had already been given to the complainant were provided.

8. The Commissioner sent an initial letter to WPD and it was confirmed on 13 September 2019 that it did not hold any information relating to risks or concerns. On 24 October 2019 WPD responded in more detail to questions the Commissioner had asked regarding what searches had been carried out to establish this. She was satisfied with the public authority's response and the complainant later confirmed that he was also content that the information was not held.
9. On 11 December 2019 WPD responded to the Commissioner's queries as to why it considers itself to be a public authority for the purposes of the EIR. WPD has provided its reasons and the Commissioner has no concerns with its response.

Scope of the case

10. The complainant contacted the Commissioner on 26 April 2019 to complain about the way his request for information had been handled. His primary concern was that he had made repeated requests for details of the safety concerns that were connected with the proposed construction of a wall and the evidence in support of the depth of the foundations of the neighbouring property.
11. After the Commissioner began her investigation she asked WPD about this matter. WPD responded to the Commissioner's detailed questions stating that it did not hold any information relating to risks/concerns. The Commissioner notes that there are "concerns" raised in the information but it is the same information that was provided to the complainant in a letter, dated 16 August 2018. The complainant subsequently accepted this position but asked the Commissioner to consider whether any procedural breaches may have occurred.
12. The Commissioner considers the scope of this case to be WPD's citing of the exceptions at regulation 12(4)(e), regulation 12(5)(b), regulation 12(5)(e), regulation 12(5)(f), regulation 13(1)(a) and whether any procedural breaches occurred in the handling of the case.

Background

13. The background to this complaint concerns WPD, a power distributor operating in the Midlands, South-West and Wales. WPD is the owner and operator of the electricity distribution network for the Midlands, South West and Wales. It is licensed under section 6(1)(c) of the Electricity Act 1989 as an electricity distributor. As such it has stated that it has an obligation under section 9(1) of the Electricity Act: (a) to develop and maintain an efficient, co-ordinated and economical system of electricity distribution; and (b) to facilitate competition in the supply and generation of electricity. Under section 16 of the Electricity Act it has a qualified duty to make: (i) connections between its distribution system and any premises, when required to do so by the owner or occupier of those premises, or by an electricity supplier acting with the consent of an owner or occupier of premises; and (ii) connections between its distribution system and any distribution system of another electricity distributor under the Electricity Act.
14. WPD considers it is therefore subject to the EIR by virtue of it being a public authority under Regulation 2(2)(c) of the EIR, namely a, "body or other person, that carries out functions of public administration". From the information provided to the Commissioner she is satisfied this is the case and this is not in dispute.

15. WPD owned a substation to the rear of the complainant's property which has now been removed. The complainant states that in March 2018 WPD agreed to build a steel reinforced concrete retaining wall on his property in order to allow safe vehicular access to a parcel of land owned by WPD immediately beyond the boundary of his property on which had recently stood the electricity sub-station. The wall would also allow the complainant vehicular access into his garden and allow it to be developed for off-road parking. Additionally, this would allow vehicular access to a separate parcel of land beyond the plot owned by WPD. This wall was not subsequently built.

Reasons for decision

Is the information environmental?

16. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...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;*
 - (d) reports on the implementation of environmental legislation;*
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);*
 - and*
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"*
17. Requests for information need to be handled under the correct scheme. The reasons why information can be withheld under the FOIA are

different from the reasons why information can be withheld under the EIR.

Why is this information environmental?

18. The Commissioner is satisfied that WPD considered the request under the correct access regime. The information requested is environmental within the definition at regulation 2(1)(c), since it is information on measures which would affect or be likely to affect the elements and measures to protect them referred to in regulation 2(1)(c) and/or 2(1)(f) which relates to the state of human health and safety regarding built structures as they may be affected by the state of the elements.

Regulation 5(3) – Personal data of the requester

19. Regulation 5(1) states that:

"a public authority that holds environmental information shall make it available on request."

20. However, Regulation 5(3) states that:

"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."

21. The complainant has expressed the view that his name and address could be redacted along with any other personal information that relates to him, his property or land, and render it non-personal data by doing so. The Commissioner believes that any correspondence that was exchanged between the complainant and WPD contains personal data both about him and his complaint that can be linked to him. She is also aware that the complainant has clearly received or sent this information and would have been entitled to it under his subject access request. To provide this information as part of an FOIA response, even in a redacted form, could potentially identify the complainant. Although the complainant does not agree with this view, the Commissioner has considered that in combination with other information, potentially from another interested or knowledgeable party a link could be made. Consequently, she considers it to be the personal data of the complainant.
22. WPD has not cited regulation 5(3) as a reason for withholding the complainant's own personal data but the Commissioner is proactively applying it to any of the complainant's own personal data. Disclosure under the EIR is to the world at large and is the equivalent of publishing it on a public authority's website.

23. As the regulator, the Commissioner cannot permit a breach of data protection legislation. Regulation 5(3) is an absolute exception which means that the Commissioner is not required to consider the balance of public interest or the views of the complainant in this respect.

Regulation 12(5)(f) – interests of the information provider

24. Regulation 12(5)(f) states:

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

(f) the interests of the person who provided the 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 other public authority is entitled apart from these Regulations to disclose it; and

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

The term "person" is not restricted to an individual but can mean a legal person such as an organisation.

25. The Commissioner's public guidance on this exception¹ explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
26. The exception can be broken down into a five-stage test, as recognised by the Information Rights Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012)²:

¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

²

http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - Has the person supplying the information consented to its disclosure?
 - Does the public interest in maintaining the exception outweigh that in disclosure?
27. The exception can only apply where disclosure would result in an adverse effect on that person's interests. Generally, where the first four stages of the test are satisfied, the disclosure of information would harm the interests of the person that provided it and a public authority will owe the person that supplied the information a duty of confidence. The public interest test will then determine whether or not the information should be disclosed.
28. Where information is caught within the scope of the exception, refusal to disclose is only permitted to the extent of the adverse effect. The Information Tribunal illustrated how this applies in practice in the case of *Archer v the Information Commissioner and Salisbury District Council (EA/2006/0037, 9 May 2007)* concerning a request for the whole of a report. It found that the adverse effect only arose in respect of part of the report and that the cited refusal could not therefore be applied to the whole document.
29. The threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm. There is no requirement for the adverse affect to be significant but the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.

WPD's view

30. WPD explained that it has withheld advice, plans and emails between it and its independent contractor relating to proposals to build a wall on the complainant's property. The issue of the building of this wall has resulted in a dispute, the details of which cannot be gone into here.

The information being withheld was written or provided to WPD by independent contractors.

31. WPD set out the three criteria that it argues engage this exception. The independent contractors were not under any legal obligation to supply this information to WPD or any other public authority. The withheld information consists of plans, surveys and other advice that were privately commissioned by WPD regarding proposals to build a wall on the complainant's property. The information and advice was provided under a contract in return for payment by WPD. The contractors concerned did not supply the information in circumstances such that WPD or any other public authority is entitled to disclose it (apart from under the EIR). The contractors concerned have not consented to its disclosure, though it is not clear whether they were asked.
32. The public authority then went on to explain how the disclosure of the withheld information would adversely affect the interests of the person who supplied it. WPD states that any disclosure of the withheld information would amount to disclosure of the know-how and expertise that the independent contractors produce as part of their business in return for payment. The information includes sensitive pricing information and removes the opportunity for the independent contractors to charge a fee for reliance on this information. In other words it takes away the contractors' ability to charge a fee for the expertise it has provided. Disclosure risks releasing their pricing information to a wider market. WPD underpins its argument by saying that it is satisfied that the disclosure of this information to a third party with whom it has no contractual relationship and who has not been part of any contractual exchange of fees would adversely affect their interests.

The complainant's view

33. The complainant has provided arguments concerning this exception which are linked with arguments concerning WPD's citing of regulation 12(5)(e). His arguments centre around the fact that the contractors have been paid for their work and cannot be harmed by the information being put to further use. His view is that the government want information to be available and reused. He additionally cites WPD's willingness to disclose information to him by quoting the agenda for a proposed meeting between him and WPD which included the outline work and costs to date.

The Commissioner's view

34. This information was part of a business arrangement and any willingness by WPD to discuss certain details with the complainant in general terms were part of its negotiations regarding the building of

the wall etc and not for release to the wider public as under EIR. The Commissioner accepts that the release of this information would be likely to adversely affect the interests of the information providers. The exception is engaged.

Public interest test

35. The Commissioner has therefore gone on to consider the public interest in this matter.

Public interest in favour of disclosing this information

36. WPD acknowledges the public interest in accountability, openness and transparency. It accepts that the information in question would be likely to be of personal use to the complainant regarding the proposed construction of the wall.
37. The complainant has provided public interest arguments in favour of disclosure. These are not directly related to this exception. The complainant questions why WPD took it upon themselves to have plans drawn up for a replacement wall for what he describes as "Wall A" (WPD replaced part of this wall with a steel reinforced concrete section). He says that he was not consulted beforehand and it was what he describes as a unilateral choice to develop his private land to enable him to have off-road parking at a cost of £20,000. He argues that WPD did not give proper notice or obtain consent in line with the Party Wall Act 1996. He disputes WPD's operation of heavy plant along a section of the wall when it has been established that it was not structurally sound and reckless of what damage might be done to a nearby allotment whilst WPD suggested that a car parked alongside the wall was a risk to WPD's substation.
38. The complainant identifies several other issues that he contends makes the release of this information in the public interest which involve safety issues and the non-replacement of material removed from his property containing hazardous Japanese knotweed. He also details obligations not fulfilled, lack of safety fencing around the substation, refusal to alter plans to suit his needs, wasting money on plans to build another wall that would have served no purpose and hampered a third party's access. The complainant also highlights the significant amount of money WPD paid or was prepared to pay - £25,000 for one wall that was of no benefit to itself and a potential £100,000 for the projected wall. The removal of the substation cost £250,000. Several thousand more, he states, would have been spent on planning. He estimates that the costs of the entire project would have been significantly more than £350,000. He suggests that WPD removed the substation even though a structural engineer's view was that the ground conditions were not suitable for laden trucks.

39. The complainant argues that WPD removed the substation before completing work on nearby substations thereby reducing capacity and resulting in power cuts. Reinstatement works have never been completed making areas of his garden unusable and obstructing access to his garden by the positioning of a lamppost and not replacing kerbstones so that he is unable to put matters right himself.

Public interest in maintaining this exception

40. WPD argues that there is little, if any wider benefit to the public in disclosing plans and advice relating to the wall. The information is localised, fact specific and relates solely to a proposal aimed at resolving matters with the complainant. Its release would not meaningfully assist the public in understanding how WPD makes decisions on or otherwise engages with environmental issues. Its release would not enhance accountability or transparency in any meaningful sense.
41. WPD's view is that it is in the public interest to prevent adverse effects to the interests of the independent contractors who prepared the information and whose business is predicated on being paid to provide advice to others. The ability of WPD to engage contractors to carry out surveys and other structural analysis on their behalf could be undermined if contractors became reluctant to engage with public authorities and provide advice which could subsequently be disclosed for free under the EIR. WPD states that the complainant has indicated that he has consulted with independent contractors himself who have given him advice about its construction. This, it argues, lends further weight against the public interest in disclosing it.

The balance of public interest

42. Whilst the Commissioner understands the complainant's strongly argued views regarding the public interest and the frustrating situation he has outlined, she does not agree that disclosure can be ordered in this situation. Her view is that the interests of the information providers weighs in favour of non-disclosure because much of the information contains plans and advice concerning the potential construction that involve the expertise and financial calculations of third parties commissioned by WPD. The complainant's argument that there are significant sums involved, either already expended or projected expenses, is a business decision which does not involve public money in its usual sense. Whilst this information is clearly of great interest to the complainant, disclosing it would not be sufficiently in the interests of the wider public.

43. As the Commissioner has found that the information should not be disclosed under regulation 12(5)(f) she has not gone on to look at the application of regulation 12(5)(e).
44. 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 in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
45. As set out 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)(f) was applied correctly.

Regulation 12(4)(e) – internal communications

46. Regulation 12(4)(e) states:

*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.*

47. The EIR does not provide a definition of what is meant by 'internal'. The Commissioner's guidance on this exception³ defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. The communications have to have taken place solely within a public authority.
48. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public

³ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.

49. The Commissioner has had sight of the information withheld under this exception and it consists of internal deliberations and decisions regarding the proposals for the wall and attempts at resolution, this includes drafts of correspondence to the complainant. The complainant's own personal data has been discussed elsewhere in this decision notice. The exception is engaged.

Public interest test

50. Having established that the exception is engaged the Commissioner has gone on to consider the public interest in maintaining the exception or disclosing the information.

Public interest in disclosing this information

51. WPD again acknowledges the arguments in favour of transparency in the way it makes its decisions in this area.
52. The complainant points to the Commissioner's guidance and says that once the issue is no longer live it should be disclosed. He considers that once WPD had taken a decision the matter was concluded and consequently no longer live.

Public interest in maintaining the exception

WPD's view

53. WPD is of the view that these communications arose solely for the purpose of communicating and reaching decisions within the organisation as it deliberated over the options. It contends that such a release would create a chilling effect on the openness in which it is able to deliberate and reach decisions.
54. It further puts forward the view that the information in question concerns a small piece of land, is fact-specific and of negligible public importance. WPD's argument is that there is little, if any, public benefit in disclosing this information.

The balance of the public interest

55. Although some of the information dates back more than a year, it is still live as there have been recent attempts to resolve the dispute. The Commissioner agrees that the information itself does not have a wider public interest as it is so closely linked to a specific dispute. As such, setting a precedent for releasing information linked to a very specific dispute, however important to the complainant, is not in the public interest.

56. 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)(e) was applied correctly.

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

57. Regulation 12(5)(b) of the EIR states that a public authority may *refuse to disclose information to the extent that its disclosure would adversely affect –*

"the course of justice, 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."

58. There is no definitive list which covers circumstances when a public authority may consider applying the exception. In *Rudd v The Information Commissioner & the Verderers of the New Forest (EA/2008/0020, 29 September 2008)*, the Information Tribunal commented that *'the course of justice'* does not refer to a specific course of action but is *"a more generic concept somewhat akin to the 'smooth running of the wheels of justice'".*

59. The public authority must, however, be able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception,
- disclosure would have an adverse effect on one or more of the factors cited, and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

60. WPD explained that the information it had withheld under this exception is correspondence between itself and its solicitors relating to property law. It attracts legal advice privilege because it was provided by a professional legal adviser to its client, WPD, and it was made for the sole purpose of obtaining legal advice in this matter. It was communicated in a professional capacity. WPD stated that privilege has not been waived because it has not been passed to any third party, apart from another law firm under a duty of confidentiality.

61. The Commissioner notes that some of this information is the complainant's own personal data. The information relates to the dispute between the complainant and WPD and advice given regarding matters of law that arose in connection with it. For this reason the

Commissioner believes that much of this information could have been considered under data protection legislation.

62. WPD outlined to the Commissioner why the disclosure of this information would adversely affect the course of justice. The dispute remains ongoing and is reasonably capable of progressing to litigation which would undermine its ability to defend itself against any claim by revealing its position in advance. Moreover it would undermine the external lawyers' capacity to give full and frank legal advice and would discourage WPD from seeking legal advice which would impair legal professional privilege ("LPP"). WPD then referred the Commissioner to the Information Tribunal case of *Woodford v IC EA/2009/0098* where it states that "*There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice*". The adverse effect is met by the general harm which would be caused to legal professional privilege by releasing legal advice.
63. Having considered WPD's arguments the Commissioner accepts that the exception is engaged.

Public interest test

64. The Commissioner has therefore gone on to consider whether the public interest is in disclosing the requested information or maintaining the exception.

Public interest in disclosing this information

65. WPD acknowledged the public interest in public authorities being open and transparent in how they make decisions under the EIR and that it could have been helpful for the complainant to see how it had reached its decisions.
66. The complainant's view is that WPD's adverse effect is not one of the strongest arguments in favour of withholding this information. His view is that there is a requirement to balance the public interest in favour of disclosure.
67. He quotes the *Mersey Tunnel Users Association v IC and Merseytravel EA/2007/0052* where the scale of the inherent weight in maintaining LPP was considered. The complainant states that this information is at the lower end of the scale and carries less inherent weight. He says that the amount of public money concerned and the lack of transparency by the public authority led to the Tribunal ordering disclosure in spite of ongoing litigation. His belief is that disclosure is also warranted in this case.

68. WPD acknowledged the public interest in public authorities being open and transparent in how they make decisions under the EIR and that it could have been helpful for the complainant to see how it had reached its decisions.

Public interest in favour of maintaining the exception

69. However WPD considered there to be a far stronger public interest in its withholding this information as it is protected by legal advice privilege. WPD stressed the objective of LPP which is to safeguard openness in all communications between client and lawyer in order to ensure access to full and frank legal advice. WPD noted that previous decision notices of the Information Commissioner's Office broadly supported the view that the public interest will ordinarily be in favour of withholding information subject to LPP and it quoted from FER0807122:

"To equal or outweigh that public interest [i.e. the public interest against disclosure of information to which legal professional privilege applies], the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency." (paragraph 26)

70. WPD did not consider that any such strong opposing factors are present in this case. In other words - no substantial amounts of public money are involved; the decision involved affects only the complainant and potentially a very small number of third parties; it does not believe that there has been any unlawful activity or misrepresentation on its part and it considers it has done its best to initiate resolution.
71. Having considered WPD's arguments and reviewed the withheld information, the Commissioner has made her decision based on the limited public interest in disclosure. There would have to be a very strong argument to overturn legal professional privilege which is a fundamental principle in law. Though the complainant disagrees, in the absence of any of the main factors outlined in the previous paragraph that would favour disclosure, it is the principle that needs to be protected.
72. In this case the Commissioner's view is that the balance of the public interest 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.

Regulation 13 personal data

73. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) of the Data Protection Act 2018 is satisfied.
74. In this case the relevant condition is contained in regulation 13(2A)(a)⁴ of the Data Protection Act 2018. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
75. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
76. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

77. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

78. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
79. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
80. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
81. WPD has explained that it considers the withheld information to relate to third parties who are identifiable.

⁴ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

82. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a third party/ies. She is satisfied that this information both relates to and identifies the third parties concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
83. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
84. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

85. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

86. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
87. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
88. The complainant's position is that it is possible for the environmental part of this information to be released without revealing anyone's personal data, effectively anonymising it. He provided an example of a letter redacted to remove personal identifying information whilst the environmental information remained. He also argues that there is a lawful basis in the GDPR for processing this information under public function.

Lawful processing: Article 6(1)(f) of the GDPR

89. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
90. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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”⁵.

91. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
92. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

93. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
94. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

95. WPD considers that disclosure is not reasonably necessary to meet the complainant's legitimate interest.
96. Clearly the complainant believes he has a legitimate interest in the disclosure of this information. He wants transparency in order that he can consider what information was held by WPD regarding the issues surrounding the building of the proposed wall that he has not seen.

Is disclosure necessary?

97. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
98. The Commissioner's view is that the complainant is not arguing that personal data should be released. His argument is that the environmental information can be released without the personal data. In other words, the release of the personal data is not necessary. By logical extension, if the personal data was redacted, this exception would no longer apply.
99. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

100. The Commissioner has therefore decided that WPD was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(2) – duty to make available environmental information on request

101. Regulation 5(1) states the following:

"a public authority that holds environmental information shall make it available on request."

102. Regulation 5(2) states that such information shall be made available -

"as soon as possible and no later than 20 working days after the date of receipt of the request."

103. WPD breached the EIR by responding beyond the statutory timeframe of twenty working days.

104. The Commissioner also notes that WPD failed to cite the exception at regulation 12(4)(a) regarding information not held. Although the internal review commented that information regarding the risks on site would have fallen within the broader terms of the request, it did not confirm that this information was not held until well beyond the statutory time.

Right of appeal

105. 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

106. 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.

107. 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

**Pamela Clements
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**