

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

**Date:** 8 October 2013

**Public Authority:** East Riding of Yorkshire Council  
**Address:** County Hall  
Cross Street  
Beverley  
East Riding of Yorkshire  
HU17 9BA

**Decision (including any steps ordered)**

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The complainant requested details of the council legal action and deliberations about a landowner's activities in Dunnington in the East Riding of Yorkshire. The council refused the request on the basis that the exceptions in Regulations 12(4)(e) (internal communications) and 12(5)(b) (course of justice) applied. The Commissioner's decision is that East Riding of Yorkshire Council has correctly applied the exceptions to the majority of the information.

However the Commissioner has decided that one section of information which the council excluded from the scope of the request did fall within its scope. He has however decided at his own discretion, that Regulation 13 applies to this information (personal data).

The Commissioner does not require the council to take any steps.

## Request and response

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1. On 8 May 2012 the complainant made the following request for information under the FOIA for details of the council's actions in relation to Manor Farm, Dunnington. The details requested were as follows:
  - a. *Full details of the minutes of any meetings at which the council discussed the issue of the abatement notice, and full details of all communications (be they by email, letter, telephone or otherwise) which concerned the issuing of the abatement notice to our client and all other relevant information.*
  - b. *Full details of the minutes of any meetings at which the council discussed the planning contravention notice and our client's response to such, and full details of all communications (be they by email, letter, telephone or otherwise) which concerned the planning contravention notice and our client's response to such and all other relevant information.*
  - c. *Full details of the opinion which the council sought from Counsel in respect of the determination of the CLEUD application, including the date of instruction and full details of all communications (be they by email, letter, telephone or otherwise) between the council and counsel which concerned the production of this opinion and to include (but not limited to), a copy of the councils instructions to counsel and a copy of counsel's opinion; and*
  - d. *Full details of the minutes of any meetings at which the council discussed the determination of the CLEUD application along with full details of all communications (be they by email, letter, telephone or otherwise) including planning officers reports which relate to the determination of the CLEUD application.*
2. The council responded on 20 June 2012 and refused to provide some of the requested information citing the following exceptions:

Regulation 12(4)(e) - internal communications

Regulation 12(5)(b) – that a disclosure would have an adverse affect upon the course of justice.

3. On 11 August 2012 the complainant wrote back to the council and again asked for information. It said that it had not received a response from the council as regards a), b) and d) above, but she accepted that c) was subject to legal professional privilege. She asked the council to provide her with details of the date when the opinion was sought, and further details about it. She also asked the council to provide some information which she considered should have been on the public planning file. She also asked for details of the complaints made about noise. The complainant pointed out that she considered that this information all fell within the scope of the earlier questions she had asked and that she therefore expected to receive this information with the council's response to her previous questions. These were disclosed on 13 August 2013.
4. The complainant also asked the council to conduct an internal review on 10 August 2012 and the council responded to this on 31 August 2012. She also asked the council to consider its arguments further on 24 September 2012.
5. During the course of the Commissioner's investigation the council reconsidered but upheld its original decision.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 7 December 2012 to complain about the way her request for information had been handled.
7. The Commissioner considers that the complainant wishes to know whether the council was correct to withhold the information.

### **Reasons for decision**

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#### Regulation 12(4)(e)

8. Regulation 12(4)(e) of the Regulations states that information may be exempted from disclosure to the extent that its disclosure would involve the disclosure of internal communications.

#### Regulation 12(5)(b)

9. 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.

10. Both of the above exceptions are subject to the public interest test required by Regulation 12(1)(b).
11. The Commissioner has firstly considered the councils response to each of the parts of the request as outlined above.

Category a)

12. The information falling within the scope of this part of the request is information relating to the issuing of an abatement notice.
13. The council considered that the scope of this part of the request was limited to asking for discussions within the council rather than with any external parties due to the wording in the first sentence. It therefore sought to exclude some information from consideration as it included correspondence with external parties.
14. The Commissioner disagrees that the intention of the complainant was to limit this second part of his request in this manner. He has therefore considered this information as falling with the scope of the request. He notes in addition that the complainant specifically clarified to the council that its intention was for this sort of information to be included in a letter dated 24 September 2012.
15. As regards this information the Commissioner is satisfied that the information cannot be withheld under Regulation 12(4)(e) (as it is not internal communications) and the council did not claim that it was exempt under Regulation 12(5)(b).
16. The withheld information does however contain information from or about third party individuals. The information is personal data relating to them.
17. The Commissioner is also the Regulator of the Data Protection Act 1998. He has therefore used his discretion to consider the application of Regulation 13 to this information. It would not be right for him to order the disclosure of this information if the exceptions applied by the authority do not apply, but knowing that doing so would potentially force the authority to breach the Data Protection Act. He has therefore considered the application of Regulation 13 below.
18. The remaining information is internal communications and so the exemption under 12(4)(e) is engaged. The Commissioner is satisfied that the information is internal communications and that therefore the exception is engaged. He has therefore considered this further in the public interest test relating to Regulation 12(4)(e) below.

Category b)

19. The withheld information falling within the scope of this part of the request is correspondence between a solicitor and officers in other council departments relating to a planning contravention notice. The council considers that this information is subject to legal professional privilege and is exempt under Regulation 12(5)(b). The council has confirmed that the details of this have not been shared with any outside organisation and therefore there is no argument that it has waived privilege.
20. The Commissioner is satisfied that the majority of the information is correspondence between client officer and the solicitor in the legal department, that the dominant purpose of the correspondence is advice. He considers that it is therefore subject to legal professional privilege. He has therefore considered this further below.
21. The Commissioner considers however that some correspondence between the solicitor and other parties is not for the dominant purpose of providing legal advice. Although this correspondence may not be covered by legal professional privilege it still falls within the exception if its disclosure would have an adverse effect upon the course of justice or the ability of the authority to carry out an investigation of a criminal nature. The information relates to the planning contravention notice and relates to the potential for legal action to be taken against the landowner – it forms part of the investigation and case building process and records the solicitor's involvement with the case. He has therefore considered this further below.
22. Additionally the information falling within the scope of the request encompasses correspondence between council officers where the legal advisers are not involved. The council has applied Regulation 12(4)(e) to this information. The Commissioner has considered this information and is satisfied that the information is internal communications and that the exception is therefore engaged. He has therefore considered this as part of the public interest test carried out on the application of this exception below.

Category c)

23. The information caught within the scope of this part of the request includes instructions to counsel, correspondence with counsel and advice from the council legal department. The information is subject to legal professional privilege. The council therefore applied Regulation 12(5)(b) to the information.
24. In her request for review the complainant accepted that the information was subject to legal professional privilege and asked the council to provide details of the legal advisor who provided the advice, and the

dates when the advice was sought and obtained. The council provided the complainant with this information. The Commissioner has not therefore considered this further.

Category d)

25. The information relates to communications between officers at the planning department and a solicitor in the legal department, together with notes of discussions and other notes made by the solicitor. Again it claims that the information is subject to legal professional privilege and that Regulation 12(5)(b) applies. The Commissioner agrees that that is the case. He has therefore considered the application of this further below.
26. Even for information which may not itself attract privilege the information involves discussions between the council solicitor and other departments about the case being built against the landowner the evidence which the council was building to take action against him for various reasons. The Commissioner is satisfied that a disclosure of this information would, as with information subject to legal professional privilege, provide valuable information to the complainant which would effectively unbalance the level playing field if it were to be disclosed outside of the court disclosure rules. The Commissioner has therefore included this as part of his consideration of the application of the exception below.

Regulation 12(5)(b)

27. The council's central argument in this respect is that the information is subject to legal professional privilege and that its disclosure would be likely to affect the course of justice.
28. The application of Regulation 12(5)(b) acts differently to the application of section 42 under the FOIA. Even if the information is subject to legal professional privilege the exception may not apply if a disclosure of the information would not have an adverse effect upon the course of justice.
29. However for the most part a disclosure of any information which is subject to legal professional privilege where legal action is planned or is under way may by its very nature be likely to affect the course of justice. Effectively it would provide one party with the others full and frank discussions about its case, possibly including weaknesses in their arguments. A disclosure of this may thereby affect the balance between the parties should the issues come before a court of law.
30. The exception does not apply as a class based exception does under the FOI Act however. Authorities must demonstrate that an adverse effect will occur in order for the exception to apply.

31. Having considered the information in this case the Commissioner agrees with the argument that a disclosure of the information would have an adverse effect upon the course of justice. This is due to the ongoing appeals and litigation over the issues involved between the parties in this case. A disclosure would cause an imbalance in the normal adversarial process involved before the courts.
32. The complainant has argued that the information would need to be disclosed in response to any appeal, or litigation as part of the disclosure rules of the court. She therefore argues that it is unreasonable of the council not to provide that information to her in order that she can best represent her client, the landowner's company.
33. The Commissioner notes this argument, however his consideration of privileged material or exempt material under the Regulations cannot take into account the potential for information to be disclosed as a result of any court action which may or may not be taken by either party. The Commissioner is not able to take into account arguments regarding what information may or may not be caught within the scope of potential legal action as an argument to rely upon when making his decision. This would be a decision overseen and managed by the courts.
34. Even where cases do not come before a court there may be a potential for a disclosure of the privileged information to allow a party to avoid prosecution. Again therefore it may have the effect of having an adverse effect upon the course of justice if it allows an individual to escape prosecution for unlawful or criminal activities.
35. The exception extends beyond information which is subject to legal professional privilege. Even where the information is not subject to legal professional privilege if its disclosure would have an adverse effect upon the course of justice then the exception may be applied. Again the arguments are similar to those for privileged information as above. If officers are discussing the case, seeking advice or discussing the legal robustness of their position then there is the potential for that information to be used to formulate a defence to any legal action which the council takes against the complainant and to cause an imbalance in the adversarial process in court. Although the discussions do not have the same degree of recognised protection as privileged information it may nevertheless engage the exception. The difference rests only in the inherent public interest recognised by the Tribunal in protecting the information which is subject to legal professional privilege.
36. Whilst the Commissioner recognises that many of the decisions and the litigation surrounding the property and its owners in this case have been resolved to an extent, matters were still ongoing at the time that the request was made. For instance the complainant wrote to the

Commissioner outlining a planning decision which was to take place during the course of the Commissioner's investigation. The council also highlighted that it had recently been before the courts for a decision on costs relating to an unsuccessful prosecution taken against the land owners.

37. The Commissioner is therefore satisfied that matters are still current therefore the advice and information is still 'live' for the purposes of his decision. He is satisfied that a disclosure of the information at the time of the request would therefore have had an adverse effect on the course of justice.
38. The Commissioner is satisfied that the withheld information engages both the exceptions in Regulation 12(4)(e) and 12(5)(b). He has therefore gone on to consider the public interest test required by Regulation 12(1)(b).
39. When carrying out this test he has taken into account the presumption of disclosure provided in Regulation 12(2).

#### The public interest test

##### Regulation 12(5)(b)

###### The public interest in the exception being maintained

40. The public interest in maintaining the exception for information which is subject to legal professional privilege are the same as those which have been identified in numerous decision notices and by the first tier tribunal in the past. The Commissioner has not voiced these arguments again in this decision notice, but for the absence of doubt he considers that these arguments apply in favour of maintaining the exception in this case. There is ongoing litigation and appeals over the issues highlighted in this request and the Commissioner considers that there are very strong arguments for the maintenance of legal professional privilege in this case at the time of the request.
41. For information which may not be subject to legal professional privilege the Commissioner considers that in this case the arguments are similar, albeit without the strong inherent public interest in privilege being maintained. Effectively the community is faced with a business which is effecting residents' quiet enjoyment of their land through noise and large HGV's moving through small country roads. Complaints received by the council have led to legal action being taken to ensure that the effect of the business is managed. On the counter side the business has argued that its business cannot be enforced against as it has carried this out over a period of 10 years. This situation has led to a number of legal actions being taken by the council, and counter appeals and claims for



cost being taken by the complainants and her client against the council. The situation was ongoing at the time of the request, and the Commissioner is satisfied that the complainant's request for information may be motivated by the desire to find weaknesses in the council's legal arguments. There is a public interest in protecting the rights of the council to build its case and discuss the legal robustness of its arguments without fear that that information will be disclosed, thereby weakening its position in any future litigation.

The public interest in the information being disclosed

42. The central public interest in the information being disclosed rests in creating transparency surrounding the council's actions in this instance. Both from the point of view of the complainant and of any residents who had made complaints about the complainant's activities on his land there is a public interest in allowing the parties to be able to scrutinise the actions and decisions taken by the council.
43. The Commissioner considers that disclosing the information would promote accountability and transparency and allow the public to better understand the basis of the council's decisions and its legal justification for its actions against the landowner.
44. As noted above, the complainant has provided additional arguments relating to fairness and the course of justice. Her arguments surround the ability of the individual to obtain a fair hearing in the actions and appeals if she has not had access to all of the information which the council had when making its decisions. Additionally she has pointed out to the council that some of the information which it withheld would be available to her via the disclosure rules before the courts. The Commissioner has outlined his view on this at above however.
45. The Tribunal has previously clarified considerations which may overturn the public interest in privileged information being withheld. In general these will relate to issues where large amounts of money or large numbers of the public are affected. Neither is the case here.
46. The Commissioner also considers that there is a stronger argument for disclosure where there are questions surrounding the transparency of the council's public statements or responses; for instance where an authority states that it has advice which says that it is legally able to take a particular course of action when the advice it has received is actually contrary to that. Alternatively where the authority has only provided part of the advice to misrepresent the true nature of the advice which has obtained. Again the Commissioner does not consider this to be a relevant issue in this case.

47. On balance therefore the Commissioner considers that the public interest rests in the exception being maintained in this instance.

Regulation 12(4)(e)

The public interest in the exception being maintained

48. The underlying rationale behind the exception is that public authorities should have the necessary space to think in private. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. A wide range of internal documents will therefore be caught, although in practice the application of the exception will be limited by the public interest test.

Thinking space

49. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases.
50. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, in general the need for a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor.
51. As stated above, the issues surrounding the actions taken by the council in this instance are still live, however many of the main decisions have already been taken by the council.
52. The Commissioner has considered whether any arguments surrounding the need for thinking space are applicable. He considers that the main decisions have already been taken by the council. Action has been taken against the landowner for various legal reasons, however litigation and appeals over these decisions were ongoing at the time of the request. Clearly part of that ongoing legal debate will include information which has been discussed and the issues raised in the previous discussions falling within the scope of this request. Whilst in general such arguments are more relevant to the application of Regulation 12(5)(b) the Commissioner considers that there was still a degree of weight to the argument that the council needs to protect its safe space as regards this information at the time of the request as discussions and deliberation over the issues raised were likely to be ongoing given the appeals and litigation.

Chilling effect

53. Public authorities often argue that disclosure of internal discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making. This is known as the chilling effect.
54. On the other hand, civil servants and other public officials charged with giving advice are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Nonetheless, the possibility of a chilling effect cannot be dismissed out of hand.
55. The Commissioner does not consider that chilling effect arguments will automatically carry much weight in principle. The weight accorded to such arguments will instead depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.
56. Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight. Arguments about a chilling effect on closely related live discussions may also carry weight. However, once the relevant discussions have finished, the arguments become more and more speculative as time passes. It will be harder to make convincing arguments about a generalised chilling effect on all future discussions.
57. In this case the Commissioner notes that there are still matters ongoing which would be affected by the disclosure of this information. He therefore considers that the issues were still live when the request was received, and that this adds weight to the arguments for the information being withheld at the current time.
58. As matters are still live and there is or was the potential for future litigation or appeals at the time of the request he considers that weight can be attached to preventing these discussions from being disclosed on the basis that this may upset the balance in the adversarial process.
59. The complainant's legal advisers would have access to information allowing them to formulate their cases with full knowledge of the council's discussions whereas the council legal officers would not have the same level of access. Should information be required to be disclosed a chilling effect might occur in future on such cases. The council would not want its discussions to be open to litigants whilst matters were ongoing and my therefore feel unable to be full and frank regarding the councils position, particularly as to any weaknesses to its case or doubts

it may have as to the robustness of its position. This would be because the council's arguments and discussions may become available to the individual prior to litigation, thereby disrupting the council's ability to develop its arguments and fully defend its position. It would not be because of any individual officers' fearing that their opinions might be disclosed.

The public interest in the information being disclosed

60. The Commissioner considers that there is a strong public interest in ensuring that public authorities fully explain their decisions to an individual or an organisation it takes action against. Other than in limited or exceptional circumstances it should be clear to the individual or organisation why and how an authority reached a decision to take action against it.
61. The Commissioner recognises that access to this information would allow the complainant a clearer understanding of why the council chose to take action against the landowner. He also recognises that the complainant and the landowner's interests are primarily private interests relating to the business.
62. More widely however, actions taken against individuals and organisations by the state should be both fully justifiable, transparent and legally robust wherever possible. In essence landowners should be able to enjoy the rights which land ownership brings unless their activities are unlawful and/or impinge upon others ability to enjoy their own undisturbed rights on their land. There is a strong public interest in the authority providing very clear explanations and reasons why it has taken action against a land owner. However he also recognises that the council will have set out its position for taking action clearly to the landowner when providing him with legal notices requiring action to be taken.
63. The Commissioner has also considered the public interest in the authority explaining to the surrounding community the reasons for its actions. The business employs members of the community and legal sanctions restricting its activities may affect the individuals.
64. Additionally the community affected by the activities would have a much clearer idea of the issues which the council has to consider when considering taking action of this nature. In this way evidence it provides in the future may be better informed.
65. Having considered the above however the Commissioner is satisfied that in this case the public interest rests in maintaining the exception in this case.

Regulation 13

66. As stated above the Commissioner has used his discretion to consider the information caught within the scope of part a) of the complainant's request but which the council did not claim an exemption for.
67. Effectively the information is details of third parties who have contacted the council regarding the noise which the landowners business was creating and the abatement notice which the council issued in response to this.
68. The Commissioner has considered the information and is satisfied that it is personal data relating to the individuals involved. He is also satisfied that even with suitable redaction of identifiers the identity of the individuals would be known to the landowner. The village is a small hamlet and those likely to have written to the council about the issues will be easily identified from the information even without direct reference to their names or addresses.
69. The Commissioner is therefore satisfied that the information is personal data.
70. Regulation 13 provides an exemption for information which is the personal data of a third party where a disclosure of that data would breach one of the data protection principles of The Data Protection Act 1998.
71. In this case the relevant principle is the first data protection principle. This states, amongst other things, that information should be processed fairly and lawfully. 'Fairly' in this context takes into account the expectations and the understanding of the individuals when they first provided their information to the data controller (i.e. in this case the council).
72. The Commissioner has considered the nature of the information in question. It is a mixture of complaints and supporting correspondence provided to the council in response to the noise issues faced by the Community.
73. The Commissioner is satisfied that the individuals would have no expectations that that information would be disclosed to the whole world in response to a request under the Regulations. In some cases involving planning issues there would be an expectation that information the individuals provided would be disclosed. For instance responses to planning applications will publish all objections they receive to the applications.

74. In the case of complaints about nuisance or breaches of planning laws however the Commissioner is satisfied that the individuals would have no expectation that the complaints or supportive information they provide to the authority will subsequently be disclosed to the complainant or to the whole world in response to a request.
75. As this would neither be expected or obvious to the individuals the Commissioner considers that on the face of it it would be unfair to disclose this information to the complainant.
76. Having considered this, the last question which the Commissioner must consider is whether there is a pressing social need for the information to be disclosed which might override the expectations of the individuals and make a disclosure of their data fair for the purposes of the first data protection principle. This is a similar test to the public interest test carried out above, however the focus as regards maintaining the exemption is slightly different. He has outlined above the reasons why it is in the public interest for individuals and the public as a whole to be fully informed where the state takes action against particular organisations and employers.
77. However the Commissioner also recognises that disclosure of complaints received is not always in the public interest. For instance a fear of disclosure may dissuade individuals from informing an authority about issues. In cases of emissions and noise pollution there are often complainants who aid the authority to build a case against an organisation for breaching noise or pollution levels, or breaching planning laws or requirements in some way. There is a public interest in protecting the public's ability to make complaints and aid authorities in this way without fear that their contributions may be disclosed. Although the courts will clearly order a disclosure of some information when a case comes before it the disclosure rules are subject to certain rules and are carefully supervised by the courts. The Commissioner considers that a disclosure under the Regulations is a significantly different situation.
78. The Commissioner agrees with the strong public interest in transparency and allowing greater scrutiny of decisions taken by authorities, particularly where these lead to specific legal action and sanctions being taken against individuals. Nevertheless he recognises that it will not always be the case that it is appropriate to disclose individual complaints or information it has received if doing so would be detrimental to an authorities ability to identify issues and to take action where it is appropriate to do so.
79. In this case the Commissioner is satisfied there is no pressing social need for the disclosure of the information. Doing so could be detrimental to the individuals concerned, and would also be likely to dissuade

individuals from providing information and evidence to the council in the future. The council was therefore correct to apply Regulation 13.

## Right of appeal

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80. 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)

81. 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.

82. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**