

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 January 2023

Public Authority: Surrey County Council
Address: Woodhatch Place
11 Cockshot Hill
Reigate
RH2 8EF

Decision (including any steps ordered)

1. The complainant requested from Surrey County Council information concerning its decision not to grant Planning Inspectorate consent for the erection of a compound and structure on registered common land at Newlands Corner, despite the requirements of Section 38 of the Commons Act 2006. Surrey County Council withheld the requested information under Regulation 12(5)(b) of the EIR stating it was covered by legal professional privilege and disclosure would adversely affect the course of justice.
2. The Commissioner's decision is that Surrey County Council has correctly applied Regulation 12(5)(b) of the EIR. However, it breached Regulation 5(2) of the EIR by taking in excess of 20 working days to respond to the complainant's request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 16 May 2022 the complainant wrote to Surrey County Council and requested information in the following terms:

"Therefore, to remove any possibility of doubt in the Council's mind, I request that the following information is provided to me under the freedom of information provisions:

- The Council has stated that it does not consider that Planning Inspectorate consent is required for the erection of the compound and structures currently in place on the registered common land at Newlands Corner, despite the requirements of section 38 of the Commons Act 2006. Its overarching reason, without supporting evidence, is that "the temporary compound is considered a temporary installation whilst the works are being undertaken and does not therefore require commons consent". Would you please, therefore, provide the following information:

- the officers' full reasons why consent for temporary fencing and structures is not required;

- the title of the Act(s), Order or regulations which the officers consider support their contention that consent is not required;

- the specific sections, sub-sections, articles, paragraphs, schedules, or regulations within those statutes which the officers consider support their contention that consent is not required

- the reference of any case law which the Council is using to support its decision not to seek consent.

and, in the event that the above information is refused, would you please set out:

- the specific exception the Council is employing for refusal, giving the relevant Environmental Information Regulations 2004 regulation, paragraph and sub-paragraph;

- an explanation of why the Council is not presuming in favour of disclosure; and

- an explanation of why the public interest in maintaining the exception outweighs the public interest in disclosing the information".

5. The Council responded on 21 June 2022 to each of the four main questions in the complainant's request. It stated its understanding that verbal legal advice was sought, and the legal opinion was that as the structure was only going to be in place for a matter of weeks no Commons Consent was needed. It added that after meetings on site, risk to the environment from the temporary storage was assessed as low as the storage was in an established car park and access was not significantly blocked (no formal report was deemed needed or written). Finally, it said temporary storage would be removed when the work had finished in early July, with full remediation works, though no significant damage was expected.

6. As the complainant was dissatisfied with the Council's response, he requested an internal review on 3 July 2022.
7. Following an internal review, the Council wrote to the complainant on 11 August 2022. It apologised for taking in excess of 20 working days to respond to the complainant's request and stated (contrary to its original response) that it did hold some recorded information falling within its scope. This information comprised of an internal email exchanged with its Legal Department which it said was subject to Legal Professional Privilege and therefore exempt from disclosure under Regulation 12(5)(b) of the EIR.

Scope of the case

8. The complainant contacted the Commissioner in October 2022 to complain about the way his request for information had been handled. In particular, he was dissatisfied with the Council's decision to withhold the requested information under Regulation 12(5)(b) of the EIR.
9. The complainant agreed with the Commissioner on 15 December 2022 that the scope of his complaint could be restricted to the Council's decision to apply Regulation 12(5)(b) of the EIR to the withheld information. However, the Commissioner also agreed to consider the enquiries and searches the Council carried out to identify and locate all recorded information falling within the scope of the request.

Reasons for decision

Regulation 5 of the EIR – duty to make environmental information available on request

10. Under Regulation 5(1) of the EIR, and subject to a number of EIR provisions, a public authority which holds environmental information shall make it available on request.
11. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that no further information is held, and he will consider any other reasons offered by the public authority to explain why no further information is

held. The Commissioner will also consider any reason why it is inherently likely or unlikely that no further information is held.

12. In this case the Council has stated that the only recorded information it holds falling within the scope of the complainant's request is an internal email between the service and its Legal Department which it said was covered by Legal Professional Privilege (LPP) and therefore exempt from disclosure under Regulation 12(5)(b) of the EIR.
13. The Commissioner contacted the Council on 19 December 2022 and requested the withheld information together with details of the enquiries and searches it carried out to locate and extract any information falling within the scope of the request.
14. The Council responded on 5 January 2023 with a copy of the withheld email and reiterated that it was the only recorded information located following its enquiries and searches with the relevant service area.
15. Having seen the withheld information and taken into consideration the Council's arguments, the Commissioner is satisfied, on the balance of probabilities, that no further recorded information is held falling with the scope of the complainant's request.

Regulation 12(5)(b) – adversely affect the course of justice 8

16. The Council has withheld the requested information under Regulation 12(5)(b) of the EIR on the basis that it is subject to LPP, and disclosure would adversely affect the course of justice.
17. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its 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.
18. The threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not; that is, a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

19. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance on the Regulation 12(5)(b)¹, it encompasses, amongst other types of information, material covered by legal professional privilege (LPP).
20. The Council has confirmed it holds the requested information which it argues is subject to legal advice privilege as it constitutes a confidential communication between a client and a lawyer for the purpose of seeking legal advice. It referenced the Law Society's guidance which states; 'Legal advice privilege protects communications between a lawyer and client that are made for the sole or dominant purpose of giving or receiving of legal advice'². This includes communications that form part of a continuum which aims to keep client and lawyer informed so that legal advice may be given as required'³. The Council stated that requests for such information must be kept confidential between a client and a solicitor as the 'repercussions for any lawyer not respecting that would be severe'.
21. The Commissioner recognises that LPP is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence. Disclosure of information which is subject to LPP will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis in response to information requests. The Council and its adviser's confidence that discussions will remain private will become weaker and discussions may therefore become inhibited.
22. Having considered the withheld information the Commissioner is satisfied that it represents a confidential communication between a client and a professional legal advisor, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception>

² <https://www.lawsociety.org.uk/topics/civil-litigation/legal-professional-privilege-guide>

³ <https://www.lawsociety.org.uk/topics/civil-litigation/legal-professional-privilege-guide>

23. The Commissioner has also considered whether the confidence attached to the information has subsequently been lost or waived through a disclosure of the advice to the world at large. Having considered the Council's arguments, the Commissioner is satisfied that the legal advice remains subject to LPP.
24. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
25. Although the specific matter which precipitated the advice may no longer be live, it is arguable that the advice is still relevant to any similar scenarios which may arise in the future concerning the application Section 38 of the Commons Act 2006
26. 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.

The balance of the public interest

27. Regulation 12(5)(b) is a qualified exception, and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exception being maintained.

Public interest arguments in favour of disclosure

28. Regulation 12(2) of the EIR provides a presumption in favour of disclosure, which adds weight in favour of environmental information being disclosed in response to an EIR request.
29. There is always a public interest in a public authority conducting its business in a transparent manner.
30. The Council has argued disclosure would promote transparency and accountability for its actions and decisions.
31. The complainant believes there are strong public interests in favour of the requested information being disclosed. He has pointed out that the Council has failed to provide any legal references to support their decision to avoid seeking consent under Section 38 of the Commons Act 2006 for the carrying out the restricted works subject to his request for information. In his view, failure to make an application under Section 38 of the Commons Act 2006, when required to do so, is not only illegal but

deprives the public of the right to make formal representations to the Planning Inspectorate about proposed works.

Public interest arguments against disclosure

32. The Council has argued it is fundamental to the administration of justice for LPP to be preserved as it safeguards the openness of all communications between a client and lawyer to access full and frank legal advice. 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 where the authority serves the public.
33. The Council's view is that the balance of the public interest lies in the exception being maintained in this case. It believes the importance of the factors favouring non-disclosure outweigh those considerations favouring disclosure.

The Commissioner's view

34. The Commissioner's role does not include commenting on or making a decision in relation to the Council's stance in relation to the application of Section 38 of the Commons Act 2006. His role is limited to deciding whether the Council was correct to refuse to provide the requested information for the reasons it has stated.
35. The Commissioner recognises there is a public interest in a Council being transparent about its actions, so it is accountable for them. The Commissioner also accepts the complainant's view that there is a public interest in matters that relate to the transparency and accountability of decisions made by a Council. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
36. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
37. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the

Bellamy⁴ case when it stated that: "...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...." Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023) ³.

38. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
39. The Commissioner's decision is that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
40. The Commissioner has made his decision in this case based on the contents of the withheld information, the complainant's arguments and on the evidence, he has received from the Council.
41. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions.
42. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

Regulation 5(1) of the EIR – environmental information to be made available on request

43. Regulation 5(1) states that: "a public authority that holds environmental information shall make it available on request."

⁴ Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

44. Regulation 5(2) states that such information shall be made available "as soon as possible and no later than 20 working days after the date of receipt of the request."
45. The Commissioner considers that the request in question constituted a valid request for information under the EIR.
46. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the Council breached Regulation 5(2) of the EIR. This breach has been accepted by the Council for which it has apologised.

Right of appeal

47. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**