

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 February 2024
Public Authority: Liverpool University Hospitals NHS Foundation Trust
Address: Aintree University Hospital
Lower Lane
Liverpool
L9 7AL

Decision (including any steps ordered)

1. The complainant requested information relating to updates around litigation for the New Royal Hospital. Liverpool University Hospitals NHS Foundation Trust (the Trust) withheld the information requested under regulation 12(5)(b) of EIR.
2. The Commissioner's decision is that the Trust was entitled to rely on regulation 12(5)(b) – course of justice, and the balance of the public interest lies in maintaining the exception.
3. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

4. On 25 October 2023, the complainant wrote to the Trust and requested information in the following terms:

“Any updates on the litigation relating to the New Royal Hospital.”

5. On 6 November 2023, the Trust responded to the complainant and confirmed it held the requested information but refused to provide it under regulation 12(5)(b) of EIR and outlined its public interest arguments to support this.
6. The Trust maintained its reliance on the exception at internal review on 15 November 2023 and reiterated its view that the specific topic has been addressed and reviewed on numerous occasions previously.

Reasons for decision

7. The following analysis sets out why the Commissioner has concluded that the Trust was entitled to rely on regulation 12(5)(b) of the EIR.

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

8. Regulation 12(5)(b) provides an exception to the extent that disclosure of the information in question 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.
9. “Would adversely affect” means that it is more probable than not, ie, a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
10. The exception at regulation 12(5)(b) is broad and encompasses any adverse effect on the course of justice; as such, the Commissioner accepts that ‘an inquiry about litigation’ is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
11. In its submissions the Trust has stated:

“Following discussions with the Director of Finance – Financial Strategy and Capital, it has been confirmed that the information requested attracts litigation privilege as we have entered formal pre-action protocol proceedings, and this position remains live.

It is also worth noting that this specific topic has been comprehensively reviewed and addressed on numerous occasions and received independent scrutiny in the form of ICO investigations and First Tier Tribunals (FTT).

Please see references below:

- FOI - 7723,7726,7733,7734,8302,8514,9002
- EIR - 9058, 9302
- ICO - IC-141289-V5N9, IC-184209-S8P1, IC-250916-C3T1
- FTT - EA/2022/0155, EA/2022/0331, EA/2022/0333, EA/2022/0384.”

Public interest test

12. The Commissioner has carefully considered the arguments put forward by the Trust. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. In this case, the Commissioner accepts that the information withheld by the Trust is that which would help it make informed decisions and any potential further actions including enforcement.
13. It is the Commissioner’s view that the public disclosure of such information at the time of the request, would not only inhibit the Trust’s ability to effectively conduct an inquiry, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of the parties involved.
14. The Trust believes that disclosure would:
 - adversely affect the ability of the Trust to seek and act upon 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
 - that disclosure would assist individuals or other third parties in attempting to challenge or dispute the legal advice provision
 - premature disclosure would prejudice the outcome of any litigation case and the Trust’s strategy by informing the defendant / third parties of our intentions regarding a claim
 - it would be unfair to the Trust to have to disclose our legal position, including any weaknesses in the case, prior to any litigation taking place – especially when the other parties to that litigation would not and could not be required to make a similar disclosure
 - injecting unfairness into any formal proceedings, disclosure would have an adverse effect on the course of justice.

15. The Trust has considered the public interest arguments in favour of disclosure and has concluded that, although weight can be attached to transparency and accountability, the weight of all these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption.
16. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, including not prejudicing legal proceedings. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Trust, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
17. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Trust was not obliged to disclose the requested information.
18. 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

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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF