

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 4 July 2023

Public Authority: Liverpool University Hospitals NHS Foundation Trust

Address: Prescot Street
Liverpool
Merseyside
L7 8XP

Decision (including any steps ordered)

1. The complainant has requested information from Liverpool University Hospitals NHS Foundation Trust ("the Trust") regarding the minutes of committee meetings. The Trust disclosed some of the requested information to the complainant, however it redacted some, citing the exceptions at regulations 12(5)(b), 12(5)(e) and 13 of the EIR. The complainant has only complained about the Trust's application of regulation 12(5)(b), as the Trust has now withdrawn its reliance upon regulation 12(5)(e) and the complainant no longer wishes to complain about the redactions made under regulation 13.
2. The Commissioner's decision is that the Trust is entitled to rely on regulation 12(5)(b) of the EIR – the course of justice - to withhold the remaining requested information ("the withheld information").
3. The Commissioner does not require the Trust to take any steps as a result of this decision notice.

Request and response

4. On 15 June 2022 the complainant made the following request:

“To be clear I want the minutes and connected documents of all future meetings of the New Hospital Committee or any subsequent Committees dealing with these issues.”
5. “These issues” refers to a series of requests made by the complainant to the Trust in relation to the new hospital.
6. The Trust responded on 13 July 2022 confirming that it held the information requested insofar as it had already been produced. The Trust made it clear to the complainant that it obviously did not hold future minutes and documents and that requests for these would need to be submitted in the future. Redactions were made to the information provided, the Trust citing regulations 12(5)(b), 12(5)(e) and 13 of the EIR as a basis for these.
7. Following the response from the Trust the complainant requested an internal review on 14 July 2022. The Trust responded on 2 August 2022 and upheld its original decision. However it acknowledged that the information it had sent was out of sync with its explanation for the redactions made and rectified this.
8. Following further correspondence with the Commissioner, the Trust then withdrew its reliance upon regulation 12(5)(e) and disclosed to the complainant the information previously withheld under that regulation.
9. The Commissioner corresponded with the complainant, who then confirmed that the sole focus of their complaint was now the information withheld by the Trust under regulation 12(5)(b) of the EIR.

Scope of the case

10. As the complainant has confirmed that they are now only complaining about the Trust’s reliance upon regulation 12(5)(b) as a basis for non-disclosure of some of the requested information, the Commissioner’s focus is solely on the application of that exception

Reasons for decision

11. This reasoning covers firstly, whether the Trust handled the request under the correct legislation and secondly, whether the information could be withheld because it would adversely affect the course of justice.
12. The requested information relates to activities affecting or likely to affect the state of elements of the environment. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) of the EIR¹ as it relates to the planning of a new hospital.

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

13. 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.
14. The Trust has explained to the Commissioner that the withheld information consists of an update to the Committee based on legal advice related to upcoming cases. The Trust has applied regulation 12(5)(b) on the basis that litigation privilege applies.
15. The Commissioner is satisfied from viewing the withheld information that the information comprises confidential communications between a client and a professional legal adviser made for the dominant purpose of preparation for potential litigation. He is satisfied that there is a realistic prospect of litigation.
16. There is no evidence that privilege has been waived, and the withheld information is not otherwise in the public domain. The Commissioner is therefore satisfied that the withheld information is covered by legal professional privilege on the basis of litigation privilege. He is therefore satisfied that disclosure of the withheld information would have an

¹ <https://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

adverse effect on the course of justice in that it would be unfair to the Trust to have to disclose its legal position in advance of litigation when another party does not have to do this. The result of this would be that litigation would not take place on a level playing field, which would adversely affect the outcome and therefore, the course of justice.

Public interest test

17. 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 in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

18. In this case it is clear to the Commissioner that the balance of the public interests lies in maintaining the exception, rather than being equally balanced.
19. Whilst the Commissioner places significant weight on public authorities exercising transparency and accountability, he also recognises the strong public interest in maintaining the Trust's right to receive and decide how to act upon legal advice in confidence.
20. The Trust argues that disclosure would adversely affect its ability to seek and act upon legal advice without constraint, disrupting the legal adviser/client relationship
21. It also maintains that disclosure would assist individuals or other third parties in attempting to challenge or dispute the legal advice provision. The Trust also says that premature disclosure would prejudice the outcome of any litigation case and the Trust's strategy by informing the defendant / third parties of its intentions regarding a claim, which would be unfair.
22. The Commissioner accepts that there is a very strong public interest in the Trust being able to have candid conversations with its legal advisors, to seek high quality professional legal advice, properly weigh the risks and benefits and reach and act upon a considered decision. Premature disclosure of such information would not be in the public's interest as disclosure has a high potential to prejudice the Trust's ability to defend its legal interests and disclosure of such information could result in serious consequential ability to recover public funds.

23. It would be inappropriate for the Commissioner to order disclosure of the requested information in these circumstances, and he has concluded that the Trust is entitled to rely on regulation 12(5)(b) of the EIR to withhold the information. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Right of appeal

24. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

Wycliffe House

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Wilmslow

Cheshire

SK9 5AF