

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 January 2012

Public Authority: The Governing Body of the University of Reading

Address: Whiteknights House
PO Box 217
Reading
Berkshire
RG6 6AH

Decision (including any steps ordered)

1. The complainant has requested information relating to rights of way over University of Reading ("the University") land. The University withheld the relevant information on the basis of the internal communications exception of the EIR (Regulation 12(4)(e)).
2. The Commissioner's decision is that the University has correctly applied the internal communications exception to the requested information and the balance of the public interest arguments favours withholding the information.

Request and response

3. On 5 July 2010, the complainant wrote to the University and requested information in the following terms:
"1. Any report prepared in the last 5 years concerning public rights of way across the grounds at Sibly Hall.
2. Any minute of any discussion or decision on public rights of way across the grounds at Sibly Hall."
4. On 13 August 2010 the University responded to the request for information. It explained that in a telephone conversation on 23 July 2010 the complainant had agreed a 2 year period in relation to both

limbs of the request rather than the 5 year period as originally requested. The University also provided a document which it stated would meet the first part of the request. It did however refuse to provide the complainant with information relating to two sets of Facilities Management Committee ("FMC") minutes in relation to the second limb of the request on the basis of potential prejudice to the commercial interests of the University (section 43(2) of the Freedom of Information Act 2000 ["FOIA"]).

5. The Commissioner, when considering the complaint about the application of the FOIA to the requested information, concluded that the University should have considered the request under the EIR and issued a decision notice¹ requiring the University to reconsider the request under the EIR.
6. On 26 April 2011 the University wrote to the complainant having reconsidered the request under the EIR. The University stated the information was being withheld on the basis that it constituted internal communications (Regulation 12(4)(e)), disclosure would adversely affect the course of justice (Regulation 12(5)(b)) and disclosure would adversely affect the confidentiality of commercial information (Regulation 12(5)(e)).
7. An internal review was requested by the complainant on 27 April 2011 and the University responded on 6 June 2011. The internal review considered the application of the above exceptions and concluded they had been correctly applied to withhold the outstanding information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular the complainant explained he did not believe disclosure of the minutes would lead to an inability for the University to engage in free and frank discussions. The complainant also stated that disclosure was in the public interest as any decision would affect the public's access to a green space.

¹ ICO decision notice FS50351681

9. The Commissioner considers the scope of his investigation to be the application of the exceptions in the EIR to the FMC minutes held by the University.

Reasons for decision

10. In this case it has previously been determined by the Commissioner that the withheld information is environmental information under regulation 2(1)(c) of the EIR, in that it is information on measures and activities affecting or likely to affect those elements of the environment referred to in regulations 2(1)(a) and (b) of the EIR.
11. The Commissioner has first considered whether the information was correctly withheld on the basis that it constituted internal communications (regulation 12(4)(e)).
12. Regulation 12(4)(e) states:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that ...

(e) the request involves the disclosure of internal communications.”
13. The Commissioner has considered the withheld information and notes that it is comprised of internal communications relating to discussions of the University's FMC and therefore the Commissioner is satisfied the exception is engaged.
14. This exception is a qualified exception and is therefore subject to a public interest test, this involves balancing factors for and against disclosure to decide whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

15. The Commissioner recognises the presumption in favour of disclosure under the EIR and notes the importance of access to environmental information to allow for participation in environmental decision making. The Commissioner also considers there is a public interest in transparency in decision making by public authorities which in turn increases public confidence.
16. The Commissioner considers there is a strong public interest in improving the public's understanding of decisions made by public authorities, particularly if those decisions may have a significant impact

on the environment. Disclosure also encourages public debate and enables members of the public to challenge decisions from a more informed position should they wish to do so.

Public interest arguments in favour of maintaining the exception

17. The Commissioner has already established that the FMC minutes are internal communications for the purposes of regulation 12(4)(e) but the University also claim legal professional privilege applies to some of the information contained within the minutes. The University argues that discussions arising from the legal advice led to the University's decision to implement a policy and a series of actions. The University also states that the advice provided was confidential and privilege has not been waived as the legal advice has not been shared with any third parties.
18. The Commissioner has considered the summary of legal advice and the summary of the report prepared by the University's legal advisors within the withheld information and agrees that the University can claim that legal professional privilege applies to it.
19. Given that some of the information contained in the minutes is protected by legal professional privilege an enhanced level of protection can be expected and this must be taken into account when considering the weight of public interest in maintaining the exception.
20. The University has explained that the FMC is the body through which high level internal discussions on, amongst other things, policy formulation and commercial interests take place. As such the University argues that the minutes should be withheld to maintain *"a safe, internal, confidential, private space (away from the public and hence external scrutiny) in which it is able to discuss and determine such issues affecting it, in order to facilitate full and frank deliberation and debate and permit high quality decision making which is required for the sound performance of the University as a whole"*.
21. The Commissioner recognises the strong public interest in maintaining a private space for staff in which issues can be considered and debated, advice from colleagues may be sought and freely given and ideas may be tested, explored to protect the integrity of the deliberation process. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies or opinions free from outside interference. However the Commissioner has to consider the specific information in dispute in this particular case in order to determine whether this safe space is still relevant and important. Having considered the University's arguments the Commissioner is satisfied that

this 'safe space' is still relevant in this case and the importance of preserving the safe space has not diminished by the passage of time.

22. He also recognises the need to consider whether staff within the University would feel less able to record or discuss issues of a similar nature in the future because that information may be disclosed. The University has argued that disclosure of such internal communications may inhibit the candid expression of views and lead to a loss of frankness in internal debate and to a diminution in the quality of internal advice; particularly where legal opinions are provided and discussed and policy decisions are being made. This argument is commonly referred to as the 'chilling effect' argument and is summarised² as arguments relating to *"the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause"*.
23. With specific reference to the information falling within the scope of legal professional privilege; the University has argued that disclosure of the withheld information would have an adverse affect on its ability to take legal advice in confidence on issues affecting it; inhibiting the free and frank exchange of views. The University considers this would lead to reluctance in the future amongst its committees to discuss legal advice and record fully such discussions as members of committees would no longer be certain that it would be retained in confidence. The University argues this could affect the quality of discussions and lead to decisions being made that are legally flawed. Not only would this undermine the University's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided.
24. The Commissioner has also considered the potential impact on the University's relationship with its legal advisers. Although the Commissioner would not expect disclosure to mean that the University's legal advisers would stop giving proper and full advice, he accepts that it would not be in the public interest if the quality of internal discussions were to deteriorate because a public authority was deterred from seeking legal advice for fear that advice might end up being disclosed.
25. The University has also stated that at the time of the request the legal advice contained within the withheld information was live, current and there was still an interest to protect. Disclosure of the minutes could have an adverse affect on the University as it could place the University in a weaker position by revealing agreed actions the University intended

² *Scotland Office v the Information Commissioner [EA/2007/0070]*

or intends to take to protect its interest, thus identifying potential areas of weakness.

26. After considering the nature of the withheld information, the Commissioner considers that the chilling effect arguments do have weight due to the timing of the request, as at the time and to date the University had not gone ahead with any proposed plans for the use of its land. The Commissioner considers that the arguments also interrelate with those connected to legal professional privilege.

Balance of the public interest arguments

27. Having considered the arguments in favour of disclosure and those for withholding the information the Commissioner is satisfied that the balance of the public interest arguments favour maintaining the exception. He has given particular weight to the need to preserve the 'safe space' in this case and accepts that the loss of that 'safe space' is a real possibility should the information be disclosed. Having reviewed the withheld information, he is satisfied that disclosure whilst the issues were still recent, current and live at the time of the request would have a detrimental impact on the University's ability to debate and discuss issues of this nature in this type of forum in an open manner, particularly where there are legal opinions provided.
28. The Commissioner has taken account of the strong inbuilt public interest in protecting the concept of legal professional privilege and the likelihood of disclosure affecting the University's decision making process. He notes that the legal advice was still live in this case and this intensifies the strength of this argument. In addition the 'chilling effect' argument adds further weight to the public interest in maintaining the exception.
29. The Commissioner has considered the weight of the public interest arguments in favour of disclosure, particularly as the information is environmental information and is relevant to a number of people as it relates to public rights of way, but he is not convinced that the arguments are sufficient to counter the weight of the arguments for withholding the information in this case.
30. In the circumstances of this case however the Commissioner cannot set out his more detailed reasoning for reaching this decision within this Notice because to do so would reveal the nature and content of the withheld information itself. The content of the withheld information and the Commissioner's further reasoning is provided in the confidential annex.

31. Therefore the Commissioner is satisfied that the University was correct to withhold the requested information and he upholds the application of regulation 12(4)(e). In light of this he has not gone on to consider the application of other exceptions to the information.

Right of appeal

32. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. 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

Pamela Clements
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