

Environmental Information Regulations 2004

Decision notice

Date: 29 October 2012

Public Authority: Wiltshire Council

Address: County Hall
Bythesea Road
Trowbridge
Wiltshire
BA14 8JN

Decision (including any steps ordered)

1. The complainant made a request to Wiltshire Council (the Council) for internal correspondence between planning and legal officers regarding certain planning applications. The Council withheld the information, relying on regulations 12(4)(e) (internal communications) and 12(5)(b) (course of justice) of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner's decision is that the Council has correctly withheld information which engages regulation 12(5)(b), but that the public interest test favoured disclosure for the information which engages regulation 12(4)(e).
3. The Commissioner requires the Council to disclose the information which engages regulation 12(4)(e). 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 Freedom of Information Act 2000 (the Act) and may be dealt with as a contempt of court.

Request and response

4. On 17 December 2011, the complainant wrote to the Council and requested information in the following terms:

"Please could you kindly supply a copy of all e-mails, memo's, and any other internal correspondence sent or received from any planning officer and any legal officer which relates to advice obtained or given in respect of the following planning applications [three application numbers listed]"
5. The Council responded on 20 December 2011. It withheld the requested information, relying on exceptions 12(4)(e) (internal communications) and 12(5)(b) (course of justice) of EIR.
6. Following an internal review the Council wrote to the complainant on 30 March 2012. It stated that it was upholding the original decision.

Scope of the case

7. The complainant asked the Commissioner to investigate his request for information as he considers the public interest to be in favour of disclosure.
8. The complainant also stated that he was concerned the Council was not taking a consistent approach, as he had previously made a request of a similar nature and had been provided with information on that occasion.
9. The Commissioner considers the scope of the case to be whether the Council has correctly complied with EIR. Specifically, whether the requested information should be withheld under regulations 12(4)(e) and 12(5)(b).

Reasons for decision

Background

10. The complainant has made a request for information about three planning applications where he was acting as agent for the owner of the properties.
11. At the time of the request the planning decision notices for these applications had been issued and were freely available to the public.

Environmental Information

12. Regulation 2(4) EIRs defines environmental information as follows (emphasis added by the Commissioner):

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, **land, landscape** and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

....

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;"

13. The Commissioner considers that information about planning applications is environmental information under the terms of EIR.
14. The Commissioner has therefore reviewed the information submitted by the Council in order to determine whether the aforementioned exceptions apply.
15. As per regulation 12(1)(b), all exceptions under regulation 12 of EIR require a public authority to conduct a public interest test to establish whether the information should be disclosed. In all instances there is a presumption in favour of disclosure.
16. The withheld information consists of emails and draft planning recommendations between members of Council staff. Therefore the Commissioner considers the withheld information to be internal communications.
17. Some of the internal communications involve members of Council staff who were working in their capacity as solicitors or legal advisors. These communications concern the legal rights and obligations of the Council. This qualifies as legal advice and means these specific communications are protected by legal professional privilege.
18. Legal professional privilege requires special consideration which is not applicable to other internal communications. For reasons outlined below,

the Commissioner has considered these communications with regard to regulation 12(5)(b). Consequently the Commissioner will not apply his decision over regulation 12(4)(e) to these communications unless he determines exception 12(5)(b) not to be engaged (or that the public interest under 12(5)(b) favours disclosure of the information).

Regulation 12(5)(b) – Course of Justice

19. Regulation 12(5)(b) states:

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

(b) 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;”

20. The Commissioner considers that the withheld legal advice is subject to legal professional privilege and engages regulation 12(5)(b). Under EIR, legal professional privilege is covered by regulation 12(5)(b), as highlighted as follows.

21. The Information Tribunal in the case of *Woodford v Information Commissioner*¹ stated that the harm caused to legal professional privilege by disclosure would adversely affect the course of justice.

22. Furthermore, as established in the Information Tribunal case of *Kirkaldie v Information Commissioner and Thanet District Council*², regulation 12(5)(b) is comparable with section 42 of the Act (legal professional privilege exemption). Therefore many of the Information Tribunal's established positions on section 42 can be applied to this decision.

Public interest arguments in favour of maintaining the exception

23. There is a strong public interest in withholding information which engages regulation 12(5)(b). Legal professional privilege is a fundamental requirement of the English legal system, as the freedom of clients to obtain appropriate advice allows for fair representation in legal proceedings. This was confirmed for section 42 in the case of *Bellamy v Information Commissioner*, where it was stated that legal professional

¹ (EA/2009/0098), paragraph 27

² (EA/2006/0001), paragraph 22

privilege was "a fundamental condition on which the administration of justice as a whole rests".³

24. In *Calland v Information Commissioner & Financial Services Authority* (EA/2007/0136), it was stated that there must be "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."⁴
25. The information refused under 12(5)(b) concerns advice about the legal obligations of the Council in ensuring that the eventual decision of the planning application complied with the relevant legislation.
26. The Commissioner considers that it is in the public interest for decisions to be made within a fully formed legal context. This advice needs to be extensive and cover the many possible issues that may arise in a decision.
27. Further, the Commissioner also accepts that legal advice is both requested and provided with the reasonable expectation that the information would not be released.
28. In this case, the Commissioner is satisfied that if the information was disclosed it would adversely affect the Council's ability to defend its position if it ever faced a legal challenge in connection with this issue.
29. In the Council's refusal notice it highlighted the Kirkaldie decision and quoted that regulation 12(5)(b) "exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals and organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation."
30. The Commissioner considers legal advice is said to be live if it is still being relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

³ (EA/2005/0023), paragraph 35

⁴ (EA/2007/0136), paragraph 37

Public interest arguments in favour of disclosure

31. The complainant has stated that he wishes to have the information so that he can understand why the applications were refused. With this, he would be able to work on the faults so that later applications would have a greater chance of succeeding.
32. The Commissioner recognises this public interest, and notes that one of the intentions of the EIR is to improve public understanding of decisions to help promote participation in public governance.
33. As with all decisions taken which are financed with public spending, there is an inherent argument for the information to be released to promote transparency and accountability within public authorities.
34. It has been argued that the disclosure of information concerning decisions made by public authorities which affect individuals' lives promotes more open governance, and improves the decision making capabilities of a public authority.

Balance of the public interest

35. It is the Commissioner's view that there is a strong argument for the legal advice to not be disclosed. Having reviewed the information he considers that the information is strictly relevant to the Council's obligations to guarantee that it is working within the relevant planning laws.
36. Whilst the decision has been issued the legal advice provided is still live as it could be relied upon in an appeal process. Disclosure of the information would adversely affect the Council's position should any appeal occur.
37. Further, even though no appeal has been made, the Commissioner does not consider that this is a sufficient factor to overturn "a fundamental condition on which the administration of justice as a whole rests".
38. Whilst the arguments for transparency, accountability and public involvement in governance do carry weight, in this case they do not provide a "clear, compelling and specific justification" required for disclosure. Consequently, those factors lack the weight necessary to overturn the inbuilt protection of legal professional privilege.
39. Therefore the Commissioner's decision is that the balance of the public interest test is in favour of maintaining the exception for the information which engages regulation 12(5)(b).

Regulation 12(4)(e) - Internal Communications

40. 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.”

41. The internal communications in this case are largely emails between members of Council staff who are not solicitors, or involving solicitors but where there is no information that could be classified as legal or litigation advice. The other items of internal communications involve draft planning notices.

42. Within the history of some of the internal emails there are messages from a third party. The Commissioner does not consider these to be included in the information classed as internal communications.

43. The Commissioner considers the wording of the request to apply only to internal communications and the third party information does not need to be considered in this decision or disclosed by the Council.

Public interest arguments in favour of maintaining the exception

44. The argument for maintaining the exception is focussed on protecting the internal decision making process. The Council has stated that it is in the public interest for their officers to be able to “communicate freely with internal advisors”.

45. This relates to the well-established argument for public authorities to retain a safe space for formulating policies and decisions without premature scrutiny from the public. It has also been argued that releasing internal communications may make public authority staff less candid than they might be if they knew the information would not be disclosed.

46. As stated previously the complainant had concerns that the Council was not showing a consistent approach, as it had previously provided information in response to a similar request. In response to a question from the Commissioner, the Council stated that it does not have a “blanket policy to withhold certain types of information” and “considers the circumstances of each individual case”.

47. The Commissioner accepts this assurance, and notes that public authorities have the discretion to disclose information even if it may engage an EIR exception(s).

Public interest arguments in favour of disclosure

48. When considering the safe space argument, the Commissioner is mindful that the Information Tribunal has stated that the weight of public interest in protecting the safe space will be significantly reduced once the decision has been made.⁵
49. Having reviewing the internal emails amongst members of Council staff the Commissioner does not consider the contents to be sensitive or to reveal details which would be damaging to the Council's decision making process for planning applications.
50. Within the communications there is mention of members of the public who have sent in submissions about the planning applications. However they are not mentioned by name and their submissions were made available to the wider public upon the completion of the planning decision notices.
51. The Commissioner has reviewed the draft planning decision notices and notes that they reflect the decisions that are available from the Council's website. Therefore these parts of the withheld information cannot be considered sensitive as at the time of the request the information was already in the public domain.
52. The Commissioner also considers that the public interest arguments for disclosure regarding exception 12(5)(b) applies to that under exception 12(4)(e).

Balance of the public interest

53. Given that the information contained in the internal communications is not sensitive the Commissioner does not consider the safe space argument to have substantial weight in this case.
54. The Commissioner considers that as the decision on all three planning applications has already been issued, the weight of the interest in protecting the Council's internal decision making process has been greatly diminished.
55. The Commissioner has also considered the argument that Council staff would be more reserved in their future communications. However, he notes that the information excluded under regulation 12(4)(e) in this

⁵ EA/2007/0072 Department for Business, Enterprise and Regulatory Reform v Information Commissioner & Friends of the Earth, paragraph 114

case is not of a sensitive nature, so is unlikely to result in Council staff being any more reserved in future cases.

56. In the circumstances of this case – particularly given his analysis of the actual information withheld under exception 12(4)(e) - the Commissioner has concluded that there is greater weight for the information to be released. This is in order to help individuals understand why their applications were refused so that they can adjust future applications, thus improving their involvement in effective public governance.
57. The Commissioner's decision is that given the innocuous nature of the information combined with the public interest in accountability and transparency, the public interest is in favour of disclosing the internal communications which engage exception 12(4)(e).

Summary

58. The Commissioner's decision is that the public interest test is in favour of disclosure for the information which engages regulation 12(4)(e), but favours maintaining the exception for the information which engages regulation 12(5)(b).

Right of appeal

59. 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

60. 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.
61. 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

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