

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 January 2021

Public Authority: Buckinghamshire Council
Address: Gatehouse Road
Aylesbury
Buckinghamshire
HP19 8FF

Decision (including any steps ordered)

1. The complainant has requested legal advice in relation to a specific planning matter. Buckinghamshire Council withheld the requested information under the exceptions for the course of justice (regulation 12(5)(b)) and confidentiality of proceedings (regulation 12(5)(d)).
2. The Commissioner's decision is that Buckinghamshire Council has correctly applied the exception in regulation 12(5)(b) to the requested information and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant in this case acts for Ashcroft Tower Limited which is seeking to secure planning permission for residential development of a piece of land at Poyle Lane, Burnham, Buckinghamshire.
5. The land of interest was formerly part of the curtilage of a now demolished house. Planning permission was granted some years ago for a large stable block. This permission was implemented although not completed.
6. The complainant has stated that a question has arisen as to whether the land should be included in the Register of Brown Land which Buckinghamshire Council (the "council") is obliged to keep under secondary legislation. Council officers have decided that it should not be included and it is the complainant's opinion that it should be included.
7. The council sought counsel's opinion on the question and (prior to the request) provided the complainant with a summary of the advice.
8. The complainant and their client suspect that the summary of the advice provided to them is neither fair nor accurate and that counsel was not fully and accurately instructed on the background facts. The complainant, therefore, made a request for this information and this request is the focus of this decision notice.

Request and response

9. On 14 February 2020 the complainant wrote to Buckinghamshire Council (the "council") and requested information in the following terms:

(in relation to the Ashcroft Tower site in Burnham)

"Accordingly, we now formally call upon you to supply to us copies of [redacted] advice and the Council's instructions which procured it..."
10. The council responded on 27 February 2020. It referred the complainant to its response to a previous request they had made for the same information, confirming that its position remained the same.
11. The internal review of the council's original handling of the request (issued 9 November 2018) confirmed that it was withholding the requested information under the exceptions for the course of justice (regulation 12(5)(b)) and confidentiality of proceedings (regulation 12(5)(d)).

Scope of the case

12. On 18 March 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

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

14. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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."

15. The Commissioner has issued guidance on the application of regulation 12(5)(b)¹. The guidance confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would result through the disclosure of, otherwise confidential, information covered by LPP.
16. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* (Bellamy) as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

communications or exchanges come into being for the purposes of preparing for litigation.”²

17. There are two categories of LPP – litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies when no litigation is in progress or contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

Is the exception engaged?

18. The council has confirmed that the withheld information, which consists of instructions to counsel and counsel’s advice, is subject to LPP.
19. In order to attract LPP, the information must be communicated confidentially in a professional capacity between a client and a professional legal adviser.
20. The council has confirmed that it considers the withheld information is subject to both LPP and legal litigation privilege.
21. The council clarified that the information is a communication from itself in the capacity of a client seeking professional legal services in relation to inclusion of land on the Brownfield Land Register, and external counsel in the capacity of the professional legal adviser. The council confirmed that the dominant purpose of the communication between itself and counsel is the seeking and provision of legal advice.
22. The council also confirmed that it considered the information was also subject to litigation privilege because the information comprises confidential communications made for the purpose of providing or obtaining legal advice in relation to contemplated litigation and in this regard the relevant criteria is also met. The council considers that its decision not to register the land on the brownfield land register is ongoing and the complainant’s client has a statutory right to continue

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_informa_t

their challenge as part of the local plan process which is ultimately subject to challenge in the High Court.

23. The Council confirmed that it considered that the confidentiality attached to LPP had not been lost. It stated that it has not disclosed counsel's advice to a third party and only provided a summary to the complainant in 26 June 2018. The council confirmed that it considered that the provision of a summary does not necessarily amount to unrestricted disclosure, which would result with a removal of the cloak of confidentiality relating to the advice.
24. Having viewed the withheld information and referred to the council's submissions the Commissioner is satisfied that the information is subject to LPP and that it therefore falls within the scope of the exception.
25. In relation to adverse effects to the course of justice, following the decision of the Upper Tribunal in the case of *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), the Commissioner considers that adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. Whilst the Commissioner accepts it is not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; she considers that there would need to be special or unusual factors in play for this not to be the case.
26. In this case, the Commissioner considers that the possibility of litigation is real and that the need to protect LPP in this case is heightened as any adverse effects to the course of justice are likely to be more pronounced.
27. Next is the question of whether the council's disclosure of a summary of the advice to the complainant has an impact on LPP.
28. Once a public authority has established that requested information falls within the definition of LPP, the next question that often arises is whether privilege or confidence has been lost or waived because of earlier disclosures.
29. Waiver is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. In this context, 'cherry picking', or only revealing part of the advice given, isn't permitted.
30. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under the EIR.

This is because under the EIR we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In an EIR context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential. However, the provision of a summary of legal advice to a limited audience that does not reveal its substance will not lead to a loss of privilege.

31. The Commissioner is satisfied that the disclosure of a summary of the advice to the complainant does not constitute an unrestricted disclosure of the advice itself to the world at large. She, therefore, considers that the confidentiality attached to the information has not been lost and that it remains subject to LPP.
32. In relation to the council's proposal that the information is also subject to litigation privilege, in this context, litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Having considered the council's arguments and viewed the withheld information the Commissioner is satisfied that the advice was provided within the context of proposed or contemplated litigation.
33. The Commissioner has concluded that the information is subject to both LPP and litigation privilege and is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged. She has gone on to consider the public interest test.

Public interest test

34. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosure

35. The council has acknowledged that there is a public interest in ensuring the fullest participation in the planning process, which would enable members of the public to be more familiar and better informed on the matters that would have an impact on their lives.

36. The council has also recognised that there is a public interest in ensuring that public authorities have reached decisions on the basis of sound advice.
37. The complainant has argued that, as a public body, the council should adopt a transparent approach to the performance of its quasi judicial role and other planning functions. The complainant considers that the public interest would favour disclosure even if a summary of the information had not been provided. The complainant has argued that confidence in public decision making is undermined when natural suspicions as to the content and effectiveness of legal advice are not allayed.
38. The complainant has further argued that, if the Council's actions were to be subject to judicial review it would, in any event, be under a duty of candour to disclose the full basis of its decision.

Public interest in maintaining the exception

39. The council has argued that the confidentiality of legal advice has not changed since it made its decision and is still accorded significant weight. It has submitted that the weighting in favour of maintaining the exception remains because of the importance of maintaining confidentiality between professional legal advisers and their clients thus ensuring the provision of full and frank legal advice is not undermined and that the council is not unfairly exposed to challenges.
40. The council argued that the planning processes are, by their very nature, open and transparent and allow and indeed encourage a high amount of public participation including extensive consultation. It considers that the public interest in this matter is served via the existing legal remedies available to the complainant and that to disclose its legal position outside these channels would undermine its position.
41. The council has asserted that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and counsel to ensure access to full and frank legal advice. In turn, the council has argued, LPP is fundamental to the course of justice.

Balance of the public interest

42. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. She recognises that there may be a need for enhanced transparency and scrutiny of decision making in planning cases. This is particularly the case where information relates to matters

that affect large numbers of people or have specific environmental implications.

43. However, following previous decisions of the Information Tribunal, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is, in turn, fundamental to the course of justice.
44. The Commissioner recognises that the complainant has a personal interest in accessing the information, however, she considers that the public interest in the context of the EIR refers to the broader public good. Where decisions made by authorities have a significant effect on the local community the balance in favour of disclosure might carry enough weight to challenge the weight in favour of maintaining the confidence attached to LPP. However, beyond the complainant's personal interest in this matter, the Commissioner has no evidence that these effects are present in this case.
45. The Commissioner is mindful that, as a solicitor, the complainant will be aware that legal remedies are available should their client wish to challenge the council's decision in relation to their land. The Commissioner does not consider that the EIR was intended to be a means of bypassing existing legal routes.
46. The Commissioner considers that it is highly likely that disclosing the information would damage the council's ability to undertake its planning duties effectively and compromise its legal position. This, in turn, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice. The Commissioner has not been presented with any evidence that there are grounds for circumventing the legal mechanisms and remedies which are already available in relation to this matter. Furthermore, the complainant makes the point that, if the council's actions were to be subject to judicial review it would be under a duty of candour to disclose further information.
47. The council has confirmed that, whilst there is no statutory right of appeal against a decision not to include land on the Brownfield Land Register, the legal remedies available include a challenge by way of Judicial Review or an application for planning permission submitting very special circumstances regarding the proposed development to overcome harm to the Green Belt through the normal development management process. The council explained that, if the planning application was refused there would be the statutory right of appeal to the Secretary of State (via the Planning Inspectorate) against that

decision. The council has stated that the complainant's client was advised of this and they were also advised that they could promote their site for inclusion in the Burnham Neighbourhood Plan.

48. The Commissioner considers that there is a strong public interest in allowing local authorities to carry out their duties in respect of planning as effectively as possible, particularly in situations where decisions made might be subject to legal challenge. In this case, it is clear that the complainant disputes the council's decision in relation to their land. The Commissioner considers that providing the complainant with the information via the EIR would undermine the council's ability to defend its decision with no reciprocal disclosure being made by the other party. The Commissioner considers that the public interest in benefitting the interests of an individual do not carry significant weight when balanced against the public interest in protecting the course of justice from adverse effects and the public interest in allowing the council to carry out its functions as a planning authority, including the seeking of legal advice to facilitate this function.
49. In view of the above, the Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. 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).
50. 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.
51. As the Commissioner has concluded that the council has correctly withheld all the requested information under regulation 12(5)(b) she has not gone on to consider its application of regulation 12(5)(d).

Right of appeal

52. 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

53. 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.
54. 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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