

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

Date: 8 November 2022

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant requested from Derbyshire County Council ('the council') information relating to the council's actions against a landowner. The landowner erected a wall which the council argues blocks part of the highway. The council withheld information under Regulation 12(5)(b) (course of justice), and Regulation 12(4)(e) (internal communications). It also argued that no information is held as regards some letters to third parties (Regulation 12(4)(a)).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) and Regulation 12(4)(a) to withhold information. However, he considers that one letter to a third party should be disclosed, suitably redacted to protect the rights of the individual under Regulation 13.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose a copy of the council's letter to a complainant dated 28 April 2021, redacted as stated.

4. 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 22 June 2021 the complainant wrote to the council and requested information in the following terms:

"Further to my previous FOI request and your review of the same after it was inadequately fulfilled, I have now made a formal complaint to the information commissioner. However, as the case is still ongoing and unresolved I now request any further information that you have relating to this case on or after 26th November 2020 to the present. The relevant case references are

8225426
82002440
8220797
100952/KJ

Any other case references that have been opened with regard to this case.

Also, regarding 8220797, this appears on a letter dated 23rd August 2018, but I have had no other information in regard to this so please forward any information regarding this case regardless of whether it was after 26th November 2020.

I am particularly interested in correspondence that has been sent out from the Authority and also that which has been received from others including complainants and Bradwell Parish Council. I expect to see information that has personal data redacted but not completely withheld as this would be unreasonable."

6. The initial request, 8225426, was made on 14 July 2020 and was for:

"Please supply me with an electronic copy of the file relating to the above case and any other cases that may have been opened separately. I also need any other correspondence that was received or sent on or after 13th January 2018 to the County Council in relation to the above address including records of conversations."

7. In response to request 8225426 the council had disclosed some information, however the complainant remained unhappy with the amount of information disclosed to him.
8. As regards the request of 22 June 2021, the council responded on 13 August 2021. It refused the request on the basis that section 42 of FOIA (legal professional privilege), and Regulation 12(4)(d) (material in the course of completion) and Regulation 13 (personal data) of the EIR applied.
9. Following an internal review, the council wrote to the complainant on 15 September 2021. It revised its position to apply Regulation 12(4)(e), (internal communications) in place of Regulation 12(4)(d). It also clarified that no response was sent from the council in response to letters from Bradwell Parish Council.

Scope of the case

10. The complainant contacted the Commissioner on 20 October 2021 to complain about the way his request for information had been handled.
11. The scope of this decision notice is whether the council was correct to apply the exceptions it has under Regulation 12(5)(b) and Regulation 12(4)(e) to withhold the information from disclosure. It will also consider whether the council holds any other relevant information falling within the scope of the complainant's request for information, (Regulation 12(4)(a)).

Reasons for decision

EIR or FOIA

12. The Commissioner has considered the council's application of section 42 to the information. The issue which the exempted information relates to is the construction of a boundary wall which the council argues blocks part of the highway. The issue is therefore related to the land and landscape, and measures taken by the council to have the boundary wall removed. The information falls within definitions provided in Regulation 2(1) of the EIR.

13. The Commissioner therefore considers that the information falls within the definition of environmental information under the EIR. The council should therefore have considered the information under the terms of the EIR rather than under FOIA. The council was not correct to apply section 42 of FOIA to the information.
14. The equivalent exception under the EIR is Regulation 12(5)(b) – course of justice. The Commissioner has therefore used his discretion to consider the council's arguments in terms of this exception applying.

Regulation 12(5)(b) – Course of Justice

15. Regulation 12(5)(b) 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.
16. Regulation 12(5)(b) can be applied where information is considered exempt because it is subject to legal professional privilege.
17. The withheld information comprises communications between a professional legal adviser and their client, (the council), for the dominant purpose of providing legal advice. It therefore attracts legal advice privilege.
18. The Commissioner has therefore decided that the exemption in section Regulation 12(5)(b) of the EIR is engaged in this instance.
19. The Commissioner has therefore considered the public interest test required by section 12(1)(b) of the EIR.

The public interest test

20. 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.

The public interest in disclosure

21. There is a general public interest in the disclosure of information held by public authorities. This creates greater transparency on the actions and decisions of public authorities, and also creates greater accountability for those actions. The Commissioner has taken this into account.

22. There is a specific public interest in disclosure in this case because the issue relates to a dispute surrounding the extent of a property boundary as compared to the extent of highway. The owner of the property has erected a boundary wall in an area he considers to be within his property boundary, however the council argues that this blocks part of the highway.
23. There is a public interest in ensuring that the highways remain open and safe to travel on, and therefore in the council being transparent about the actions it has taken/is taking to ensure that that is the case.
24. There is also a public interest in ensuring that the council's actions are legally correct, and that members of the public are not prevented from taking actions on their property which they are legally entitled to take.

The public interest in the exception being maintained

25. There is a strong public interest inherent in the important principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
26. The issues around the wall were still live at the time of the request. If disclosed, the information would provide the legal advice and analysis which the council is relying upon in its dispute with the property owner. If the dispute cannot be resolved informally then this may become a future enforcement matter for the council, and the advice would also be relevant to this.
27. To equal or outweigh the strong public interest in protecting the principle of LPP, 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.
28. The Commissioner is not satisfied that any of these factors are present to the extent that they outweigh the strong public interest in protecting the principle of LPP. This is an ongoing case which may ultimately result in enforcement action being taken against the property owner. The legal advice may therefore continue to be relied upon by the council in its further actions regarding this issue.

The conclusion of the public interest

29. The Commissioner has considered whether the public interest in disclosing the information outweighs the public interest in the section 42 being maintained.
30. His decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed in this case. The Commissioner has therefore decided that Regulation 12(5)(b) was applicable in this case.

Regulation 12(4)(e) – Internal Communications

31. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises internal communications. The exception is class-based, which means that it is engaged if the information in question falls within its scope. There is no requirement to consider prejudice or adverse effect at this stage.
32. The withheld information comprises of email correspondence between various council employees of the council. The Commissioner is satisfied that the withheld information falls under the description of “internal communications”.
33. Accordingly, the Commissioner is satisfied that the exception at Regulation 12(4)(e) is engaged.
34. The Commissioner has therefore considered the public interest test required by section 12(1)(b) of the EIR.

The public interest test

35. 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.

The public interest in disclosure

36. The public interest in disclosure is the same as that noted in the relevant consideration for Regulation 12(5)(b).

The public interest in the exception being maintained

37. The public interest in the exception being maintained relates to the purpose behind the exception. In this case, this relates to creating a safe space for council officers to be able to discuss potential enforcement issues away from the public eye. Its actions will therefore impinge upon the data protection rights of individuals, and potentially, legal enforcement action being taken against an individual.
38. The issues surrounding the boundary dispute were live at the time that the request was received. The withheld information surrounds the council's discussions regarding the dispute. A disclosure of the information whilst discussions with the landowner were ongoing is clearly not in the public interest as it would undermine any safe space the council has to consider its options and decide upon its best course of action.

The conclusion of the public interest

39. The Commissioner has considered whether the public interest in disclosing the information outweighs the public interest in the Regulation 12(4)(e) being maintained.
40. In this case, given the situation related to a potential enforcement issue, and officer discussions as to how to handle the correspondence and actions which it needed to take, the Commissioner is persuaded by the council's arguments that a safe space was required in this case.
41. The Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed in this case. The Commissioner has therefore decided that the council was correct to apply the Regulation 12(4)(e) in this case.

Regulation 12(2) – Presumption in favour of disclosure

42. 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.
43. As covered 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 exceptions provided by Regulation 12(4)(e) and Regulation 12(5)(b) were applied correctly.

Regulation 12(4)(a) – information not held

44. The complainant argued that third parties made complaints to the council about the boundary wall. He argues that the council will hold copies of its responses to these complaints.
45. The council argued that it does not hold the information requested by the complainant. It has therefore applied Regulation 12(4)(a).
46. The ICO must therefore decide on the balance of probabilities whether the public authority holds any - or additional - information which fall within the scope of the request (or was held at the time of the request).
47. The council clarified that, as regards its case reference 8220797, it had disclosed two documents, redacted to remove personal data.
48. The council clarified that officers ran a search of their database using the key search terms to ensure that no correspondence has been sent to Bradwell Parish Council regarding the property.
49. The council also provided a report showing all of the enquires received between the 26th November 2020 and 22nd June 2021 when using key search criteria terms.
50. It said that letters and emails from third parties to the council would not fall within the scope of the request unless they were in relation to the case numbers under which the complainant requested information and within the date range specified. Therefore, any letters received by the council in relation to the initial case number provided may not have been released if the cases were opened prior to 26th November 2020.
51. The Commissioner asked the council to specifically consider whether there were any council responses to third parties falling within the scope of the request. The council identified one letter but argued that it fell outside the scope of the request for information.
52. Having viewed the letter, and after considering the council's argument as to why the information falls outside the scope of the request, the Commissioner does not agree that that is the case.
53. The council also argued that it is not possible to sufficiently redact the letter in order to ensure that the individual cannot be identified. Again, the Commissioner disagrees. The Commissioner considers that a removal of the name and address of the recipient, the name of the signatory, together with the complete first sentence of the second paragraph, and the first three words of the second sentence in that paragraph, would remove any identifiers from the letter.

54. The Commissioner therefore requires the council to disclose this letter to the complainant as required by Regulation 5(1), with the name, address, and other identifiers from within the letter redacted under the individuals rights under Regulation 13 of the EIR

The Commissioner's conclusion

55. Other than the above letter, whilst the Commissioner recognises that the complainant remains concerned that further information should be held by the council, the council has confirmed to the Commissioner that it has carried out adequate and appropriate searches of its records in order to locate any relevant information falling within the scope of the complainant's request for information. Where it has located relevant information, it has disclosed this to the complainant.
56. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
57. On this basis, the Commissioner has concluded that, on the balance of probabilities, no further information is held by the council falling within the scope of the complainant's request for information of 22 June 2021.

Right of appeal

58. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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

**Ian Walley
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