

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 February 2023

Public Authority: Cheshire East Council
Address: Municipal Buildings
Earle Street
Crewe
CW1 2BJ

Decision (including any steps ordered)

1. The complainant requested information about the decision to pollard trees on a particular road. Cheshire East Council (the Council) withheld the information under regulation 12(4)(e) (internal communications) of the EIR. During the course of the Commissioner's investigation the Council withdrew reliance on regulation 12(4)(e) and stated that the information was exempt under regulations 12(5)(b) (course of justice) and regulation 13 (third party personal data). The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(5)(b). The Commissioner does not require the Council to take any steps.

Request and response

2. On 12 June 2022, the complainant wrote to the Council and requested information in the following terms:

"Under FOI please supply me with all records and copies of emails and other forms of communication related to the decision to pollard the trees on Gainsborough Road".
3. The Council responded on 21 June 2022 and stated that the information requested was exempt under regulation 12(4)(e) of the EIR. The Council upheld this position at the time of its internal review.

Scope of the case

4. The complainant contacted the Commissioner on 1 December 2022 to complain about the way their request for information had been handled.
5. During the course of the Commissioner's investigation the Council withdrew reliance on regulation 12(4)(e) and instead stated that it considered all of the information to be exempt under regulation 12(5)(b). The Council stated it considered regulation 13 to also apply to some of the withheld information which relates to individual claims.
6. The scope of the Commissioner's investigation into this complaint is to determine whether the Council should disclose the information requested.

Reasons for decision

Regulation 12(5)(b) – course of justice

7. Regulation 12(5)(b) of EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, 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.
8. The Commissioner considers that the course of justice element of the exception is wide in coverage, and accepts that it can include information about civil investigations and proceedings¹.
9. The Council explained to the Commissioner that the decision to pollard trees on Gainsborough Road was made following claims received for damages against the Council from the insurers of a number of local residents. It is alleged that the trees in question have caused subsidence issues. The Council carried out remedial work in the area, which included pollarding the trees – pruning them to keep them smaller than they would naturally grow.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

10. The Council confirmed that all of the withheld information has been prepared or is otherwise held in relation to establishing its liability in respect of live, ongoing claims brought against the Council for damages. The claims in question were live at the time of the request and remain live at the time of this notice.
11. The Council considers that disclosure of the withheld information would “undermine existing legal remedies, and adversely affect the course of justice”. It also referred to the fact that, in relation to legal proceedings, the civil procedures rules provides a process where the court determines whether information is relevant to the proceedings and when information should be released. The Council is of the view that any disclosure of information under the EIR, essentially into the public domain, would be unfair and undermine legal proceedings in relation to the claims in question.
12. Having viewed the withheld information and taking into account the Council’s explanations and representations, the Commissioner accepts that it is more probable than not that disclosure of the information would adversely affect the course of justice. He is, therefore, satisfied that regulation 12(5)(b) was engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

13. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
14. The Council acknowledges that disclosure would promote accountability and transparency. It also accepts that disclosure would provide the public with a better understanding of the basis for decisions made around tree maintenance at the location in question, and its justification for carrying out the actions that it did.
15. The Council also confirmed that it took into account the presumption in favour of disclosure as provided for under regulation 12(2) of the EIR.
16. However, the Council argues that “the public interest inherent in this exception is strong due to the fundamental importance of the general principle of upholding the administration of justice, and the importance of not prejudicing legal proceedings”.

17. The Council pointed out that the claims that the withheld information relates to were live at the time of the request and have still not been settled. It does not consider that it is in the public interest to prejudice ongoing legal proceedings, which it considers disclosure of the withheld information would do in this case.
18. The Council does not consider there is any wider public interest in disclosure of the specific information other than to those individuals who are pursuing claims against the Council. In this regard the Council again referred to the alternative access regime provided to claimants through the civil procedures rules process.
19. The Commissioner has carefully considered the arguments put forward by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. In this case, the Commissioner accepts that disclosure would provide the public with information relating to the decision to pollard the trees in question.
20. The Commissioner's guidance on Regulation 12(5)(b) recognises that the civil procedure rules provide an access regime for court or tribunal records. The same guidance acknowledges that circumventing the jurisdiction of the appropriate court procedures by allowing access to court records under the EIR has the potential for adversely affecting the course of justice. This is because of the expectation that the parties involved in judicial proceedings will only be party to information disclosed under the appropriate rules.
21. The Commissioner considers that disclosure of the requested information under the EIR rather than under the civil procedure rule has the potential to undermine the public's confidence in the judicial system and might prejudice any on-going cases.
22. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, including not prejudicing legal proceedings. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
23. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

24. 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. As stated 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 exception provided by Regulation 12(5)(b) was applied correctly.
25. As the Commissioner has determined that regulation 12(5)(b) applies to all of the withheld information, he has not gone on to consider the Council's application of regulation 13 to some of the withheld information.

Right of appeal

26. 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

27. 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.
28. 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

Joanne Edwards
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF