

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

### **Decision notice**

**Date:** 16 April 2014

**Public Authority:** Newry & Mourne District Council

**Address:** O'Hagan House  
Monaghan Row  
Newry, Co. Down  
BT35 8DJ

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

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The complainant has requested information from Newry and Mourne District Council regarding a dispute over a Public Right of Way. The Council refused to disclose the requested information, citing the exceptions under regulations 12(3), 12(4)(e) and 12(5)(b) of the EIR. The Commissioner considers that the exception under regulation 12(5)(b) applies to all of the requested information and therefore requires no steps to be taken.

### **Background**

The request for information which is the subject of this Notice relates to information involving ongoing High Court proceedings regarding land belonging to Lord Ballyedmond adjacent to Killowen beach in County Down, Northern Ireland. The dispute relates to whether a laneway leading to the beach is a Public Right of Way. Lord Ballyedmond had successfully obtained an injunction to prevent access to the laneway and the Council was involved in ongoing litigation. The hearing was scheduled to begin in the High Court in Belfast on 24 February 2014, however the matter was settled out of court by agreement. Subsequently, Lord Ballyedmond died in a helicopter crash in Norfolk on 13 March 2014.

## **Request and response**

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1. On 14 June 2013, the complainant wrote to the Council and requested information in the following terms:

"I should be grateful if you could provide me with all information in your possession and/or under your control in relation to a special meeting of the full Council held on Tuesday 28 May 2013 in relation to the Public Right of Way at Tullahogue, Ballyneddan, Rostrevor.

Please note that this request should include, but is not limited to, any handwritten notes, memoranda, letters, statements, reports, minutes, either discussed at, furnished to, or produced in relation to the aforementioned meeting."

2. The Council responded on 1 August 2013 and stated that the requested information was being withheld in its entirety and that the Council was applying the exceptions as set out in regulations 12(3), 12(4)(e) and 12(5)(b) of the EIR as a basis for non-disclosure.
3. Following an internal review the Council wrote to the complainant on 25 September 2013. The reviewer upheld the original decision to withhold the requested information under the above exceptions.

### **Scope of the case**

4. The complainant contacted the Commissioner on 25 September 2013 to complain about the way his request for information had been handled.
5. The Commissioner has considered the way in which the Council has handled the complainant's request for information, in particular its application of the above exceptions within the EIR to the requested information.

### **Reasons for decision**

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#### **Is the requested information environmental in nature?**

6. The complainant has disputed the fact that the requested information is environmental and has argued that his request should have been dealt with under the Freedom of Information Act 2000.
7. The Commissioner has considered the regime under which the request should have been dealt with. In doing so, he has referred to his own decision notice dated 22 February 2012 involving Wiltshire County

Council.<sup>1</sup> That decision notice deals with a similar subject matter involving a public right of way and within that notice the Commissioner's reasons for deeming the relevant information to be environmental are outlined at paragraphs 18-23. The Commissioner is satisfied that the information requested by the complainant is similar and that therefore the Council was correct to deal with the request under the EIR.

### **Regulation 12(5)(b) of the EIR**

8. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect 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.
9. The council said that the request sought disclosure of information relating to live and ongoing litigation in relation to a Public Right of Way. The Council said that therefore some of the information was legally privileged and disclosure of the remainder would be likely to prejudice pending Court proceedings. Therefore disclosure of the requested information or any part of it would have an adverse effect on the course of justice.

### **Information subject to legal professional privilege**

- Legal advice received by the Council

### **Information whose disclosure would otherwise adversely affect the course of justice**

- Committee/Meeting minutes
- Internal Communications
- Communications from third parties

### **Legal professional privilege**

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<sup>1</sup> FS50203056

10. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*<sup>2</sup> as;

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)

11. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.

12. In the case of *Kirkaldie v ICO & Thanet District Council*<sup>3</sup> the Tribunal stated that,

“The purpose of this exception is reasonably clear. 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”. (paragraph 21)

13. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase ‘course of justice’.

14. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse effect on the course of justice.

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<sup>2</sup> EA/2005/0023

<sup>3</sup> EA/2006/001

15. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both 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.
16. The withheld information which the Council states is covered by legal professional privilege consists of legal advice received by the Council. Having viewed the withheld information, the Commissioner is satisfied that it records the communications to or from the council's legal advisers made for the purpose of providing or obtaining legal advice in relation to the ongoing litigation as mentioned in the background to this Notice and is therefore subject to legal professional privilege, more specifically litigation privilege.
17. Information will only be privileged so long as it is held confidentially. The Council has confirmed that none of the information has been made public or otherwise disclosed without restriction to any third party so there has been no waiver of privilege.
18. The Commissioner has therefore gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
19. In *Archer v ICO & Salisbury District Council*<sup>3</sup> the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.
20. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*<sup>4</sup> in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not

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<sup>4</sup> EA/2005/0026 and 0030

be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.

21. The Commissioner notes that legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
22. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
23. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by the request when making his decision in this case.
24. The Commissioner considers that the 'course of justice' exception can be applied broadly to a number of circumstances where disclosure of the requested information would result in some prejudicial effect.
25. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest*<sup>5</sup>, which stated that:  
*"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".*
26. In assessing whether regulation 12(5)(b) is engaged, the Commissioner must have regard to the circumstances of the case as they were at the time the request for information was made. The fact that High Court proceedings were to take place in the future is important. Although the

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<sup>5</sup> EA/2008/0020

matter was settled out of court by way of agreement, the implementation of that agreement requires planning permission and permissions from several other statutory authorities. The agreement provides for the case to be re-listed for hearing should the necessary statutory and third party consents not be forthcoming. Therefore, the litigation can still be considered live and ongoing. This continues to be the case despite Lord Ballyedmond's death as his estate has not yet gone through probate and the wishes of his personal representatives as to the estate, the agreement and anything connected with the legal proceedings have not as yet been ascertained, so litigation is still a very real possibility. In any case, at the time of the request, the case was still listed for hearing at the High Court and the agreement had not been finalised, therefore the litigation was definitely live and ongoing at the time of the request.

27. In this case the Commissioner considers that the exception provided by regulation 12(5)(b) can be extended to include the right of an organisation, such as the Council, to present their position fairly. The Commissioner has decided that disclosure of the requested information not covered by legal professional privilege, at the time the request was made, would be prejudicial to the Council's position in respect of the ongoing litigation. He considers the nature of this prejudice is the likely disruption of the administration of justice – insofar as it relates to the ongoing proceedings, and therefore the Commissioner must conclude that disclosure of all of the information requested by the complainant properly engages regulation 12(5)(b). Since regulation 12(5)(b) applies to the entirety of the requested information, the Commissioner has not gone on to consider the remaining exceptions applied by the Council. He has gone on to consider the public interest arguments both in favour of and against the maintaining of the exception at regulation 12(5) (b)

### **Public interest arguments in favour of disclosing the requested information**

28. The Commissioner considers that disclosing the requested information would promote accountability and transparency and allow the public to better understand the basis of the council's decision, its position and its legal justification for a particular course of action, i.e. the agreement reached in this case by way of settling the case out of court.

### **Public interest arguments in favour of maintaining the exception**

29. The council said that withholding the information would protect the council's processes as it would allow for only disclosing information required by court as and when called for within the legal process. It also said that clients should be able to seek and be given legal advice

in a free and frank manner without fear of those communications being prematurely disclosed.

30. The Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the Bellamy case, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
31. The Council has stated that it is very important for it to be able to consult with its lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter the Council from seeking legal advice. The Commissioner accepts that it is important for public authorities to be able to obtain legal advice and to conduct discussions with their legal adviser in a free and frank environment, particularly where proceedings are live and ongoing.
32. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing fundamental principle of English law. The Tribunal recognised this in the Bellamy case as mentioned at paragraph 10 above when it stated that:  
  
"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
33. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.
34. In relation to the requested information withheld under 12(5)(b) which is not subject to legal professional privilege, the Commissioner considers that, nevertheless, the information forms an important part of discussions surrounding the legal proceedings, as it related to the special meeting held to discuss the Public Right of Way. It is very much in the public interest for the Council to carry out its statutory duties, to be able to protect and defend the rights of the ratepayer and to be given the space to discuss the best way to do so fairly through confidential discussions and communications.



## **Balance of the public interest arguments**

35. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
36. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
37. The Commissioner is also satisfied that there is a lot of information about the matter already in the public domain as the case is high profile and the landowner is a well-known public figure within the Council area and beyond. The public interest in the additional knowledge which the public would gain should the requested information be disclosed would not outweigh the public interest in maintaining the exception in view of the ongoing litigation.
38. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He is also satisfied that the strong public interest in favour of the Council being able to fairly present its position is not outweighed by any public interest factor in favour of disclosure, such as transparency or accountability. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

**Right of appeal**

39. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

40. 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.
41. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**