

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

Date: 12 June 2014

Public Authority: Wigan Metropolitan Borough Council

Address: Town Hall
Library Street
Wigan
Lancashire
WN1 1YN

Decision (including any steps ordered)

1. The complainant has requested information relating to the planning application for a particular property. In response, Wigan Metropolitan Borough Council (the Council) refused to disclose the information it held that was covered by the scope of the request under regulations 12(4)(d) (unfinished documents) and 12(5)(b) (course of justice) of the EIR. The Commissioner has found that the exceptions are engaged but that in all the circumstances the balance of the public interest favours disclosure. The Commissioner therefore requires the Council to disclose the withheld information as identified in paragraph 7 of this notice to ensure compliance with the legislation.
2. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 18 July 2013 the complainant wrote to the Council and asked for the following information with regard to a planning application:

The request requires copies of all correspondence relating to the above from May 1st. 2013 to date except for e-mails between officers and myself which I already have.

This should include all inter-departmental correspondence, telephone attendance notes, meeting and file notes etc.; etc. including, specifically;

Exchange of any correspondence with the legal department.

Briefing notes to counsel regarding interpretation and application of any relevant planning policy.

Counsel's Advice re these points.

4. The Council acknowledged receipt of the request the following day before issuing its substantive response on 19 September 2013. The Council advised the complainant it had processed the request in accordance with the EIR and that it had identified information falling within the scope of the request. However, it considered this information was excepted from disclosure under regulations 12(4)(d) and 12(5)(b) of the EIR, with the balance of the public interest on each in favour of maintaining the exception.
5. The complainant wrote to the Council again on 25 September 2013 and asked it to reconsider its refusal. The complainant argued that the Council had failed to take into account as part of its decision what he believed was a plausible perception of wrongdoing in relation to the consideration of the planning application.
6. The Council subsequently carried out an internal review, the outcome of which was sent to the complainant on 22 October 2013. The reviewer found that the Council should have advised the complainant of the classes of information it held that were covered by the request, although the review upheld the original decision that all of the requested information was subject to the exceptions previously cited.
7. The classes of information identified by the Council and the corresponding exception applied are summarised below:

- A. An email from a Places Directorate officer to their manager, which contains a draft response to the complainant. This was withheld under regulation 12(4)(d) of the EIR.
- B. Information between officers of the Council's Places Directorate and Legal Division in which legal advice is sought and given. This was withheld under regulation 12(5)(b) of the EIR.
- C. Instructions to counsel and counsel's advice. This was withheld under regulation 12(5)(b) of the EIR.

Scope of the case

- 8. The complainant contacted the Commissioner on 13 November 2013 to complain about the way his request for information had been handled. In particular, the complainant asked the Commissioner to consider whether the Council's decision to withhold the items of information described at A – C above was made in accordance with the EIR.
- 9. When carrying out an investigation, the Commissioner will normally give a public authority an opportunity to justify its position under the legislation. The Commissioner may also ask for sight of the withheld information connected to a complaint.
- 10. The Commissioner wrote to the Council on 3 March 2014 requesting its further submissions and a copy of the withheld information. The date specified for a response was 17 May 2014. The Council did not reply by that date nor did it engage with the Commissioner's attempts to confirm when it intended to do so. The Commissioner therefore served an information notice on 1 April 2014 that formally required the Council to provide the information asked for in the letter of 3 March 2014. The Council responded to the Information Notice on 6 May 2014 and it is these submissions that have formed the basis of the Commissioner's decision.

Reasons for decision

Regulation 12(4)(d) – unfinished document

- 11. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
- 12. The withheld information comprises an email sent from a planning officer to a senior official within the Council. In response to the

Information Notice served by the Commissioner, the Council provided the following explanation to justify its application of the exception:

The email was sent from the planning officer to the Assistant Director for Planning, this is a standard process whereby the officer regularly seeks advice from a senior officer on the content of a proposed response. In this case, the proposed response was incorrect and the senior officer highlighted this fact and therefore the content of this email is not factually correct in relation to the planning application.

13. The Commissioner's guidance on regulation 12(4)(d)¹ states that a document may be unfinished for the purposes of the exception where the authority is still working on it at the time of the request or because work on it ceased before it was finalised and therefore is no intention to finalise it. Draft documents will similarly engage the exception because a draft of a document is by its nature an unfinished form of that document. A draft version of a document will still be considered an unfinished document even if the final version of the document has been published.
14. In view of the Council's explanation, the Commissioner is satisfied that the exception is engaged. Therefore, as required by regulation 12(1)(b) of the EIR, he has gone on to consider the public interest test attached to the application of the exception.

Public interest arguments in favour of disclosure

15. In the Commissioner's view, the importance of transparency in the way that a public authority functions means that some weight must always be placed on the public interest in disclosure. The complainant has further argued that this weight is strengthened in this case because of what he considers are legitimate concerns about the way the Council acted with regard to the planning application.

Public interest arguments in favour of maintaining the exception

16. The Council has argued that "it is not in the public interest for a draft (incorrect) document to be placed into the public domain, especially in relation to planning issues. If this draft email was to have been

¹http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx

disclosed, this would have given the public incompletely incorrect information on the status of a planning application.”

Balance of the public interest

17. The Commissioner considers that it is not for him to argue a point on a public authority's behalf. Instead, it is the responsibility of the public authority to provide compelling arguments to support its position for the Commissioner to consider.
18. In this case the Council's arguments for the application of regulation 12(4)(d) are brief and do not go beyond largely generic statements for withholding the disputed information. Arguments, in short, that are not of sufficient detail and depth to demonstrate why the EIR's express presumption in favour of disclosure (regulation 12(2)) should be overridden.
19. In coming to this decision, the Commissioner has considered the findings of the Information Tribunal in *Tillyer v Information Commissioner & New Forest National Park Authority* (EA/2012/0244, 10 June 2013)². In that case the Tribunal found that putting misleading information into the public domain may serve no purpose and therefore weaken the strength of the public interest in disclosure. However, in the Commissioner's view, this argument will only bite where it is impossible for a public authority to put the disclosure into context.
20. The Commissioner considers that the Council's submissions fail both to specify how the information is misleading and why it is unable to provide a statement accompanying the disclosure that explains the information may be inaccurate. He has therefore found that the strength of the Council's arguments as presented is not sufficient to outweigh the inherent weight of the public interest arguments in disclosure.

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

21. 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, 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.

² http://www.informationtribunal.gov.uk/DBFiles/Decision/i1028/EA-2012-0244_10-06-2013.pdf

22. For disclosure to have an adverse effect on the factors described in the exception there must be an identifiable harm or negative impact on these interests. Furthermore, the exception will only be engaged where a public authority can demonstrate that there *would* be an adverse effect. This requires that the adverse effect is more likely than not to occur.
23. Regulation 12(5)(b) is very wide in coverage and may potentially include material subject to legal professional privilege, information about law enforcement investigations and proceedings, and records of courts, tribunals and enquiries. To support its view that the exception is engaged, the Council informed the Commissioner of the following:

The emails correspondence are between the Council's legal advisors in-house and external and the client department (planning department).

24. The Council did not clarify the precise nature of the adverse effect linked to disclosure. However, the explanation provided above suggests the Council considers that the disclosure of legally privileged information would automatically result in an adverse effect on the course of justice.
25. The concept of legal professional privilege is a key ingredient of the course of justice; allowing parties space in which to seek advice on their respective positions under law and the accompanying powers and obligations. Consequently, some caution must be exercised when considering whether privileged information should be disclosed. The Commissioner's guidance on regulation 12(5)(b) of the EIR³ sets out two ways in which releasing privileged material could adversely affect the course of justice; it might unfairly disadvantage the public authority in a particular case or it might undermine confidence in legal professional privilege more generally.
26. However, the risk of harm occurring should not be overplayed and must reflect the information under consideration and the situation as it stood at the time a request was made. This qualification was emphasised by the Upper Tribunal as part of its findings on the relationship between legal professional privilege and regulation 12(5)(b) in *GW v Information Commissioner, Local Government Ombudsman and Sandwell MBC*

³http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.pdf

[2014] UKUT 0130 (AAC)⁴ [the LGO case]. In other words, a public authority cannot simply assume there is a connection between the disclosure of privileged information and an adverse effect on the course of justice.

27. It is noticeable in this case that the information request was made a short time after the Council had asked for, and received, legal advice. The fact that the information was therefore not 'stale' – which refers to circumstances where information has lost its sensitivity due to the passage of time - may therefore lend weight to the view that the Council would be disadvantaged through disclosure. Against this, however, is the knowledge that the legal advice only pertains to a narrow procedural matter. This raises the possibility that the likelihood of the Council being significantly disadvantaged may be less than if the legal advice concerned issues that were wider-reaching. Moreover, not all of the documents to which the exception has been applied reference the terms of the request for the legal advice or the legal advice itself, and so it is not immediately clear how disclosure of this information would be harmful to the course of justice.
28. The Commissioner considers that the combination of these factors mean that the engagement of the exception cannot be taken for granted. In the LGO case, the Upper Tribunal expressed its judgement that "*it is for the public authority to identify and establish any adverse effect on the course of justice on which it relies* [paragraph 53]." The Commissioner is of the view that the Council's submissions again only refer indirectly to the detriment that may arise and fail to provide any clear and compelling evidence that indicates the possibility of an adverse effect occurring is more probable than not. This is in spite of the fact that the Council has had repeated opportunities to provide complete arguments.
29. Notwithstanding this point though, there is little doubt that disclosure will allow interested third parties to scrutinise the withheld information to see whether there is anything that helps them. Insofar that this would be unfair to a public authority seeking to obtain impartial advice on an issue, the Commissioner considers that there would be an adverse effect.
30. Regulation 12(5)(b) of the EIR also differs from section 42 of FOIA in that it is potentially far broader and may, unlike the exemption in FOIA,

⁴ <http://www.osspsc.gov.uk/judgmentfiles/j4159/GIA%204279%202012-01.doc>

allow for information that is not legally privileged to be covered as long as disclosure would adversely affect the course of justice. As referred to above, it is not evident that all of the material withheld under the exception would attract legal professional privilege. The Commissioner has therefore considered whether it could reasonably be found that disclosure of this residual information would also result in a harmful effect. In his view it can if it is borne in mind that the information ultimately formed part of the attempt to resolve a planning dispute; an action that can be linked to the course of justice. On this basis, the Commissioner has considered it appropriate to find that the exception is engaged with regard to all of the withheld information. Regulation 12(5)(b) is, however, qualified by the public interest test and therefore it will only apply where the balance of the public interest favours maintaining the exception.

Public interest arguments in favour of disclosure

31. As referred to under the consideration of regulation 12(4)(d), the complainant has forcefully argued that there are legitimate grounds for believing that the Council acted without legal basis in respect of a planning application. The complainant therefore considers that the weight of the public interest invested in transparency is bolstered in this case because of the value that the information has in allowing the public to better understand the reasons for the Council's actions and to hold it accountable for its decision-making.

Public interest arguments in favour of maintaining the exception

32. The Council failed to provide specific public interest arguments as part of its submissions to the Commissioner. However, in its correspondence with the complainant, the Council argued that disclosure "*would provide an indication of the arguments, strengths or weaknesses which the Council might have, unbalancing the level playing field under which potential adversarial proceedings are meant to be carried out.*"

Balance of the public interest

33. The withheld information relates to a narrow procedural issue with regard to a particular planning application. On the one hand, it is debatable whether the information itself would have significant value to the wider public because of its localised focus, thereby minimising the overall strength of the case for disclosure. On the other hand, it may reasonably be argued that the narrowness of the issue itself is likely to weaken the severity of any harm that would be caused through disclosure.

34. In determining where the balance of the public interest lies, it is necessary to consider the EIR's express presumption in favour of transparency. This requires that requested information should be disclosed unless there are compelling reasons not to do so. In this case the Council has not been specific about the particular concerns it has about the information being placed in the public domain. Nor has any evidence been provided which could support the position that disclosure in the limited circumstances of this case would make a public authority wary about asking for legal advice in the future, to the potential detriment to the public it serves.
35. To return to the approach adopted in the LGO case, the Commissioner considers that it is the responsibility of a public authority to identify and establish any adverse effect on the course of justice on which it relies. For the reasons stated, the Commissioner has agreed with the Council that disclosure would adversely affect the course of justice. However, he has also found that this effect has not been shown to be severe. Therefore, bearing in mind the EIR's emphasis on transparency, the Commissioner has decided that in all the circumstances the public interest in favour of disclosure outweighs the public interest in favour of maintaining the exception.

Procedural issues

Regulation 5(2) – time for compliance

36. Regulation 5(2) of the EIR requires a public authority to respond to a request as soon as possible and no later than 20 working days after the date of the receipt of request. In this case the Council failed to comply with this requirement by issuing its response outside of the 20 working days specified.

Right of appeal

37. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.
39. 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

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