

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 18 January 2021

**Public Authority:** Lewes District and Eastbourne Borough Council  
**Address:** Southover House  
Southover Road  
Lewes BN7 1AB

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to a planning application. Lewes District and Eastbourne Borough Council disclosed some information and withheld other information under the exception for the course of justice – regulation 12(5)(b).
2. The Commissioner's decision is that Lewes District and Eastbourne Borough Council failed to disclose information within the statutory time limit and breached regulation 5(2) but that it correctly withheld legal advice under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

## Background

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4. The complainant, who represents a local residents association, has explained that the request relates to a planning application for a small housing development down a bridleway, (reference LW/19/0474). The bridleway has dual status as a private road and the application was withdrawn and then re-submitted in a similar form as LW/20/0210.
5. Although the second application was rejected by Lewes District and Eastbourne Borough Council, the complainant has concerns that a future development might be approved, resulting in restricted public access to the bridleway.

## Request and response

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6. On 8 October 2019, the complainant wrote to Lewes District and Eastbourne Borough Council (the "council") and requested information in the following terms:

*"This is a Freedom of Information request to see all internal emails, correspondence, meeting minutes and any other file notes and written communications concerning the following:*

*- the above application's legal validity, specifically regarding access via a bridle way and boundary definitions in the application*

*- between LDC and West Sussex Highways Authority, West Sussex County Council, Mid Sussex District Council or Burgess Hill Town council concerning access via Theobalds Road to Valebridge Road*

*- concerning reaction to the formal letters submitted by Martin Stuart at Sensus Architecture..."*

7. The council responded on 7 October 2019 and disclosed some information.
8. Following an internal review the council wrote to the complainant on 9 January 2020. It stated that it had disclosed all the relevant held information.

## Scope of the case

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9. On 18 June 2020 the Commissioner advised the complainant that their complaint had been received for investigation.
10. During the Commissioner's investigation the council disclosed additional information to the complainant and withheld other information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
11. The Commissioner confirmed that her investigation would consider whether the council had correctly withheld the information.

## Reasons for decision

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### Regulation 5 – Time for compliance

12. Regulation 5(1) of the EIR states:

*"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."*

13. Regulation 5(2) states:

*"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."*

14. In this case the complainant submitted their request on 8 October 2019 but the council failed to disclose some of the information until the time of, the Commissioner's investigation, during November 2020.
15. The Commissioner finds that the council failed to disclose information within the statutory time limit and breached regulation 5(2).

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

16. 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."*

17. The Commissioner has issued guidance on the application of regulation 12(5)(b)<sup>1</sup>. 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.
18. 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 communications or exchanges come into being for the purposes of preparing for litigation."*<sup>2</sup>
19. 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?*

20. The council has stated that the withheld information constitutes legal advice from one of its in-house solicitors to their client, a planning officer and that it is subject to LPP. The council has confirmed that the confidentiality attached to LPP has not been lost.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

<sup>2</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_informa\\_t](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_informa_t)

21. 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.
22. 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.
23. The council has argued that disclosure of the information would result in public access to legal advice when the most recent planning application in respect of land associated with the planning application identified in the request is still live. It clarified that the matter is live in the sense that the council's refusal of the planning application (September 2020) is subject to any appeal made within six months.
24. The council confirmed that, whilst the advice in question about the validity of the developer's application was given in relation to the first application the advice applies equally subsequent applications as there was no change to the application boundary area. The council confirmed, therefore, that the advice continues to have relevance to the second application and any appeal against its refusal. In short, the information subject to LPP is still "live".
25. The council considers that disclosing the advice would indicate the council's reasons in September 2019 for rejecting the contention that the planning application was invalid. It has argued that this would undermine its position, should it need to re-consider the advice when dealing with any appeal against the recent refusal to grant planning permission or any subsequent application from the developer.
26. Having considered the available evidence, the Commissioner has concluded that the information is subject to LPP and she 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**

27. 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*

28. The Commissioner acknowledges 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 with, and better informed on, the matters that would have an impact on their lives.
29. The Commissioner also considers that there is a public interest in ensuring that public authorities have reached decisions on the basis of sound advice.
30. The complainant has argued that the planning application in question was not rejected by the council on grounds associated with access to the bridleway but for other reasons. They believe that the applicant could appeal the council's decision to refuse the application without, therefore, having to address the question of access.
31. The complainant has stated that, to date, part of the bridleway in question has single houses on single plots alongside, laid out in the 1920s, but there has never been a situation where more than one house has been approved on a plot on the basis of using the bridleway as the access. They are concerned that if this site were to be approved for multiple residences, it would create a domino effect which would erode public access to the bridleway.
32. In essence, the complainant considers that the council has wrongly determined that access to the bridleway is not a relevant concern and considers that there is, therefore, a public interest in accessing any advice which resulted in this decision.

### *Balance of the public interest*

33. 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.

34. 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.
35. The Commissioner recognises that the complainant has a genuine personal interest in accessing the information, and that a number of other local residents who are used to having access to the bridleway will also have an interest. She is mindful that the complainant is concerned about the prospect of a future housing development receiving planning approval and that they disagree with the council's grounds for refusing developments thus far.
36. However, the Commissioner is mindful that the withheld advice is still live and relevant to future applications which relate to the site in question. Whilst the complainant might disagree with the council's position, there are existing legal channels available for those wishing to challenge planning decisions. In order to justify circumventing these channels and interfering with the course of justice, sufficiently weighty public interest factors will need to be present.
37. The Commissioner 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 those few persons potentially affected by this matter and by a scenario (a development) which has not yet come to pass, the Commissioner has no evidence that these effects are present in this case.
38. 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.
39. 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. 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 a relative few 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.

40. 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).
41. 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

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42. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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**  
**Head of FoI Casework and Appeals**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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