

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

**Decision notice**

**Date:** 11 September 2023

**Public Authority:** Liverpool University Hospitals NHS Foundation Trust

**Address:** Aintree Hospital  
Lower Lane  
Fazakerley  
Liverpool L9 7AL

**Decision (including any steps ordered)**

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1. The Commissioner's decision is that Liverpool University Hospitals NHS Foundation Trust ('the Trust') is entitled to withhold the requested information about a building project under regulation 12(5)(b) of the EIR. This exception concerns the course of justice. It's not necessary for the Trust to take any corrective steps.

**Request and response**

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2. The complainant made the following information request to the Trust on 5 June 2023:

"Re 2 Can I please have copies of all the material relating to:

"We have issued correspondence under Pre-Action Protocol for Construction and Engineering Disputes relating to the structural defects in the Royal Liverpool University Hospital Building that required remediation".

Including any responses and internal communications and communications with legal advisors, specialists and any related minutes or reports.”

3. The Trust withheld the information under regulation 12(5)(b) of the EIR and maintained this position following its internal review.

### **Reasons for decision**

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4. This reasoning covers the Trust's application of regulation 12(5)(b) of the EIR to the requested information. Given the specifics of the request and the Trust's description of the information it's withholding, on this occasion the Commissioner hasn't considered it necessary to view that information.

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

5. Under regulation 12(5)(b) 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. The exception is subject to the public interest test.
6. In its refusal to the complainant, the Trust referred to the Commissioner's published guidance on this exception. This states that the phrase "course of justice" should be interpreted fairly broadly. The Trust advised that legal professional privilege (LPP) forms part of the foundation of the UK's justice system, because of the importance of an organisation being able to communicate legal matters/updates to its senior leaders and legal advisors in confidence.
7. The Trust told the complainant that the information it's withholding consists of communications and updates based on advice from solicitors about legal strategies to recover monies lost. It confirmed that it considers that this information attracts LPP as it has entered formal pre-action protocol proceedings.
8. The Commissioner notes that the request repeats a statement that the Trust had made that it had issued correspondence "under Pre-Action Protocol" and that the request is for all material relating to that statement, including "...communications with legal advisors".
9. The Commissioner is satisfied that the information to which the Trust has applied regulation 12(5)(b) is excepted from disclosure under that exception. This is because the information comprises direct and indirect communications between the Trust and its legal team about legal proceedings. That is, communications between the Trust and its legal

team directly, and communications between Trust officers about advice received from the legal team. The Commissioner has gone on to consider the public interest test.

### **Public interest test**

10. The Trust acknowledged the general public interest in transparency and openness about how it spends money and how it makes decisions. It accepted that public authorities should be accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability, and there would be a public interest in knowing whether the Trust followed or went against legal advice when it comes to decisions which will affect the public.
11. The Trust also accepted that there's a public interest in a disclosure that would promote public debate about proposals "affecting the Construction and Engineering Disputes relating to the structural defects in the Royal Liverpool University Hospital Building and the Trust's future development plan." This would, the Trust said, go towards furthering the public's understanding of the Trust's approach and its future.
12. The complainant didn't present any public interest arguments for disclosure in their request for a review or in their complaint to the Commissioner. However, the Commissioner notes that, in previous, similar, complaints, the complainant has put forward arguments similar to those set out by the Trust,
13. Against disclosure, the Trust said that it considers it's vital to be able to obtain full and frank legal advice in a safe space. It must be able to communicate this to its senior leaders in order to comply with its legal obligations and conduct its business accordingly. The Trust said that, as legal advice has to be necessarily fair, frank and reasoned, it's inevitable that it's likely to highlight the strengths and weaknesses of a course of action.
14. The Trust confirmed in its refusal that the information requested is recent and the matter to which it relates was live.
15. The Trust said it believed that disclosure would:
  - adversely affect the Trust's ability to seek and act on legal advice without constraint, disrupting the legal adviser/client relationship
  - disturb the openness of communications between the Trust as client and its legal advisers; and
  - interfere with the provision of full and frank legal advice.

16. The Commissioner notes the very strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the UK legal system. He also notes that, in this case, the litigation that's the focus of the complainant's request was live at the time of the request. This adds further weight to the argument for non-disclosure as disclosure would risk undermining the Trust's position in that litigation. It is firmly in the public interest that the Trust is able to use litigation to recover monies it is lawfully owed.
17. The Commissioner is aware of the EIR's presumption in favour of disclosure and the general public interest in public authorities being transparent. However, he hasn't been presented with any specific or compelling public interest arguments for the information's disclosure that would justify undermining the client/lawyer relationship.
18. The Commissioner's decision is therefore that the balance of the public interest favours non-disclosure. He's satisfied that there's greater public interest in this case in withholding the information under regulation 12(5)(b) in order to protect the relationship between a client and their legal team.

## Right of appeal

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19. 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)

20. 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.
21. 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

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