

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2023

Public Authority: Croydon Council
Address: Bernard Weatherill
House 8
Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested specific legal advice. London Borough of Croydon ('the Council') refused to provide the requested information, citing regulation 12(5)(b) (the course of justice and enquiries).
2. The Commissioner's decision is that the Council was correct to withhold the requested information under regulation 12(5)(b).
3. The Commissioner does not require further steps.

Background information

4. The Commissioner understands there is a complex background history to this complaint and the relationship between the Council and the complainant.
5. The Council has explained there have been disputes between the residents of a specific road (including the complainant) as to the right or otherwise of vehicular access at a specific part of the road ('the road'). The complainant asserts that the right of way status of the road is a bridleway, i.e., there are no public vehicular rights of access.

6. The Council has explained that a company, connected to the complainant and other neighbouring residents, purchased the freehold of a portion of the road and may now have passed its interest to a second company, also connected to the complainant and other residents. The complainant commenced judicial review proceedings against the Council in 2018 and discontinued them in 2019 regarding the public right of way status of the road.
7. The Council has made a Definitive Map Modification Order ('DMMO') application in relation to the road, stating that it has restricted byway status. The complainant has disputed the DMMO and, where a DMMO is subject to unresolved objections, the Council is obliged to submit the Order to the Secretary of State for consideration as to whether or not the DMMO will be granted. Therefore, the Council expects that in due course a Public Inquiry will take place into the DMMO.
8. The Council has explained that there is an added complication in that a third party (separate to those referred to in paragraph 6) has also purchased land which includes part of the road. This third party is also asserting legal rights and claims about the public rights of way status of the road.

Request and response

9. On 22 September 2022, the complainant wrote to the Council and requested:

"A freedom of information requests is hereby made to both Croydon Council and the Planning Inspectorate to disclose all professional advices, including legal advices, received by Croydon Council and the Planning Inspectorate held in any format and created over the last ten years in relation to all issues associated with the above.

This is a matter of general public interest and all advices received by Croydon Council in connection with its consideration of the DMMO application presented to it and the separate order it has made should be disclosed to the public to allay fears of bias, conflict, self-protection and general decision making shortcomings."
10. The Council responded on 27 October 2022. It confirmed that the professional advice was in the public domain and had previously been provided to the complainant. It also confirmed that the legal advice was exempt from disclosure under regulation 12(5)(b) (the course of justice and inquiries).
11. The complainant wishes to challenge the Council's reliance on regulation 12(5)(b).

12. The withheld information is legal advice that the Council has received since 2015, from counsel and in-house and external legal teams.

Reasons for decision

13. The Commissioner is satisfied that the requested information falls within the definition of environmental information according to regulation 2(1)(c) of the EIR, which relates to measures and activities that will affect the landscape. Therefore, the Council was correct to handle this request under the EIR.
14. Regulation 12(5)(b) of the EIR exempts information from disclosure if doing 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. To reiterate, the withheld information is legal advice and 'The judicial review concluded in 2019, but it related directly to the predominant issue at stake – i.e., the public right of way status' of the road. The Commissioner understands that the purpose of the withheld information was the seeking and giving of legal advice and its accepted by the Commissioner that disclosure of information that attracts LPP (legal professional privilege) would adversely affect the course of justice, and therefore regulation 12(5)(b) can apply to this information.
16. The Council has explained, even though the judicial review concluded in 2019, the content of the legal advice remains relevant and applicable in relation to the ongoing disputes about the road. It has also argued that 'The threatened legal proceedings remain in existence and all legal advice relating to them is live.'
17. In order for information to engage regulation 12(5)(b), its disclosure must, more probably than not, adversely affect the course of justice. If the complainant, or any other party, were made privy to the Council's legal advice and intended arguments or position in relation to its support of the restricted byway of the road, this would simultaneously strengthen third party's positions and weaken the Council's.
18. DMMOs, and any other judicial challenges, are meant to be carried out on an even playing field. Requiring the Council to disclose its legal advice, when it is likely it will need to rely on it in the future, would unfairly disadvantage the Council and therefore the Commissioner is satisfied that the exception is engaged. However, as a qualified exception, the information may only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest test

19. The only public interest argument in favour of disclosure that the Council has identified is 'providing such information would aid transparency and understanding of the issues surrounding the DMMO applications.'
20. The Commissioner agrees. He also notes that there is always an inherent public interest in public authorities being open and transparent and compliance with a request received under the EIR would demonstrate those qualities.
21. The complainant believes this matter is a significant public interest matter and has explained to the Commissioner, 'The advice impacts thousands if not tens of thousands of members of the public that use the way each year, and has cost the council, we estimate, over £100k in fees.' The Commissioner can't verify these claims, neither is it his role to do so. However, he does accept that the information will be of particular interest to the parties disputing the status of the road and those who may live on it or be affected by the decision in some way.
22. On the other hand, there is always a strong inherent public interest in protecting the exchange of legal communications between clients and those advising; the concept of LPP is vital to the English justice system and it requires strong public arguments to overturn anything that might undermine this principle.
23. Whilst he recognises that this is an emotive and important issue for the complainant, the Commissioner believes that the balance lies in maintaining the exception. It's not for the Commissioner to comment on which party has the best position or what the status of the road is. It appears that is for the Secretary of State to decide and this decision should be allowed to be made without either party's position being undermined. The complainant is concerned that the status of the road affects a significant number of individuals and has cost the Council a significant amount of money; since this is the case it's in the public interest for the appropriate status of the road to be determined as efficiently as possible so, to benefit all parties involved.

Right of appeal

24. 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

25. 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.
26. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF