

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 April 2015

Public Authority: Cornwall Council

Address: County Hall
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested recorded information from Cornwall Council which concerns an application for a Certificate of Lawful Existing Use Development at for land at Gilbert's Coombe, Redruth, Cornwall.
2. The Commissioner's decision is that Cornwall Council has correctly applied Regulation 13 to most of the personal data contained in the information it previously sent to the complainant and that it has correctly applied Regulation 12(5)(b) in respect of information to which legal professional privilege can be ascribed.
3. The Commissioner requires Cornwall Council to reconsider the extent to which it has redacted personal data from the information it previously sent to the complainant. The focus of its reconsideration should be the seniority of some of the officers named in those documents.
4. The Commissioner also requires the Council to provide the complainant with appropriate advice and assistance in respect of the redactions made to a certificate concerning the burial of a deceased person's ashes. It should take this action under duty provided by Regulation 9(1) of the EIR.
5. 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

6. On 18 March 2014, the complainant wrote to Cornwall Council ("the Council") and requested information relating to the use of land at Gilberts Coombe, Redruth, Cornwall in the following terms:

"I am requesting an enquiry into the recent granting to Land at Gilbert's Coombe for a Certificate of Lawful use of motor cycle trials, practice and training.

I also request under the Freedom of information Act any minutes of meetings, phone calls or indeed any other references taken during the time [a named person] was making his decision. I also ask for the names of any persons who were involved in the decision to award the certificate (Delegated Decision). I also ask for the names of the three planning officers that are members of the Motor Club in question as this would certainly be a conflict of interest."

7. The Council acknowledged the complainant's request on 15 April, It advised her that the request would be dealt with under the Environmental Information Regulations 2004 ("the EIR") and that the Council would make its response to her request by 16 May 2014.
8. The Council made its response to the complainant on 22 May, advising her of the following:

"Most of the information we hold is on our online planning register. You can find this information by following this link.

Further correspondence can be found in the attached PDF.

The Council can confirm that it holds additional information in response to your request but has decided that this information should be withheld from disclosure to you pursuant to the provisions of Regulation 12(4)(d) Material in the course of completion, unfinished documents and incomplete data, Regulation 12(4)(e) Internal Communications, Regulation 12(5)(b) 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, Regulation 12(5)(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law, Regulation 12(5)(f) the interests of the person who provided the information to the public authority and Section 13 Person information of the Environmental Information Regulations ("EIRs"). The information includes a draft officer report, a request for legal advice from the case officer to our

legal department, the legal advice between the case officer and legal officer and one letter of objection.”

9. On 14 June the complainant wrote to the Council to complain about the information the Council had sent her. The complainant questioned the relevance and contents of some of the information she had been sent and she referred to the Council's letter of 22 May 2014, in which the Council had stated it had decided to withhold additional information. The complainant also asked a number of questions which were raised by the information she had received.
10. The Council wrote to the complainant on 19 June, advising her that it would reconsider her request and the information it had sent her.
11. The Council wrote to the complainant again on 24 June, this time advising her that the questions she had raised since receiving the information would be dealt with by way of Stage 2 of the Council complaints process.
12. The Council completed its internal review and wrote to the complainant on 11 August to explain the outcome of that review.
13. The Council informed the complainant that it was satisfied she had been sent the correct information and that her request for information had been met. The Council also confirmed its reliance on the following exceptions to disclosure:
 - Regulation 12 (4) (d) – Material in the course of completion, unfinished documents and incomplete data;
 - Regulation 12(4) (e) – Internal Communications;
 - Regulation 12 (5) (b) – Course of Justice;
 - Regulation 12(5)(f) – where disclosure would prejudice the interests of the person who provided the information; and
 - Regulation 13 – where the information constitutes personal data of one or more third parties and where disclosure would contravene the any of the data protection principles or section 10 of the Data Protection Act.
14. Also on 11 August, the Council sent the complainant a second letter in which it provided answers to the questions she asked, which the Council considered did not fall within the ambit of the EIR.

Scope of the case

15. The complainant contacted the Commissioner 9 October 2014 to complain about the way her request for information had been handled.
16. The Commissioner has considered the exceptions to disclosure the Council has relied on and has examined the withheld information. This decision notice is the Commissioner's decision in this matter.

Reasons for decision

Regulation 13 – Personal data

17. 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.
18. In order to engage regulation 13 the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1990 ("the DPA").
19. Section 1(1) of the DPA defines personal data as:

“data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.”
20. The Commissioner has noted the redactions made to the documents which were previously disclosed to the complainant. The Commissioner has now examined unredacted copies of these documents – these are contained in 'Appendix 1a' of the bundle of evidence the Council supplied to the Commissioner.
21. The redacted information in Appendix 1a consists of the following:
 - The names of a lessor and lessee concerning a particular parcel of land;
 - A certificate for the burial of a deceased person's ashes;
 - Correspondence between named individuals and the Council;
 - Names on a Council record of telephone conversations;

- Email addresses and names shown on emails sent to and from the Council concerning complaints made about noise;
 - Correspondence with the Council from a solicitor;
 - Correspondence with the Council from the owner of the land;
 - Correspondence with the Council from the complainant's own solicitor.
22. The Commissioner finds that the majority of the redacted information satisfies the definition of personal data provided by the DPA.
 23. The Commissioner also finds that information contained in Appendix 1a is intrinsically linked to a significant amount of information which the Council holds.
 24. In the case of names, addresses and email addresses of 'some' of the individuals named on the documents the Commissioner finds that they would have no reasonable expectation that their personal data would be made public by virtue of a request made under the EIR. The Commissioner has therefore decided that it would be unfair to those data subjects for the Council to disclose their personal data. He finds that the first data protection principle could not be satisfied to allow certain items of personal data to be processed by way of disclosure under the EIR.
 25. This however is not the case for all of the personal data which the Council has redacted. The Commissioner notes that some of the redacted information relates to potentially senior members of the Council's staff, examples being: a Senior Legal Officer, a Development Manager Group Leader (Planning Enforcement), a Development Manager (General Team), a Principal Development Officer, and a Development Management Group Leader (General).
 26. Where a person holds a relatively senior position within the Council, and is acting in his or her professional capacity in respect of council business, the Commissioner considers that the reasonable expectation of privacy is diminished and that disclosure of names, telephone numbers, email addresses, etc is more likely to be fair.
 27. With this in mind the Commissioner requires the Council to revisit the redactions it made concerning its own staff's personal data. It should consider the seniority of those members of staff and determine whether further information should be disclosed under the EIR.
 28. The Commissioner's decision is that the Council is entitled to rely on Regulation 13 to continue to withhold most of the redacted information contained in Appendix 1a but is not entitled to withhold the personal

data of its senior staff, where the information relates to those persons acting in their professional capacities.

29. The Commissioner has noted that one piece of withheld information concerns the name of a deceased person. This information does not satisfy the definition of personal data provided by the DPA. The Commissioner recommends that the Council speaks with the complainant about this particular piece of information and the document which contains it: It should take this action by virtue of Regulation 9(1) of the EIR – where the Council has a duty to provide advice and assistance.
30. Where a person holds a relatively senior position within the Council, and is acting in his or her professional capacity in respect of council business, the Commissioner considers that the reasonable expectation of privacy is diminished and that disclosure of names, telephone numbers, email addresses, etc is more likely to be fair.
31. With this in mind the Commissioner requires the Council to revisit the redactions it made concerning its own staff's personal data. It should consider the seniority of those members of staff and determine whether further information should be disclosed under the EIR.

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

32. The Commissioner has examined the information which the Council has withheld in reliance on Regulation 12(5)(b). This information is referred to by the Council as 'Appendix 1b', Appendix 1c', 'Appendix 1d' and 'Appendix 1e'.
33. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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.
34. Having reviewed all of the withheld information relevant to this exception, the Commissioner finds that it can properly be characterised as; documents, including emails, which record requests for legal advice made to properly qualified persons, and details of the advice given to officers of the Council.
35. The Commissioner understands that the withheld information has not been made available to any third party or to the public and therefore the

current status of the information is that the legal professional privilege attached to the withheld information has not been lost.

36. The Commissioner is mindful of the Information Tribunal's decision in *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037). In that case, the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an "adverse" effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word "would" as being "more probable than not".
37. 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 legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
38. In this case, the Commissioner considers that disclosure of the legal advice would adversely affect the council's ability to defend itself should it be faced with a legal challenge in connection with this issue.
39. The Commissioner considers that the council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.
40. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest

Arguments in favour of disclosing the requested information

41. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.

42. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of the use of the land adjacent to the complainant's property. Disclosure would also allow the public to consider the quality of the legal advice which was sought and received by the Council.

Arguments in favour of maintaining the exception

43. In his previous decisions the Commissioner 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.
44. 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."

45. Where a public authority is engaged in any form of legal action of its own initiation and 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.
46. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

47. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

48. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
49. However, having considered the content of the withheld information, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure. He is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.
50. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
51. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
52. The Commissioner has decided that the council has properly applied regulation 12(5)(d) to the information sought by the complainant.

Regulation 12(5)(f) Interests of the person who provided the information to the public authority

53. Regulation 12(5)(f) states that information can be withheld where its disclosure would have an adverse effect on:

(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;

54. The Commissioner has identified that the following criteria need to be considered in order for the exception to be engaged:
 - a. Could the authority have required the provider to provide that information?
 - b. Is the authority entitled to disclose that information otherwise than in response to a request under the Regulations
 - c. Has the provider consented to the disclosure of the information
 - d. Would a disclosure of the information have an adverse effect upon the interests of the letter's author?
55. The information which the Council has withheld in reliance on this exception consists of correspondence it received from an objector.
56. It is clear to the Commissioner that the correspondence was sent to the Council with the likely expectation that it would not be shown outside of the Council.
57. In this case there was no requirement for the letter's author to make his/her objection, and the Commissioner has seen no evidence which confirms that he/she has consented to its release.
58. The Commissioner finds that the letter engages Regulation 12(5)(f).
59. Ordinarily the Commissioner would go on to determine whether the Council can maintain its reliance on this exception by considering the where the balance of the public interest lies: In this case this is not necessary. The letter is indisputably the personal data of its sender. It therefore falls to be considered under Regulation 13 above.
60. In the Commissioner's opinion the author of the letter would not expect it to be placed into the public domain by virtue of a request made under the EIR. To do so would be unfair to the letter's author and such an action would contravene the first data protection principle.
61. The Commissioner's decision is that the Council is entitled to rely on Regulation 13 to withhold the letter of objection.

A case officer's draft report

62. The Council has withheld a report made by one of its case officers and did so in reliance of Regulation 12(4)(d).
63. The draft report concerns the possible granting of a Certificate of Lawful Development – existing use, at Gilbert's Coombe, under application PA12/08740.
64. The Commissioner has noted that the draft report was submitted to the Council's Legal Planning Instructions Department in an email which clearly asks for legal advice.
65. At the time the complainant made her request the case officer's report was only held by the Council in draft form and therefore the Council would appear to be correct to rely on Regulation 12(4)(d) of the EIR to withhold it.
66. Notwithstanding the Council's reliance on Regulation 12(4)(d), the Commissioner considers that the draft report cannot be dissociated from the overall purpose of the email to which it was appended.
67. The draft report's clear association with the case officer's request for legal advice, leads the Commissioner to find that the draft report itself acquired legal professional privilege and it therefore engages the Regulation 12(5)(d) exception.
68. For the reasons outlined at paragraphs 28 – 48 above, the Commissioner has decided that the Council is entitled to rely on Regulation 12(5)(d) to withhold the draft report.
69. The Commissioner notes that the case officer's final report was published on the Council's website at the time the Certificate of Lawful Development was considered.
70. The Commissioner has not considered the Council's application of Regulation 12(4)(e). This is because the Council's continued withholding of recorded information has been dealt with under the regulations already considered above.

Right of appeal

71. 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

72. 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.
73. 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

Andrew White
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