

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

Date: 08 May 2012

Public Authority: Wirral Metropolitan Borough Council
Address: Town Hall
Brighton Street
Wallasey
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested the release of the background papers relating to a report produced by Wirral Metropolitan Borough Council (the "Council") in connection with its Parks and Countryside Services Procurement Exercise (PACSPE).
2. The Commissioner's decision is that the Council was entitled to rely on the exceptions provided by 12(4)(d) (unfinished documents) and 12(5)(b) (course of justice) of the EIR in respect of some of the requested information. He has, however, decided that the public interest favoured the disclosure of other parts of the information to which regulation 12(4)(d) or 12(4)(e) (internal communications) had been applied. In addition, the Commissioner has found that regulation 12(5)(b) was not engaged in some cases.
3. The Commissioner requires the public authority to disclose the following information to ensure compliance with the legislation (using the reference numbers set out in the schedule of documents attached to this notice) –
 - 1(a), 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 1(h), 1(i), 1(j), 1(k), 1(m), 1(p), 1(q)
 - With the exception of the exempt appendices attached to the drafts – 2, 6, 8, 9, 10, 11, 14, 17
 - 3, 7, 12, 13(a), 16

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The report described in the information request (see below) refers to a report relating to PACSPE, which was presented to Cabinet of the Council on 22 September 2011¹.
6. A decision on PACSPE was to be the culmination of a process that was instigated by the Council in June 2008, which sought to review and find ways of improving the efficiency of its Parks and Countryside Service. This involved a procurement exercise being carried out with the aim of identifying a single provider to manage the service.
7. The Council received a number of tender bids from various external companies in response to the procurement exercise. These bids were evaluated against a combination of price and quality factors and a preferred provider settled on.
8. It had previously been decided, in June 2010, that no in-house bid should be submitted as part of the PACSPE process. As such, there was no in-house bid to compare with the proposals from the external tenderers. However, due to the change in the financial climate following the conception of PACSPE, it was deemed appropriate for Cabinet to consider:

"...the possibility of not accepting any tender and Members will need to consider all the risks of awarding, or not awarding, the contract..."
9. The report presented to Cabinet on 22 September 2011 sets out these risks and outlines the key issues for Members to consider when taking a decision.
10. A copy of the report was available to the public prior to the request being made, with the exception of exempt appendices attached to the report.

¹ <http://democracy.wirral.gov.uk/documents/s20621/PACSPE%20Report.pdf>

Request and response

11. The complainant wrote to the Council on 23 September 2011 and requested information in the following terms –

“Can I have all of the background papers relating to the PACSPE report, for the sake of clarity this should include PACSPE related emails between yourselves [and four named officials].”

12. The Council responded on 14 October 2011. It stated that the complainant was already in possession of some of the information covered by the scope of the request. The Council, however, refused to disclose the remaining balance of the information (the “disputed information”), citing regulations 12(4)(d) (unfinished documents) and 12(4)(e) (internal communications) of the EIR as its basis for doing so.
13. The Council wrote to the complainant again on 19 October 2011 with the outcome of its internal review. This upheld the original decision that the disputed information was excepted information for the purposes of the EIR.

Scope of the case

14. The complainant contacted the Commissioner to complain about the decision of the Council to withhold the disputed information.
15. During the course of the Commissioner’s investigation, the Council has introduced the possibility that additional exceptions – regulation 12(5)(b) (course of justice) and regulation 12(5)(e) (confidentiality of commercial or industrial information) – would apply to parts of the disputed information.
16. In the combined cases of the *Home Office v the Information Commissioner* (GIA/2098/2010) and *DEFRA v the Information Commissioner* (GIA/1694/2010)², the Upper Tribunal found that the Information Commissioner was required to consider any ‘late’ applications of exemptions (or equally exceptions) identified by a public authority. The Commissioner has therefore gone on to consider each of

² <http://www.osspsc.gov.uk/judgmentfiles/j3160/GIA%201694%202010-01.doc>

the four exceptions referred to by the Council, alongside the disputed information itself.

Reasons for decision

17. The disputed information consists of; 11 drafts of the report, background papers commenting on certain versions of the draft, and emails between officers at the Council regarding the PACSPE process.
18. The Council has decided that the information requested by the complainant represents environmental information and therefore the appropriate access-regime is the EIR rather than FOIA.
19. The complainant has not indicated that he disagrees with the Council's decision to process the requests under the EIR. Similarly, the Commissioner is satisfied that the EIR applies, considering that the requested information is on a measure, namely the maintenance functions for parks and open spaces, that is likely to affect the state of the elements of the environment. As such, it would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR.

Regulation 12(4)(d) – unfinished documents

20. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
21. The information to which the exception has been applied consists of a series of draft reports, evidencing the changes made as a result of the internal discussions on the contents of the report prior to its finalisation in September 2011.
22. In line with the decision of the Tribunal in *Secretary of State for Transport v the Information Commissioner* (EA/2008/0052)³, it is the view of the Commissioner that drafts are unfinished documents for the purposes of regulation 12(4)(d), and remain unfinished even upon completion of a final version. The Commissioner is therefore satisfied that the exception is engaged in respect of the draft reports and, as

³[http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20\(EA-2008-0052\)%20-%20Decision%2005-05-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20(EA-2008-0052)%20-%20Decision%2005-05-09.pdf)

required by regulation 12(1)(b) of the EIR, has proceeded to consider the public interest associated with disclosure.

The public interest arguments in favour of disclosure

23. In any economic climate, but particularly in the current one, there will be a significant public interest in understanding how a decision is reached by a public authority that will not only affect the way in which some of the authority's services are delivered but may also have important cost implications. Ultimately, a public authority has a fiduciary duty to the public it serves.
24. The Commissioner appreciates that the report of 22 September 2011 will have been a key reference tool for Members when making a decision about whether a contract in respect of PACSPE should be awarded. The disclosure of the draft reports will, the Commissioner accepts, allow the public to trace the evolving picture of what information the drafters of the report felt should be included in, and equally omitted from, the final version.
25. This will help satisfy the public that any decision made by the Cabinet was fully-informed and based on reasonable grounds. Equally, the Commissioner has previously adopted the position that once a final version of a document has been completed (as it was in this case), it is likely that the public interest in withholding incomplete or draft records is likely to diminish.
26. The need to secure public confidence in the decision-making of the Council was also particularly acute at the time of the request. As highlighted at paragraph 6.9 of the published report, the Council's External Auditor had expressed concerns about the Council's ability to demonstrate value for money in regards to a separate procurement exercise; the Highways and Engineering Services Procurement Exercise (HESPE). In the Audit Commission's Draft Annual Governance Report of September 2011 quoted by the Council, the Auditor specifically questions whether the Council has "proper arrangements to secure value for money in its use of resources."
27. While HESPE is not linked to PACSPE, it is considered feasible to argue that the unease felt about the Council's Corporate Governance in respect of HESPE will similarly extend to the Council's decision on PACSPE. This is because it relates to another procurement exercise in which the consideration of value for money will again be paramount.

The public interest arguments in favour of maintaining the exception

28. When assessing the public interest associated with the exception, the Commissioner will consider the nature of the withheld itself alongside the timing of the request.
29. The Council has advanced in this case the importance of preserving a 'safe space' for officers to discuss and develop issues of policy, particularly where, to quote the Council, "officers are likely to be in a position of advising members where there is oscillating political control."
30. The Commissioner, however, respectfully disagrees with the Council about the weight or relevance of this argument. This is because he considers that the need for safe space in which to think and draft ceases with the completion and publication of the final version of a document.
31. More weight, though, is attached to the claim which says that inherent in regulation 12(4)(d) is a public interest argument in favour of avoiding un-adopted positions being exposed to public scrutiny even after drafting is complete. This is so a public authority can avoid expending resources on justifying draft documents or interim positions. This point will have greater resonance where the information relates to a potentially contentious decision, based on the services affected and the amount of money involved.
32. Leading on from this argument, the Council has referred the Commissioner to the recent political background of the Council, as well as other issues that have impacted on the Council's ability to operate effectively. Bearing in mind this charged atmosphere, the Council has suggested that disclosure of the written comments/advice/views expressed on the draft reports would have a 'chilling effect' on the Council. Specifically, in light of the fact that officers are expected to advise different administrations, the Council has argued that disclosure of this information will affect the frankness and candour with which officers debate issues in the future.

The balance of the public interest

33. The Commissioner has observed, and is mindful of, the decision of the Information Tribunal in *Mersey Tunnels Users Association v Information*

*Commissioner (EA/2009/0001, stage 2)*⁴. Regarding the application of regulation 12(4)(d), the Tribunal remarked that –

“27. We consider that there may be little, if any, public interest in disclosing a draft which is an unfinished document, particularly if a finished or final version has been or is likely to be made public...Presenting work in a draft form before a final decision is made allows a public authority to consider matters at an early stage and to comment upon the final form such a report would take.

28. We do not consider that disclosure of these draft documents would provide the public with any greater understanding of the way in which the Council has dealt with the relevant issues.”

34. The Commissioner accepts that in some instances the release of draft documents will add little to the public debate about a prevailing issue. However, he does not consider this to be the case here.
35. In particular, the Commissioner believes there is a real and substantial public interest in understanding how officers decided what information should be put before Cabinet when making an important decision. Not least, this should have the effect of alleviating any concerns about the balance and reasonableness of any decision made.
36. This, the Commissioner would stress, is not to say that the arguments of the Council do not carry any weight. He understands that, in principle, there will be a strong argument in favour of protecting the positions that had not been advanced in the report presented to Cabinet. Furthermore, in respect of the appendices attached to the reports, he realises that there was never any intention of making this information available to the public to scrutinise. It can reasonably be imagined, then, that the authors of the draft reports had a legitimate expectation that the information contained in the appendices would not be disclosed.
37. The Commissioner therefore considers that a balance needs to be struck between these competing interests.
38. Based on the timing of the request, the nature of the information, and the EIR's emphasis on disclosure, the Commissioner has found that the public interest weighs in favour of the release of the main body of each of the draft reports. In making this finding, the Commissioner considers

⁴[http://www.informationtribunal.gov.uk/DBFiles/Decision/i364/MTUA%20v%20IC%20&%20HBC%20\(0001\)%20Decision%20\(Stage%202\)%2011-01-10.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i364/MTUA%20v%20IC%20&%20HBC%20(0001)%20Decision%20(Stage%202)%2011-01-10.pdf)

that the Council has not provided specific reasons demonstrating why an un-adopted position should not be exposed after the publication of the final draft. Similarly, the Council has failed to produce compelling arguments to support its position that disclosure of drafts after a final version has been published would have a chilling effect.

39. The Commissioner is, however, mindful of the accepted convention by which an exempt appendix may be used by a public authority. Such an appendix will allow important information to be presented to, say, Cabinet or a committee, while ensuring that this information is excluded from public scrutiny. This may be the case, for example, where commercially sensitive information, or information of a personal nature, is being discussed.
40. The Commissioner recognises that at the time the request was made, the information contained in the final version of the exempt appendices had not been made publicly available, unlike the main body of the report. On this basis, the Commissioner accepts that both the chilling effect argument and the argument that resources would need to be spent justifying interim positions, are stronger. He has therefore decided the public interest in respect of this information would swing back in favour of maintaining the exception.

Regulation 12(4)(e) – internal communications

41. 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.”

42. The Commissioner has had sight of the withheld information and observes that it comprises of internal communications relating to PACSPE generally, and in a number of cases to the evolution of the report through its various forms. The Commissioner is therefore content that the exception is engaged.
43. The next step for the Commissioner is to assess the public interest test attached to the exception.

The balance of the public interest arguments

44. The Commissioner is satisfied that the same public interest factors apply to both regulation 12(4)(d) and (e). He does not therefore intend repeating those here. Instead, he has gone on to weigh up the public interest arguments both for and against disclosure.

45. Regarding the disputed information itself, the Commissioner is aware that a number of the communications record candid views on the development of PACSPE. He would accept that, at the time the report was being drafted, disclosure of these views would likely have hindered the Council in producing the final draft of the report.
46. However, the Commissioner considers that at the time the request was made, the report had been finalised and so any question of hindrance would drop away. Furthermore, for the same reasons set out under the consideration of regulation 12(4)(d), he has not been presented with sufficient evidence to conclude that there would be a chilling effect associated with disclosure.
47. The Commissioner has therefore decided that the public interest favours disclosure. In coming to this decision, the Commissioner recognises that the decision of the Cabinet could potentially be called-in following the submission of the request; that is, be subject to review. However, the Commissioner does not feel that disclosure would affect the integrity of the process and may even aid it by promoting the transparency of the Council's decision-making.

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

48. The Council has argued that the various pieces of information to which regulation 12(5)(b) has been applied attracts legal professional privilege (LPP).
49. Regulation 12(5)(b) is a broad exception which encompasses any adverse affect on the course of justice, the ability to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. It is now accepted that information subject to LPP will be covered by regulation 12(5)(b).
50. The success, or not, of an application of regulation 12(5)(b) will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?
51. The Commissioner has addressed questions (i) – (iii) below. Should he find that any of the questions are not answered in the affirmative, the Commissioner must necessarily conclude that the exception does not apply.

Is the exception covered by LPP?

52. LPP is a convention designed to protect the confidentiality of communications between a lawyer and client, which can include in-house legal advice. There are two types of privilege – litigation privilege and legal advice privilege.
53. The Council has argued in this case that litigation privilege will apply to some parts of the withheld information, while other parts will attract legal advice privilege.
54. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. As the Commissioner cautions in his published guidance⁵, there must be a reasonable prospect of litigation – a real likelihood, not just a fear or possibility – for a claim to litigation privilege to have merit. Furthermore, the information must have been created for the dominant purpose of obtaining legal advice or for lawyers to use in preparing the case.
55. To support its claim that this branch of privilege is engaged, the Council has stated that the information in question contains commercial information relating to tenderers involved in PACSPE. It therefore follows, the Council has claimed, that there is a real possibility that litigation action would be taken against the Council if the information was disclosed.
56. The Commissioner notes, however, that this claim is based on the fear of litigation and not on any knowledge, or reasonable assumption, of the prospect of litigation at the time the request was made. He has therefore dismissed this argument, focusing instead on the possibility that any of the information was subject to advice privilege.
57. Legal advice privilege will apply where the dominant purpose of a communication is to obtain legal advice, or to give it. The Commissioner notes that the definition only allows for a narrow range of information and, in applying this definition, has found that LPP, and equally regulation 12(5)(b), is not engaged with respect to the following records (using the reference numbers on the attached annex); 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 1(h), 1(i), 1(j), 1(k), 1(m), 1(p), 1(q), and 17(appendices).

⁵http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/LEGAL_PROFESSIONAL_PRIVILEGE.ashx

58. For the remaining elements of the information – 1(l), 1(n), 1(o), 4, 5 and 18 – the Commissioner is satisfied that it consists of the obtaining, or the giving, of advice from a qualified legal adviser. He therefore considers that these records attract LPP.

Would disclosure of the information adversely affect the course of justice?

59. To the extent that the disputed information attracts LPP, the Commissioner must then adjudge whether disclosure would adversely affect the course of justice. If not, the exception will not apply.
60. The arguments expounding the importance of LPP have now been well rehearsed, allowing the free and frank discussion of legal matters in the knowledge that such exchanges will be retained in confidence.
61. It is the Commissioner's view that any disclosure of information subject to LPP will have an adverse affect on the course of justice simply through the weakening of the doctrine. This would, in turn, undermine a legal adviser's capacity to give full and frank legal advice and would have the effect of discouraging parties from seeking legal advice.
62. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a prejudicial effect and that, as a result, regulation 12(5)(b) is engaged. He has therefore gone on to consider the public interest test.

The public interest arguments in favour of disclosure

63. The Commissioner accepts that some weight must always be attached to the general principle of transparency. This is because transparency should equate to accountability and, in turn, help the public to trust and participate in the decisions taken by a public authority.
64. The public interest in disclosure, though, will go beyond this general principle of transparency due to the nature of the contents of the withheld information itself. This is because of the ramifications of any decision taken by the Council on the procurement exercise, which features in terms of cost, liability and the nature of the services provided. It follows, therefore, that it will be entirely reasonable for the public to want to check that any advice given to Cabinet was based on sound legal advice.

The public interest arguments in favour of maintaining the exception

65. It is generally recognised that there will always be an initial weighting in favour of maintaining LPP due to its importance as concept.

66. It is vital that public authorities should be able to consult freely with their lawyers, thereby safeguarding access to fully informed, realistic and frank legal arguments. This does not mean that the counter arguments favouring disclosure need to be exceptional, but they must be at least as strong as the interest that the privilege is designed to protect.

Balance of the public interest arguments

67. When reaching a decision on the public interest, the Commissioner has found it helpful to refer to the findings of the Information Tribunal in *Calland v Information Commissioner & Financial Services Authority* (EA/2007/0136)⁶. At paragraph 37 of its decision, the Tribunal said that there must be some “clear, compelling and specific justification for disclosure...so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.”
68. It has been observed that there are particular, and entirely reasonable, grounds in favour of the disclosure of the information attracting LPP. The Commissioner acknowledges that transparency in the way that the Council arrived at a decision on PACSPE could serve to benefit the local population affected by the governance of the Council.
69. However, it is not possible to ignore the weight invested in LPP, particularly in the context of a potential breach of a trust between a legal adviser and their client. Taking this into account, it is the opinion of the Commissioner that the public interest in maintaining the exception outweighs the public interest in disclosure.
70. To return to the test set out by the Tribunal in *Calland*, the Commissioner has found that there is an absence of clear, compelling and specific justification for disclosure.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

71. The Council has argued that the exempt appendices attached to the variations of the draft report are excepted information on the basis that they contain commercially sensitive information.

⁶ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>

72. The Commissioner has decided that this same information is covered by the exception set out at regulation 12(4)(d) of the EIR. He has not therefore found it necessary to consider the application of regulation 12(5)(e).

The aggregation of the public interest

73. Following the approach adopted by the European Court of Justice in *Office of Communications v Information Commissioner* [2011] EUECJ c-71/10, the Council has pointed out the need to aggregate public interest factors where more than one EIR exception applies. Put simply, aggregation means that the public interest in disclosure can be overcome by the combined weight of the various exceptions.
74. The Commissioner has found that he has not been required to consider the aggregation of the public interest in this case. This is due to the information that the Commissioner has decided should be disclosed only being subject to one exception; either for the reason that only one exception was applied by the Council or because the Commissioner has determined that any other exception was not engaged.

Right of appeal

75. 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

76. 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.
77. 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

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Schedule of documents

Ref	Format	Version*	Date on info	Time	E1	E2	E3	E4
1(a)	Internal emails		18/08/2011	13:41		12(4)(e)		
1(b)			18/04/2011	08:26		12(4)(e)	12(5)(b)	
1(c)			18/04/2011	08:33		12(4)(e)	12(5)(b)	
1(d)			19/04/2011	16:25		12(4)(e)	12(5)(b)	
1(e)			19/04/2011	16:42		12(4)(e)	12(5)(b)	
1(f)			20/04/2011	10:35		12(4)(e)	12(5)(b)	
1(g)			20/04/2011	10:58		12(4)(e)	12(5)(b)	
1(h)			20/04/2011	12:11		12(4)(e)	12(5)(b)	
1(i)			20/04/2011	12:20		12(4)(e)	12(5)(b)	
1(j)			20/04/2011	12:26		12(4)(e)	12(5)(b)	
1(k)			20/04/2011	14:07		12(4)(e)	12(5)(b)	
1(l)			20/04/2011	15:21		12(4)(e)	12(5)(b)	
1(m)			07/09/2011	11:47		12(4)(e)	12(5)(b)	
1(n)			07/09/2011	12:30		12(4)(e)	12(5)(b)	
1(m)			07/09/2011	11:47		12(4)(e)	12(5)(b)	
1(n)			07/09/2011	12:30		12(4)(e)	12(5)(b)	
1(o)			07/09/2011	15:15		12(4)(e)	12(5)(b)	
1(p)			07/09/2011	16:23		12(4)(e)	12(5)(b)	
1(q)			07/09/2011	18:55		12(4)(e)	12(5)(b)	
2	Draft report	1	07/09/2011		12(4)(d)			
3	Background paper					12(4)(e)		
4	Draft report	2	07/09/2011		12(4)(d)		12(5)(b)	12(5)(e) (appendices)
5	Draft report	3	12/09/2011		12(4)(d)		12(5)(b)	12(5)(e) (appendices)
6	Draft report	4	12/09/2011		12(4)(d)			12(5)(e) (appendices)
7	Background paper					12(4)(e)		
8	Draft report	5	12/09/2011		12(4)(d)			12(5)(e) (appendices)
9	Draft report	6	12/09/2011		12(4)(d)			12(5)(e) (appendices)
10	Draft report	7	12/09/2011		12(4)(d)			12(5)(e) (appendices)
11	Draft report	8	12/09/2011		12(4)(d)			12(5)(e) (appendices)
12	Background paper					12(4)(e)		
13(a)	Internal emails		14/09/2011	13:14				
13(b)			14/09/2011	13:21			12(5)(b)	
14	Draft report	9	12/09/2011		12(4)(d)		12(5)(b)	12(5)(e) (appendices)
15	Draft report	10	12/09/2011		12(4)(d)			12(5)(e) (appendices)
16	Background paper					12(4)(e)		
17	Draft report	FINAL	15/09/2011		12(4)(d)		12(5)(b)	12(5)(e) (appendices)
18	Internal email		24/08/2011	12:25		12(4)(e)	12(5)(b)	

* The version number does not necessarily correspond with the version number stated on a document