

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

### **Decision notice**

**Date:** 21 May 2012

**Public Authority:** Oxfordshire County Council  
**Address:** County Hall  
New Road  
Oxford  
OX1 1ND

#### **Decision**

---

1. The complainant wrote to Oxfordshire County Council (the "council") and requested correspondence generated since March 2011 which related to Heath Bridge, Church Road drainage and Church Road/Housing Estate drainage pipe since March 2011.
2. The council provided some information but withheld other information because it was considered to be the personal information of third parties or subject to legal professional privilege. The council identified further relevant correspondence which it considered was not subject to the Freedom of Information Act 2000 (FOIA) because it comprised information held by an elected member in their representative capacity as a local councillor.
3. The Commissioner's decision is that the council should have handled the request under the EIR rather than the FOIA and that it was late in providing some of the requested information. The Commissioner has upheld the council's decision to withhold some of the information under the exceptions for personal data and adverse affect to the course of justice. He has also found that some of the requested correspondence is not covered by the EIR as it constitutes information held by a councillor for their own purposes.
4. The Commissioner does not require the public authority to take any steps.

## Background

---

5. Milton-Under-Wychwood, near Oxford, is a village located on the Littlestock Brook which is a tributary of the River Evenlode.
6. Residents' homes in the Heath area of the village have been flooded several times. The flooding is linked to a bridge situated on Church Road and the council indicated it would install a larger bridge if flood modelling work carried out by the Environment Agency identified this was the appropriate solution.
7. The council subsequently concluded that a replacement bridge would not provide significant benefit to houses at risk of flooding and decided that it would pursue other options instead<sup>1</sup>.
8. Heath residents, aggrieved at the decision not to proceed with the bridge replacement, formed a pressure group – "Littlestock Brook Action Group" and have pursued the matter with the council. It is within this context that the request for information appears.

## Request and response

---

9. On 4 October 2011, the complainant wrote to the council and requested information in the following terms:  
  
*"Correspondence relating to Heath Bridge, Church Road drainage and Church Rd / Housing estate drainage pipe since March 2011."*
10. The council responded on 28 October 2011. It provided some information, stating that it had redacted the names of some third parties because it considered that this was personal data and exempt from disclosure under section 40(2) of the FOIA.
11. Following an internal review the council wrote to the complainant on 2 December 2011. The review stated that, following further searches, more information relevant to the request had been located. Some of this information was provided to the complainant. The council confirmed

---

<sup>1</sup> See, for example:

[http://www.thisisoxfordshire.co.uk/news/4877613.Floods\\_Bridge\\_will\\_not\\_be\\_replaced/](http://www.thisisoxfordshire.co.uk/news/4877613.Floods_Bridge_will_not_be_replaced/)

that it held correspondence from and to the local constituency MP, David Cameron, which fell within the scope of the request. This information was withheld because it was considered to be personal data and exempt under section 40(2) of the FOIA. The council confirmed that further correspondence was withheld because it was considered to be subject to legal professional privilege (section 42(1) of the FOIA).

## Scope of the case

---

12. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They asked the Commissioner to consider the following:
  - In relation to correspondence held by a councillor, whether the council correctly defined this information as not being held for the purposes of the FOIA;
  - In relation to correspondence to/from David Cameron MP, whether the council correctly withheld this under section 40(2) of the FOIA;
  - Whether the council correctly withheld information under the legal professional privilege exemption (section 42(1)).
13. During the course of the Commissioner's investigation the complainant raised other matters but agreed that these should not be addressed in the decision notice.
14. Prior to investigating these matters, in view of the nature of the requested information, the Commissioner considered whether the request should have been handled under the EIR rather than the FOIA.
15. During the course of his investigation, the council agreed with the Commissioner that the request should have been handled under the EIR. It confirmed that it wished to withhold the same information identified under FOIA under the exceptions in regulations 12(3) and 13 (personal data), regulation 12(4)(d) (material still in the course of completion), regulation 12(4)(e) (internal communications) and regulation 12(5)(b) (adverse affect on the course of justice).
16. The Commissioner has confined the scope of his investigation to these matters.

## Reasons for decision

---

### Is it Environmental Information?

17. The council handled the request under the FOIA. However, the Commissioner considers that the information was environmental and should have been considered under the EIR. The council agreed with the Commissioner's view and reconsidered the request under the EIR.
18. The withheld information relates to the prospective replacement of a bridge and other actions intended to address flooding. The Commissioner considers that these proposals constitute a measure likely to affect the elements and factors listed in regulation 2(1)(a) and (b) the EIR.
19. The Commissioner has determined that the requested information would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR, for the reasons set out below. Regulation 2(1)(c) provides that:

*"'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material on –*

*(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".*

20. The factors referred to in (a) and (b) include:

*"(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)."*

21. In coming to his view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the

Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

22. The Commissioner is satisfied that information regarding the replacement of or modifications to a bridge and other steps to address flooding fall within the definition of environmental information for the purposes of the regulations as provided in regulation 2(1)(c).

### **Regulation 13 – personal data**

#### *Correspondence to and from David Cameron MP*

23. During the course of his investigation the Commissioner noted that some of the withheld correspondence from David Cameron MP might contain the personal data of the complainant. Regulation 5(3) of the EIR states that the duty to make environmental information available on request does not apply to personal data of the applicant. The council agreed to reconsider this information as a subject access request under section 7 of the Data Protection Act 1998 (DPA) and respond to the complainant separately in this regard.
24. The Commissioner has gone on to consider whether the council correctly applied regulation 13(1) to the remainder of the information
25. Regulation 13(1) of the EIR states that a public authority is not obliged to disclose information if to do so would:
  - constitute a disclosure of personal data, and
  - this disclosure would breach any of the data protection principles or section 10 of the DPA.
26. Public authorities will often receive requests for MPs' correspondence or for information which is contained within MPs' correspondence. MPs will often write to authorities to pass on information or concerns provided to them by constituents. Correspondence will, therefore, often contain the personal data of third parties.
27. The Commissioner's guidance recommends that, where public authorities receive requests for MPs' correspondence it would be good

practice for the authority to consult the MP in question. This consultation is considered to be important because it gives the MP an opportunity to provide details of the context or purpose of any correspondence and the potential affects of disclosure. The public authority needs this information to ensure that it does not release information inappropriately or unlawfully<sup>2</sup>.

*Is the information personal data?*

28. In order for the exception in regulation 13(1) to be engaged, the information being requested must constitute personal data as defined by section 1 of the DPA. This defines personal information as data which relates to a living individual who can be identified:
- from that data,
  - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
29. In this instance the council contacted the MP and, on the basis of the submissions received, concluded that the correspondence identified matters which the MP had raised with the council on behalf of constituents. As the information related to and identified specific individuals, the council determined that the correspondence constituted the personal data of third parties.
30. Having viewed the information in question the Commissioner is satisfied that the correspondence constitutes the personal data of third parties. As he accepts that the information falls within the scope of regulation 13(1) the Commissioner has gone onto consider whether disclosure would breach any of the data protection principles.

*Would disclosure of the information contravene any data protection principles?*

31. The council has argued that disclosure of the information would breach the first data protection principle.
32. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

---

<sup>2</sup> Guidance published on the ICO website here:  
[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/GUIDANCE\\_ON\\_DEALING\\_WITH\\_REQUESTS\\_FOR\\_MPS\\_6\\_AUGUST\\_VERSION1.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/GUIDANCE_ON_DEALING_WITH_REQUESTS_FOR_MPS_6_AUGUST_VERSION1.ashx)

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

33. The Commissioner's general approach to cases involving personal data is to consider the fairness element first. Only if he believes that disclosure would be fair would he move on to consider the other elements of the first data protection principle.

*Would disclosure of the information be fair?*

34. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has also weighed these factors against the public interest in disclosure.

35. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.

36. Constituents referred to in the correspondence in question are acting in their capacity as private individuals rather than public officials, and the correspondence in question involves an MP taking up individuals' concerns about the matters referred to in the request. The council has argued that these private individuals would expect that such correspondence would not be publicly disclosed.

37. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the identified individuals' reasonable expectations. The Commissioner considers that the data subjects would have had a reasonable and legitimate expectation that, beyond disclosures to relevant third parties, made by their MP to further their interests, their personal information would not be disclosed more widely without their consent.

38. In such situations, the Commissioner accepts that authorities are not obliged to approach individuals for their consent to disclosure if they are already of the view that the information in question should not be disclosed, and it is likely that such consent would not be given.

39. The Commissioner considers that the disclosure of personal data where that disclosure is not within an individual's reasonable expectations could be distressing to them as it could represent an unwarranted invasion of their privacy.

40. The Commissioner has balanced these factors against the legitimate public interest in public authorities being transparent in the way they discharge their duties in order to promote accountability and public confidence. There is also a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.
41. The correspondence in question relates to the council's actions in respect of an issue of significant concern to a local community, one which has caused damage and distress to the individuals affected. However, this does not necessarily mean that the wider public interest is served by disclosure of the information requested. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects, in this case, individuals who have raised concerns with their MP.
42. Whilst the complainant and a relatively small number of residents affected by these issues might have a legitimate interest in viewing the correspondence, the Commissioner considers that it would not be proportionate to override the need for privacy in respect of this information, given the intrusion and distress disclosure may cause.
43. The Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject.
44. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on consider the other elements of the first data protection principle. The Commissioner therefore upholds the council's application of Regulation 13(1) because disclosure of this information would breach the first data protection principle.

*Correspondence to and from Councillor Rose*

45. The Commissioner's guidance clarifies that, whilst local authorities are public authorities for the purposes of the EIR, councillors or 'elected members' are not. Information held by councillors for their own purposes will not be covered by the EIR but information they hold on behalf of or as part of the local authority will be covered<sup>3</sup>.

---

<sup>3</sup> Guidance published here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freed](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freed)



46. The council confirmed to the Commissioner that Councillor Rose (the "councillor") is the county councillor for the area where Heath bridge is located and is also the Cabinet Member for the Highways department. The council has argued that the correspondence in question relates to the councillor's representative role as an elected member and the information was received or created by the councillor rather than the public authority.
47. Having viewed the relevant information the Commissioner notes that this consists of correspondence with residents or with third parties on behalf of residents. He is satisfied that this information is held by the councillor in his capacity as an elected member. As the information is not, therefore, held by the council, the Commissioner has concluded that the council correctly decided that it was not covered by the EIR.

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

48. Regulation 12(5)(b) provides that the disclosure of information can be refused if 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."
49. In the Information Tribunal hearing of *Kirkaldie v Information Commissioner and Thanet District Council (EA2006/001)* the Tribunal stated that the purpose of this exception was reasonably clear and that:

*"...it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".*

In this hearing the Tribunal decided that legal professional privilege (LPP) is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase "course of justice".

50. The Tribunal in *Woodford v IC (EA/2009/0098)* confirmed that the test of "would adversely affect" for this exception would be met by the general harm which would be caused to the principle of LPP, without

needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

51. The council has argued that the exception applies to a range of information, including correspondence between its Legal Services department and the Littlestock Brook Action Group's solicitors in relation to the dispute over decisions regarding flood alleviation at the Heath bridge, associated confidential legal advice sought by the council and other internal correspondence relating to these matters.
52. Having viewed the information, the Commissioner is satisfied that some of it covers confidential communications between a client and a lawyer made for the dominant purpose of seeking or giving legal advice. He is, therefore, satisfied that it records the seeking and giving of legal advice and is therefore subject to LPP.
53. The remainder of the relevant information consists of internal council correspondence, which discusses and sets out the relevant legal considerations and correspondence with third parties which clarifies and develops the council's legal position.
54. The council has explained that the dispute to which the information relates is current and the threat of judicial review remains a possibility. Disclosure of the information would provide third parties with access to the council's position in this matter, putting the council at a disadvantage. As a result, the council's ability to prepare for any proceedings would be prejudiced.
55. The Commissioner considers that regulation 12(5)(b) is not limited to excepting only information that is subject to LPP. The wording of the exception has a broad remit encompassing any adverse affect on the course of justice generally; this allows for documents that are not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect on 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 Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO* (EA/2010/0034) when they acknowledged that the regulation covered more than just LPP.
56. In *Rudd v IC & Verderers of the New Forest* (EA/2008/0020) the Tribunal clarified that 'the course of justice' does not refer to a specific course of action but "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'" (paragraph 29).
57. Having considered all the relevant information, the Commissioner is satisfied that it engages the exception, as its disclosure would, by

prejudicing the council's ability to defend the legal basis for its decisions, adversely affect the course of justice.

58. As the Commissioner has concluded that regulation 12(5)(b) applies in this case, he has gone on to consider the relevant public interest arguments.

*Public interest in disclosure*

59. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
60. In its submissions to the Commissioner the council did not explain any of the arguments it considered in favour of disclosure, focussing instead on the public interest arguments in favour of maintaining the exception.
61. The Commissioner has given this matter careful consideration and he considers there are arguments in favour of disclosure in this case. Disclosure would promote the overall transparency and accountability of the council and provide the public with more in depth information on its decision making with regard to flood alleviation.
62. Disclosure would also assist public debate and enable members of the public to challenge the decisions made by the council from a more informed position.
63. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "*a significant group of people*". In the case of *Shipton v Information Commissioner and the National Assembly for Wales* [EA/2006/0028], a differently constituted Tribunal suggested that the public interest in disclosure would outweigh maintaining the exemption (section 42 of the FOIA) "*when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming*" (paragraph 14b).
64. In this instance, residents affected by flooding have suffered damage and distress and have a strong interest in knowing and being able to challenge the grounds for the council's decisions in this regard.

*Public interest in maintaining the exception*

65. The council has argued that there is a general public interest in not disclosing legal correspondence, excepting that which is of historical interest. A public authority's legal advice should be comprehensive, confidential and candid and the receiving of such advice and discussions around the advice should not be constrained or influenced by concerns about disclosure.
66. The council maintains that the correspondence in question relates to matters that were current at the time of the request and the threat that its decisions in relation to these matters might be subject to judicial review remains a live one. The council has confirmed that parties opposed to its decisions with regard to the Heath bridge have continued to seek clarification regarding its actions, suggesting that the threat of action remains a possibility. Disclosure of the information at this time would prejudice the council's ability to prepare for such a threat.
67. The Commissioner considers the council needs to be able to obtain free and frank legal advice. If disclosure were ordered this would undermine the council's ability to obtain such advice in a timely fashion in future and have the confidence that advice given is done so freely without the consideration of disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated:

*"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."*

68. It is also the Commissioner's view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR or the Act. This view was supported by the Information Tribunal in the hearing of *Creekside Forum v Department of Culture, Media and Sport (EA/2008/0065)*. The Tribunal stated that:

*"Disclosure under [the Act or Regulations] puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis."*

The Commissioner notes that there must be a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.

*Balance of the public interest arguments*

69. In the hearing of Calland v Financial Services Authority (EA/2007/0136) the Information Tribunal stated:

*“What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential”.*

70. In weighing the balance of the public interest arguments in this case, the Commissioner has given due consideration to the specific circumstances of the individuals affected by the flooding which is the focus of the legal advice. Whilst he accepts that the extent to which the individuals are affected by these matters is not trivial, he is not convinced that the disclosure of the information to serve the interests of a relative few counterbalances the public interest in preventing adverse affects to the course of justice.

71. The Commissioner considers that the weighting is further shifted towards maintaining the exception by the fact that the requested information is still 'live'. The disclosure of information relating to the council's legal position ahead of any prospective challenge would clearly provide those opposed with an advantage not available to the council.

72. Having considered the relevant arguments the Commissioner does not consider that there is a clear, compelling and specific justification for disclosing the information, the public interest arguments in disclosing the information are strong but not strong enough to create the compelling case. There is a stronger weight to the arguments for maintaining the exception. He has therefore concluded that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

73. As the Commissioner is satisfied that regulation 12(5)(b) applies in this case to all remaining withheld information and that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception, there is no need for him to go on to consider the council's application of regulation 12(4)(d) and regulation 12(4)(e) to the same information.

## Right of appeal

---

74. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

75. 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.

76. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**