

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

### **Decision notice**

**Date:** 9 April 2024

**Public Authority:** Rhondda Cynon Taf County Borough Council  
**Address:** The Pavilions  
Cambrian Park  
Clydach Vale  
CF40 2XX

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

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1. The complainant requested legal advice relating to the collapse of a dormice bridge on a particular road in February 2016. Rhondda Cynon Taf County Borough Council (the Council) withheld the information requested under regulation 12(5)(b) (Legal Professional Privilege) of the EIR. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) to the withheld information. The Commissioner does not require any steps to be taken.

#### **Request and response**

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2. On 9 September 2023 the complainant wrote to the Council regarding the collapse of a dormice bridge on the A473 in 2016 and requested information in the following terms:

"To clarify items regarding legal and solicitors advice, I request, under FOI if necessary, the actual advice received from your KC, which you say in your report states that there is a reasonable chance that the Council will win. I would like to see the full wording of this advice.

In addition, referring to your responses in your email of 1 September (which are annotated below each of my queries dated 20 July) I fail to understand why your solicitors advise that only action against Costain is relevant when in fact Redstart had a very major role. I therefore request

the actual advice received from your solicitors, again using FOI if necessary”.

3. The Council responded on 9 October 2023 and stated that the information requested was exempt under regulation 12(5)(b) of the EIR as it was subject to legal professional privilege.
4. On 10 October 2023 the complainant requested an internal review of the Council’s handling of the request.
5. The Council provided the outcome of its internal review on 8 November 2023 and upheld its decision that regulation 12(5)(b) applied to the request.

### **Reasons for decision**

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6. This reasoning covers whether the Council is entitled to rely on 12(5)(b) of the EIR to refuse to provide the information requested.
7. 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
8. In this case, the Council holds legal advice it received from Counsel for the purpose of seeking professional legal advice in respect of a potential legal claim against contractors who were involved in the construction of the dormice bridge. The Council considers the withheld information to be covered by legal professional privilege (LPP), specifically ‘advice privilege’.
9. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice on specific legal concerns. He therefore considers the information to be covered by LPP on the basis of advice privilege.
10. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
11. The complainant has suggested that privilege to the legal advice has been lost as it is referred to in documents which the Council has published concerning the dormice bridge.

12. The Council advised the legal advice obtained was given solely to its insurers. It has only been shared with its Senior Highways Officers and it has not been shared with any third party.
13. The Commissioner has viewed the withheld information in conjunction with documents which the Council has published about the collapse of the dormice bridge. The Commissioner is satisfied that the references within published documents to the legal advice does not constitute a loss of confidence of the remaining information, as it does not reveal the substance of the legal advice or give the detail of the legal arguments behind the main thrust of the advice.
14. In light of the above, it is the Commissioner's view that there has been no loss of privilege in respect of the legal advice in question, and that this information is covered by LPP.
15. The exception at regulation 12(5)(b) is only engaged if it is shown that the relevant information would, if disclosed, have an adverse effect on the course of justice.
16. The Council considers that there would be an adverse effect on the course of justice because disclosure would undermine the principle of privilege allowing a client and their legal advisor to communicate freely, frankly and in confidence.
17. The Council also advised the Commissioner that the matter to which the legal advice was obtained is live as the "matter remains within a limitation period whereby parties make seek to bring a claim against the Authority". As such it argues that disclosure could undermine its ability to defend its position in any such claim.
18. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice. As the withheld information in this case is subject to LPP and relates to a live matter, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

### **Public interest test**

19. Regulation 12(1)(b) requires that where the exception under regulation 12(5)(b) 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.

20. 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.
21. The Council acknowledges the public interest in the importance of openness, transparency and accountability that would be achieved through disclosure of the withheld information.
22. The Council also accepts that there is a public interest in both the environmental and cost impact associated with the collapse of the dormice bridge. Disclosure of the withheld information would allow the public to consider the quality of the legal advice obtained and what the Council has based its conclusions on in respect of the subject matter in question.
23. The Council also accepts that there is "a public interest in accountability and blame for the bridge collapse".
24. In respect of maintaining the exception at regulation 12(5)(b), the Council referred to the public interest in maintaining the principle behind LPP in terms of safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. Disclosing legal advice would weaken this principle and have an adverse effect on the course of justice.
25. The Council considers that there is an inherent public interest in it being able to consult with its lawyers in confidence to obtain confidential legal advice. Disclosure would undermine this basic right to obtain legal advice in private and may deter it from seeking legal advice in the future, where it is in the public interest to do so.
26. The Council also argues that it is important that it has a safe space to conduct a free and frank exchange of views on its legal rights and obligations. This allows it to defend its position and any legal challenges fairly and properly.

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

27. The Commissioner accepts that there is a general public interest in transparency and accountability around public authority decision making. He acknowledges that there is a specific public interest in openness regarding matters which have a potential impact on the environment and on the public purse. In this case, the Commissioner accepts that disclosure would provide the public with information to allow them to better understand decisions the Council has taken in relation to the collapse of the dormice bridge. However, this has to be

weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.

28. LPP is a fundamental principle of justice and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.

29. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy<sup>1</sup> case 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..."

30. To equal or outweigh the public interest in maintaining a claim of LPP, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed. 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 has received or evidence of a significant lack of transparency.

31. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has taken into account the circumstances surrounding the request, both the Council's and the complainant's arguments, the timing of the request and the nature of the withheld information. 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. The Commissioner's decision is,

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<sup>1</sup> Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

therefore, that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

32. 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.

## **Right of appeal**

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33. 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](mailto:grc@justice.gov.uk)

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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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