

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

Date: 3 January 2019

Public Authority: Adur and Worthing Councils
Address: Worthing Town Hall
Chapel Road
Worthing
West Sussex
BN11 1HA

Decision (including any steps ordered)

1. The complainant has requested information relating to the serving of an Abatement Notice. Adur and Worthing Councils initially handled the request under the FOIA, disclosing some information and withholding other information under exemptions. Following the Commissioner's involvement the public authority reconsidered the request under the EIR, disclosing further information and withholding other information under the exceptions for the course of justice (regulation 12(5)(b)) and personal information (regulation 13(1)).
2. The Commissioner's decision is that Adur and Worthing Councils wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14(1) of the EIR but that it correctly withheld information under regulation 12(5)(b).
3. The Commissioner does not require the public authority to do anything further.

Background

4. The council has explained that it received a complaint from a member of the public that a property in [redacted] had fallen into disrepair with casements from the windows falling out. It clarified that [redacted] comprises a number of leasehold flats which are owned by the [redacted]. It confirmed that an abatement notice was served on [redacted] under section 80 of the Environmental Protection Act 1990 on 21 June 2016.
5. The council explained that the alleged statutory nuisance was the ingress of water due to significant disrepair to the windows and external envelope of the property which was preventing the use and enjoyment of the residential accommodation.
6. The council confirmed that the abatement notice was not complied with and [redacted] stated to the council that they required access over a neighbouring property (the complainant's property) in order to complete their works and this access was being refused by the owner.
7. The council explained that in August 2016 it issued an abatement notice to the complainant requiring them to allow access to [redacted] to carry out the specified work. The complainant appealed against the service of the abatement notice and the council subsequently withdrew the notice and paid the complainant costs.

Request and response

8. On 7 April 2017, the complainant wrote to Adur & Worthing Councils (the "council") and requested information in the following terms:

1. All documents, letters, emails, internal memoranda, advice and minutes of meetings relating to, and all steps undertaken leading to, the decision by Adur District Council to:

(1) The service of an Abatement Notice under section 80 of the Environmental Protection Act 1990 dated 8 August 2016 upon [Redacted],

(2) The service of a similar Abatement Notice dated 21 June 2016 upon [redacted].

2. All documents, letters, emails, internal memoranda, advice and minutes of meetings relating to the decision by Adur District Council to withdraw the Abatement Notice referred to in paragraph 1(1) above

3. (1) If the Abatement Notice referred to in paragraph 1(2) above remains extant, explain what steps are being undertaken by Adur District Council as to its enforcement;

(2) If the Abatement Notice referred to in paragraph 1(2) has been withdrawn, state the date and reason for its withdrawal and in each case provide all documents, letters, emails, internal memoranda, advice and minutes of meetings relating thereto

4. All documents, letters, emails, internal memoranda, advice and minutes of meetings relating to the ongoing nuisance that it is alleged exists or the nuisance that it is alleged existed at the property at [redacted]. If the said nuisance has abated or ceased, state the date this occurred and the steps undertaken to achieve that abatement or cessation and by whom."

9. The council responded on 30 June 2017 and disclosed some information. The council withheld other information but did not cite any specific grounds for doing this.
10. Following an internal review the council wrote to the complainant on 8 March 2018. It disclosed some information and confirmed that it was withholding other information under the FOIA exemptions for personal data (section 40(2)) and legal professional privilege (section 42).

Scope of the case

11. On 17 May 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. Having considered the nature of the request, it occurred to the Commissioner that the information was likely to be environmental information. She, therefore, directed the council to reconsider the request under the EIR. The council issued a new response to the request, disclosing additional information and withholding other information under the exceptions for the course of justice (regulation 12(5)(b)) and personal information (regulation 13(1)).
13. The Commissioner confirmed with the complainant that her investigation would exclusively consider whether the council had correctly applied regulation 12(5)(b) to withhold the requested information.

Reasons for decision

Is it environmental information?

14. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.

15. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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...'

16. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.

17. In this case the withheld information relates to the use of land within the context of enforcement action. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)* ("Kirkaldie").

18. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.

Regulation 14(1) – refusal to disclose information

19. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
20. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
21. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

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

22. 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".
23. The Commissioner's guidance explains that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
24. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the

information as indicated by the wording of the exception. In accordance with the Tribunal decision of Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".

Is the exception engaged?

25. The withheld information relates to part 2 of the request, namely "*All documents, letters, emails, internal memoranda, advice and minutes of meetings relating to the decision by Adur District Council to withdraw the Abatement Notice...*"
26. The council has explained that the withheld information includes confidential communications between its in-house legal advisors and its Private Sector Housing Department created for the main purpose of providing or obtaining legal advice regarding proposed or contemplated litigation relation to the two abatement notices served. The council has argued that disclosure of the information would adversely affect the course of justice because it would have a negative impact on its ability to represent or defend itself in respect of any subsequent legal action taken as a result of the abatements notices served on the complainant and/or BRAL.
27. The council has stated that the complainant has confirmed that they are preparing a formal complaint to the Local Government Ombudsman and instructed a barrister to look at a charge of malfeasance in public office. The council has also confirmed that it has not yet recovered its own costs in respect of the works carried out at Brooklands and it is contemplating further proceedings in this matter.
28. Once a public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost because of earlier disclosures.
29. Having considered the council's arguments and referred to the withheld information and publically available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
30. The council has stated that disclosure of the information would adversely affect the course of justice because it would have a negative impact on the council's ability to represent or defend itself in the event of any legal action taken as a result of the service of the abatement notices.
31. The Commissioner is of the view that disclosure of information of information subject to LPP, particularly relatively recent legal advice which remains live and relevant, will have an adverse effect on the

course of justice. She considers the likelihood of this happening to be more probable than not. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

32. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure

Public interest in disclosure

33. The complainant has highlighted that regulation 12(2) requires that public authorities should apply a presumption in favour of disclosure.
34. The complainant considers that the matter to which the information relates is not 'live' as no further enforcement action needs to be taken by the council. They have argued that, given this, disclosure of the information cannot result in adverse effects to the course of justice.

Public interest in maintaining the exception

35. In *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), the Upper Tribunal ("UT") accepted the submission that the risk of the disclosure of legally privileged information, leading to a weakening of confidence in the general principle of LPP, was a public interest factor of "very considerable weight" in favour of maintaining the exception. It added that there would have to be "special or unusual factors" in a particular case to justify not giving it this weight and in this case there were none. The UT also found that disclosure would be unfair as legal proceedings were a possibility in this particular case. It was important to maintain a level playing field and disclosure of the public authority's legal advice to the requester would be unfair unless the authority had "the corresponding benefit".
36. The Commissioner notes that, in this case, whilst the abatement notice against the complainant has been withdrawn, the legal advice is still recent and might be subject to challenge.
37. The council has referred the Commissioner to the Upper Tribunal decision in *DCLG v Information Commissioner* (2012)¹ in which it was

¹ UKUT 103 (AAC), 28 March 2012, reference: GIA/2545/2011;
<http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j3477/GIA%202545%202011-00.doc>

accepted that the risk of disclosure of information subject to LPP, leading to a weakening of confidence in the general principle of LPP, was a public interest factor of very considerable weight. The council has highlighted the Upper Tribunal's comments that there would have to be "special or unusual factors" present in order to justify not giving such information this weight. The council has argued that no "special or unusual factors" are present in this case.

Balance of the public interest

38. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
 39. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
 40. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
 41. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. However, whilst the Commissioner accepts the complainant's interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
 42. In addition, the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake enforcement matters on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.
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43. The Commissioner considers that the complainant is seeking to pursue their dispute with the council over the abatement notice via the medium of the EIR. The Commissioner does not believe that this is an appropriate use of the legislation as it is clear that the complainant has already pursued the matter via the remedies available and is still at liberty to avail themselves of other available legal remedies should they wish.
44. The Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. Nor, in her view, do they meet the threshold of 'special or unusual' factors which would justify the overturning the public interest in maintaining LPP. She has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
45. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Right of appeal

46. 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

47. 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.
48. 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
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