

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 4 July 2019

**Public Authority:** Herefordshire Council  
**Address:** Plough Lane  
PO Box 4  
Hereford  
HR4 0XH

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the status of a section of road. Herefordshire Council ("the Council") disclosed some information, and withheld the remainder under the exceptions provided by regulations 12(5)(b), 12(5)(f), and 13.
2. The Commissioner's decision is that the Council is entitled to withhold the information under regulations 12(5)(b), 12(5)(f), and 13.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 13 August 2018, the complainant wrote to the Council and requested information in the following terms:

*All correspondence and reports concerning Tomkyns/Browns Lane U75235 Dorstone and in particular the report from landowners claiming the lane is not a public carriageway.*

5. The Council responded on 11 September 2018. It disclosed some information, and withheld some under regulations 12(5)(f) and 13.
6. Following an internal review the Council wrote to the complainant on 21 September 2018. It maintained the application of regulations 12(5)(f) and 13 to part of the withheld information, and applied regulation 12(5)(b) to the remainder.

## Scope of the case

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7. The complainant contacted the Commissioner on 4 December 2018 to complain about the way his request for information had been handled, and specifically that the Council had incorrectly applied regulations 12(5)(b), 12(5)(f), and 13.
8. The Commissioner considers the scope of the case to be whether the Council is entitled to withhold information under regulations 12(5)(b), 12(5)(f), and 13.

## Reasons for decision

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### Context

9. In 2011, the Council received complaints, in its capacity as relevant Highway Authority, alleging that a section of the 'U75235 County Road' (near Little Mountain in Dorstone Parish) was obstructed and not available for public use. The Council requested that the landowners remove the obstruction; to which the landowners denied that the section of road was a public highway.
10. Following investigation, the Council issued a report in August 2012, inviting responses from interested parties. The Council subsequently concluded that the section of road was a public highway. The landowners contested this, and commissioned a report on their position

from a private consultant; a draft version of which was provided to the Council.

11. The section of road remains obstructed and not available for public use, and the Council has explained that it is now likely to take legal action under section 130 of the Highways Act 1980, by way of notice to require the landowners to remove the obstruction within a certain timeframe. There are then several routes by which the matter may proceed, including litigation should the landowners maintain their position.

### **Regulation 12(5)(b) – The course of justice**

12. Regulation 12(5)(b) 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-*

*(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...*

13. The Commissioner's public guidance on this exception<sup>1</sup> explains that she accepts the exception is designed to encompass information that would be covered by legal professional privilege.
14. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' is 'more probable than not'.
15. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Tribunal described legal professional privilege as 'a fundamental condition on which the administration of justice as a whole rests'. The Commissioner accepts

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

that disclosure of 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.

16. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

Is the exception engaged?

17. The Council has provided a copy of the withheld information to the Commissioner. The Commissioner has identified that it represents three instances where the Council's Public Rights of Way Team has sought, and received, legal advice from either the Council's Legal Services Team or an external legal firm. The Council has explained that the legal advice was originally sought under legal advice privilege. The Council has also confirmed that any associated confidence has not been lost through the information being disclosed to any third parties.
18. In the circumstances of this case the Commissioner understands that the legal advice was sought in relation to the status of the road and subsequent communications with the landowners. This legal advice was sought in 2013 and 2017, but the continuing dispute between the Council and the landowner has subsequently meant that the matter remains 'live', and may reasonably progress to litigation.
19. Having considered the above, the Commissioner recognises that the disclosure of the information would undermine legal professional privilege, and that the disclosure would also affect the Council's ability to defend itself in related legal challenges. The Council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.
20. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

### Public interest test

21. Where regulation 12(5)(b) is engaged, it is subject to the public interest test required by regulation 12(1)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
22. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information, as required by regulation 12(2).

### *The public interest in disclosure*

23. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
24. In the circumstances of this case, the complainant argues that the road is a public highway which has been deliberately obstructed by the landowners. Whilst public users of the road have previously submitted information to the Council, they are not aware of any action that has been taken by the Council to remove the obstruction, and the matter remains unresolved. In this situation, the complainant contests that there is a public interest in understanding the 'balancing information' that has been provided by the landowners to the Council.

### *The public interest in maintaining the exception*

25. The Council has confirmed that the matter remains unresolved, and will be the subject of further action by the Council. However, this consequently means that there is a realistic prospect of litigation between the Council and the landowners. The disclosure of the information would reveal potential areas of uncertainty for the Council, and may place it at disadvantage in any litigation.

### *Balance of the public interest*

26. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. To equal or outweigh that public interest, 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.
27. Having considered the context of the request, the Commissioner recognises that the legal advice relates to a live matter that may

reasonably proceed to litigation. Whilst the Commissioner recognises that the complainant may be dissatisfied with the speed that matters are progressing, there is no evidence available to the Commissioner that indicates that the Council is acting incorrectly. The Commissioner perceives that it is very important that the Council be able to seek, and receive, legal advice in order to fulfil its duties as a highways authority, particularly in contested matters that may ultimately lead to litigation.

28. Having considered the above Commissioner is satisfied that the public interest favours maintaining the exception, and that the Council has correctly applied regulation 12(5)(b).

### **Regulation 12(5)(f) – Interests of the information provider**

29. 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...*

30. The Commissioner's public guidance on this exception<sup>2</sup> 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.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1638/eir\\_voluntary\\_supply\\_of\\_information\\_regulation.pdf](https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf)

31. With regard to engaging the exception, and as recognised by the Tribunal, a four stage test has to be considered, namely:
- 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?
  - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
32. The Council states that the landowners who provided this information were under no legal obligation to do so. The withheld information is a draft report privately commissioned by the landowners about the status of the road. The landowners have voluntarily provided the information to the Council only for the purpose of seeking to persuade the Council of the strength of their position.
33. The Council has explained that, apart from under the EIR, it is not entitled to disclose the information. The report was not requested by the Council, and is not required as part of any procedure applying to the determination of a public highway or the removal of obstruction to a right of way.
34. The Council has provided the Commissioner with emails from the landowners stating that they do not consent to the disclosure of the report.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

35. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Council needs to identify harm to the person's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
36. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (i.e. once the application of the exception has been established). However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to

specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

37. In the circumstances of this case the Council, has explained that the status of the road remains a matter of dispute between the Council and the landowners, and will result in further action by the Council under the Highways Act 1980.
38. The landowners have confirmed that the report was commissioned on the basis that the matter may be subject to judicial action in the future, and as such, has been prepared so that it may form evidence to present before a court or other tribunal. It has therefore been a requirement that the report must reveal and explain evidence that does not fit the landowner's aims. Should this report be publicly disclosed, it would reveal the landowners position, including weaknesses and counter arguments, to the world at large; therefore jeopardising their right to a fair hearing.
39. Having considered the withheld information, and the arguments provided by the Council, the Commissioner is satisfied that the disclosure of the draft report would adversely affect the interests of the landowners. She has therefore concluded that the Council was correct to apply the exception provided by regulation 12(5)(f).

#### Public interest test

40. Where regulation 12(5)(f) is engaged, it is subject to the public interest test required by regulation 12(1)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
41. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information, as required by regulation 12(2).

#### *The public interest in disclosure*

42. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
43. In the circumstances of this case the Council considers that the release of the information would publicly clarify the landowners' position



regarding the status of the road, and allow the public to compare this with the Council's own report issued in 2012.

*The public interest in maintaining the exception*

44. The Council has advised that the report was privately commissioned by the landowners at their own expense, and in the expectation that the matter may be subject to judicial action. As such, the report refers to the strengths and weaknesses of the landowners' position. The disclosure of this information in the public domain would prejudice the landowners' position in any future litigation, and would dissuade individuals from voluntarily providing information to the Council when seeking to resolve such matters informally.

*Balance of the public interest*

45. Having considered the context of the request, the Commissioner recognises that the report has been voluntarily provided by the landowners in an effort to convince the Council of their position. Whilst the Council has since determined that it disagrees with the landowners' position, the Commissioner recognises that the matter may be referred to the courts for determination. In such a situation, it is recognised that disclosure of the report would prejudice the landowners' right to a fair hearing. It is also recognised that the disclosure of such information, provided voluntarily to the Council, would discourage individuals from seeking to engage with the Council in respect of contentious matters.
46. Having considered the above Commissioner is satisfied that the public interest favours maintaining the exception, and that the Council has correctly applied regulation 12(5)(f).

**Regulation 13 - Personal data**

47. 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) is satisfied.
48. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>3</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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<sup>3</sup> As amended by Schedule 19 Paragraph 307(3) DPA.

processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").

49. 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.
50. 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?

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

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

52. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
53. 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.
54. 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.
55. The information in this case represents correspondence between the landowners and the council, representations from individuals, and the names and contact details of individuals given on representations from organisations.
56. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
57. 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.

58. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

59. 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".*

60. 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.

61. 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.

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

62. 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<sup>4</sup>.*

63. 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:-

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<sup>4</sup> 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".*

- 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.
64. 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*

65. 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.
66. 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 be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
67. In the circumstances of this case the Commissioner recognises that the status of the road has remained unresolved since 2011, and that this is likely to have affected local residents. The disclosure of the withheld information, including correspondence with the landowners and representations from private individuals, would allow the public to understand, in greater detail, the current status of the matter and the different viewpoints that have been considered by the Council.

#### *Is disclosure necessary?*

68. '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.
69. In the circumstances of this case the Commissioner understands that the general status of the matter is publicly known, and that significant held information about this has been disclosed. It is also relevant for the Commissioner to note that, unless the landowner alters their position, the matter will need to be considered by the courts. In such a situation, it is reasonable for the Commissioner to consider that disclosure of the

individuals' personal data would not advance the wider matter in any meaningful way towards a determination. Having considered these factors, the Commissioner has concluded that disclosure is not necessary.

70. 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

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

## Right of appeal

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72. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**