

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 June 2016

Public Authority: Aylesbury Vale District Council
Address: The Gateway
Gatehouse Road
Aylesbury
Buckinghamshire
HP19 8FF

Decision (including any steps ordered)

1. The complainant has made a request to Aylesbury Vale District Council ("the council") for information about legal advice received in respect of local 'Neighbourhood Development Plans'. The council refused the request under regulation 12(4)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner finds that the council has correctly refused the request under regulation 12(4)(b). However he has identified that the council breached regulation 5(1) by failing to consider the request under the EIR, and consequently also breached regulation 14 by failing to issue an EIR refusal notice.
3. He does not require any steps to be taken.

Request and response

4. On 17 September 2015 the complainant made a request for:

Please may I have a copy of the recent legal advice/opinion/counsel that AVDC procured (using public money) concerning the status of local Neighbourhood Development Plans in relation to their weight when considering planning applications within the areas covered by those plans. It covered the impact of a recent case concerning Woodcock vs SoS, I believe. Please also include in this, if the report does not contain

this information, the precise brief or question given to the lawyers in the first place by AVDC.

5. The council responded on 29 September 2015. It withheld the requested information under section 42 of the Freedom of Information Act ("the FOIA").
6. The complainant requested an internal review on 2 October 2015.
7. The council provided the outcome of its internal review on 3 November 2015. It maintained its application of section 42.

Scope of the case

8. The complainant contacted the Commissioner on 4 November 2015 to complain about the council's refusal of his request under section 42 of the FOIA.
9. The council clarified to the Information Commissioner's Office on 15 January 2016 that it should have refused the request under regulation 12(5)(b) of the EIR, on the basis that the information was environmental in nature.
10. The Commissioner therefore considers the scope of this case to be the determination of whether the council has correctly refused the request under regulation 12(5)(b).

Reasons for decision

The relevant access regime

11. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect the elements of the environment listed in regulations 2(1)(a) will be environmental information.
12. The information requested relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council. The Commissioner therefore considers that the request should be dealt with under the EIR.

13. In view of this the Commissioner has concluded that the council wrongly handled the request under the FOIA and as a result breached regulation 5(1) of the EIR.

Regulation 14 – Refusal to disclose information

14. In the circumstances of this case the Commissioner has found that at the time of the request and internal review, the council failed to consider the request under the terms of the EIR. As a consequence of this the council did not comply with regulation 14, which provides that a public authority must specify, in writing and within 20 working days, the exception upon which it is relying to refuse a request.
15. As the council addressed this failing during the course of his investigation the Commissioner does not require it to take any steps in this regard.

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

16. Under this exception a public authority can refuse to disclose information on the basis that 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 Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
17. The Commissioner is aware that the information withheld in the circumstances of this case has previously been considered in decision notices FER0600226¹ (issued 25 February 2016) and FER0611821² (issued 31 March 2016). In both of these prior decisions the Commissioner identified that regulation 12(5)(b) had been correctly engaged, and that the public interest test favoured the maintenance of the exception.
18. The council has confirmed to the Commissioner that in the determination of this case it is relying upon the same submissions as those provided for decision notices FER0600226 and FER0611821. The Commissioner has therefore reviewed those decisions, and has in

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623636/fer0600226.pdf>

² https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624022/fer_0611821.pdf

particular identified that the dates of the respective requests, responses and internal reviews are substantially similar to the relevant dates in this case. As such is reasonable for the Commissioner to accept that the contextual factors considered in decision notices FER0600226 and FER0611821 are directly applicable to this case.

19. The complainant in this case has referred to related legal developments (namely a revised position issued by the Secretary of State) that have occurred after the date of the internal review, and which he considers conflict with the legal advice withheld by the council. However the Commissioner must ultimately consider the contextual factors present at the time the request was made, and is not able to base his determination on events that postdate that.
20. For the above reasons, the Commissioner considers it appropriate to refer to his prior decisions in reaching a determination on this case. The relevant sections of the decision notice FER0600226 (as recorded in decision notice FER0611821) are reproduced in the annex to this decision notice.
21. For these reasons, and based on the reasoning contained in the following annex, the Commissioner has concluded that regulation 12(5)(b) is engaged and that the public interest test favours withholding the information.

Right of appeal

22. 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@hmcts.gsi.gov.uk

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

23. 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.
24. 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

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

Annex

Regulation 12(5)(b)

25. Regulation 12(5)(b) of the EIR states 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."

26. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met; (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on one or more of the factors cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.
27. Regulation 12(5)(b) of the EIR, specifically the reference to the 'course of justice', and section 42 of FOIA share common ground in that both may cover information that attracts legal professional privilege. However, in contrast to section 42 of FOIA, a public authority seeking to apply regulation 12(5)(b) of the EIR is required to take the additional step of demonstrating that disclosure would adversely affect the course of justice.
28. The council says that the external advice and emails between council officers and the barrister relating to the advice are subject to legal professional privilege.
29. Legal advice privilege generally applies where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:
- the communications must be made between a professional legal adviser and client;
 - the communications must be made for the sole or dominant purpose of obtaining legal advice; and
 - the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.

30. The advice is between a professional legal advisor and his client, the council, and the dominant purpose of the information is to seek and provide advice. The Commissioner is therefore satisfied that the information is subject to legal professional privilege.
31. The next question as regards the application of Regulation 12(5)(b) is whether a disclosure of that information would have an adverse effect upon the course of justice.
32. As regards this the council pointed to the general weakening of the doctrine of legal professional privilege and the ability to seek and receive full and frank advice if the information were to be disclosed. It highlighted that the advice had fed into the policies on a number of inquiries, planning appeals and judicial reviews, and that some of these were still ongoing. It said that:

"... the legal advice is not stale or out of date and is current. There is a potential on fairness to the council in having in to disclose its legal advice, as once disclosed LPP is waived, and the advice could be used by any party against the council.

There are currently a number of outstanding inquiries, planning appeals/judicial review:

- 1. Haddenham call-in inquiry (by Secretary of State)*
- 2. Great Horwood call-in inquiry (by Secretary of State)*
- 3. Moreton Road Buckingham – outstanding application pending for consideration*
- 4. Haddenham Neighbourhood Plan judicial review*

All the above matters are in some way contained within counsel legal advice the subject of LPP in this instance."

33. The Commissioner is therefore satisfied that a disclosure of 'live' advice which is currently being relied upon in a number of ways by the council would cause an adverse effect upon the course of justice.
34. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1). In doing so he has taken into account the general presumption towards the disclosure of the information as required by Regulation 12(2).

The Public Interest

The public interest in the disclosure of the information

35. The Commissioner has considered the public interest arguments for the disclosure of the information.
36. Generally, where a 5 years supply of housing is held, and a planning application is outside of an agreed neighbourhood plan then the application can be refused on that basis. The Commissioner understands that the court judgement finds that a planning application outside of the neighbourhood plan cannot be refused for this reason where there is no completed 5 year plan. The application must therefore be considered under other policies such as sustainability. Some weight will however still be placed on the refusal of the application due to the fact that it does not fall within the neighbourhood plan. Effectively the court judgement has put into question the weight and relevance accorded to neighbourhood plans where there is insufficient land already identified for future housing supply.
37. In general the public interest in the disclosure of the information relates to creating greater transparency on planning issues where the local community has already considered land which is appropriate for development. In particular, disclosure would shed light on the council's policies and decision making regarding the weight accorded to neighbourhood plans in planning decisions where the lack of a 5 year supply of houses would effectively mean that the 'plan' is considered out of date.
38. Any reduction in the weight due the lack of an identified 5 year supply may obviously result in development occurring in areas where the community does not want that to occur, i.e. outside of the areas identified in the neighbourhood plan. This has the potential to affect land and house values, the nature of communities in villages and small towns, and ultimately has the potential to create pressures on the local infrastructure. It should be noted however that the weight is only one factor amongst many taken into account in the consideration of planning applications.
39. The Commissioner notes that there was initially a great deal of confusion and concern over the meaning of the decision, and there was a suggestion that the district council had decided to approve 2 new developments which fell outside of the neighbourhood plans on the basis of the judgement. Following an initial briefing some parties urged parish councils to cease work on neighbourhood plans as they considered they were now 'worthless' following the court's decision as the district council acknowledged that it did not have a 5 year plan in place.

40. The council then sought to reduce these concerns and tried to clarify exactly what the court judgement meant in terms of neighbourhood plans. Clearly a disclosure of the legal advice which the council was relying upon would clarify to interested parties the legal status of neighbourhood plans and may serve to alleviate fears that the work being carried out by various parish councils in creating neighbourhood plans was not in vain following the decision of the court.
41. More widely, the move towards planning decisions being taken locally within communities may be affected by the court decision. There is therefore a wider public interest in clarifying the extent to which local neighbourhood plans can have an effect on planning decisions where there is no identified 5 year supply of housing, and the legal advice would obviously aid in this.
42. The clarity on this which would be shed by the disclosure of the withheld information would obviously benefit local communities who are working to develop neighbourhood plans, and serve as a warning where other councils do not have a 5 year housing supply already identified.

The public interest in maintaining the exception

43. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general important principle of legal professional privilege. This view has also been supported by the Information Tribunal.
44. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, "*a fundamental condition on which the administration of justice as a whole rests*".
45. The Commissioner therefore considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, well established and important common law principle. The Information Tribunal affirmed this in the Bellamy case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
46. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, laid out (at paragraph 60 of its

judgement) the following public interest factors in favour of maintaining the exemption at section 42 of FOIA, which is the exemption for legal professional privilege. The arguments are equally as valid in the case of Regulation 12(5)(b) where information subject to legal professional privilege is concerned.

"a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.

b. Were legal advice disclosed routinely, there would be disincentive to such advice being sought and/or a disincentive to seeking advice based on full and frank instructions.

c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between a public authority and its legal advisers.

d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.

e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed."

47. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
48. Referring to the information withheld under Regulation 12(5)(b) specifically within this case the Commissioner notes that the issue was an ongoing issue at the time of the request. A disclosure of the advice at this stage of the proceedings may undermine the legal position of the council by disclosing information which it may need to rely upon in future litigation to defend its position and its decisions in regards to various ongoing planning decisions and inquiries.

49. The courts and the Tribunals have identified a number of factors which can create a stronger public interest in information subject to legal professional privilege being disclosed. These include:
- There is a large amount of money involved;
 - large number of people affected;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
50. The Commissioner has considered these factors. He considers that development involves large amounts of money, and notes that the advice could be beneficial for developers, planning authorities and those involved in planning and neighbourhood plans and would have interest nationwide. This point was raised by the complainant to the council in his request for information.
51. The Commissioner considers that there has been no lack of transparency by the council over the issue, nor has it misrepresented the content of the advice or only disclosed partial advice with a view to misrepresenting the content.

Conclusions

52. The Commissioner has considered the above. There are ways to overturn planning decisions made by planning authorities through appeals, requests for a 'call in' by the Secretary of State and through judicial reviews. For the most part, the planning authority in this case (the council) would need to rely upon the legal advice it has received in order to defend its decision on a case.
53. The council has pointed out that in the event of any appeal appellants are able to seek their own legal advice on the issue of the weighting to be applied in the circumstances above. It considers that a disclosure of its advice would be detrimental to its position and would undermine its ability to defend its position in legal proceedings. The Commissioner agrees with that argument.
54. Whilst the Commissioner recognises the advice contains information which could be used widely to clarify the situation following the judgement the Commissioner must also recognise that the council has real concerns that doing so could affect its ability to defend itself in identifiable and ongoing legal disputes over planning.
55. The Commissioner therefore considers that the public interest in the exception being maintained outweighs that in the information being disclosed in this instance.