

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 July 2023

Public Authority: Braintree District Council
Address: Causeway House
Bocking End
Braintree
Essex
CM7 9HB

Decision (including any steps ordered)

1. The complainant requested a copy of legal advice from Braintree District Council ('the council') about a planning application which was under appeal. The council refused the request, applying regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that the council was correct to apply regulation 12(5)(b) to withhold the information from disclosure.
3. The Commissioner does not require the council to take any further steps.

Request and response

4. On 29 January 2023, the complainant wrote to the council and requested information in the following terms:

"Please could you let me see a copy of counsel's advice to Braintree District Council in which counsel assessed the merits of the Council's case in defending the planning appeal by Barkley Projects (Kelvedon) LLP against the refusal of outline planning permission for 300 houses and other facilities to the north of London Road, Kelvedon (ref 17/00679/OUT)

I make this request under the Freedom of Information Act."

5. The council responded on 21 February 2023. It applied the exception in regulation 12(5)(b) of the EIR and refused to provide the information
6. Following an internal review, the council wrote to the complainant on 24 April 2023. It upheld its initial decision to withhold the information.

Scope of the case

7. The complainant contacted the Commissioner on 10 May 2023 to complain about the way their request for information had been handled.
8. The complainant explained that the council had already provided them with detailed arguments as to why it had chosen not to defend the appeal, and they therefore argued that the council was not correct to apply regulation 12(5)(b) to refuse to provide the requested information.

Reasons for decision

Background to the case

9. The council refused the relevant planning application notwithstanding that council planning officers working on the application had recommended its approval. The planning applicants appealed the decision to refuse planning permission to the Planning Inspectorate, at which point the council sought legal advice on its position. Following its receipt of the advice, the council chose not to defend its decision before

the planning inspectorate, other than in certain circumstances¹. The complainant was told that the reason for this was that the legal advice suggested that its legal position was weak. The planning inspectorate subsequently found in favour of the appellant.

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

10. The following reasoning explains why the Commissioner has decided that the council is entitled to rely on regulation 12(5)(b) of the EIR to refuse disclose the requested information.
11. Regulation 12(5)(b) allows a public authority to 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.
12. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP, it may still fall within the scope of the exception if its disclosure would have an adverse affect upon the course of justice or the other issues highlighted. In this case, however, the council argues that the information is subject to LPP.

Is the information subject to LPP

13. The council argued that the information is subject to both litigation and advice privilege. The requested information is legal advice provided by a professional barrister to the council about its position regarding the planning appeal. It therefore argued that the information is subject to litigation privilege.
14. The council also noted that details within the advice would be relevant to future situations with similar circumstances. It therefore argued that the advice was also subject to advice privilege as it would be used to inform its future decision making in similar circumstances.
15. The council confirmed that the information has not been shared outside of the council and is not otherwise in the public domain.

¹ Noted in para 7.2 of the council's 'Statement of Case' to the planning inspectorate within the relevant appeal documents.

16. The Commissioner is satisfied that the advice was provided by a professional legal practitioner to the council for the dominant purpose of providing legal advice regarding the appeal hearing. He is therefore satisfied that the information is subject to litigation privilege.
17. The Commissioner also accepts that the advice would be relevant in future, similar circumstances, and that the council's decisions in such circumstances would be likely to be informed by the advice which it received.
18. The Commissioner is satisfied that as the information has not been shared outside of the council, the confidentiality of the advice, and therefore LPP, has not been waived.
19. As the withheld information is subject to LPP and related, at the time of the response, to a live matter, a disclosure of the information would undermine the level playing field which is intended between the parties during the course of litigation proceedings. It would disclose confidential communications between one party and their legal advisers regarding the litigation.
20. The Commissioner is therefore 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 Commissioner will now go on to consider the public interest test.

The public interest

21. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
22. Regulation 12(2) of the EIR also provides a presumption towards the information being disclosed.
23. The council outlined the factors it took into account in favour of disclosing the requested information. It acknowledged that there is a legitimate public interest in transparency and accountability as to how justice is administered, and this would be furthered by disclosure of the requested information. The Commissioner agrees that there is a public interest in creating transparency in planning matters and in highlighting the work of the council relating to its planning and enforcement functions.
24. On the counter side, the council argued that there is an inherent strong public interest in legal professional privilege being maintained, and that this is stronger when a matter remains live. The council noted that the

request for information was made after the date of the hearing, but prior to the Planning Inspectorate's decision being handed down. At the time of its response, therefore, it related to a live matter.

25. The Commissioner notes, however, that as the hearing had already taken place at the time that the request was received, this argument provides only a limited weight towards withholding the information as regards this particular planning issue. In essence, the Council had received the advice, decided not to defend its position, and had already submitted that position to the Planning Inspectorate. It was simply awaiting the Planning Inspectorate's decision to be promulgated. The Commissioner does note, however that there is an opportunity to appeal a Planning Inspector's decision, and that the council had reserved the right to defend certain issues should the need arise.
26. The Commissioner accepts that in reality, in this case, a further appeal was highly unlikely to occur given that the council had decided not to defend its decision before the Planning Inspectorate.
27. The Commissioner also notes the council's argument that the advice will be relevant to other, similar situations, and that it will be used to feed into its decisions in such circumstances. The council noted, also, that the advice may be relevant to other decisions it may be required to take on the site concerned.
28. The Commissioner accepts that there is a strong public interest in allowing the council to be able to seek legal advice on a full and frank basis without fear that subsequent disclosures might affect its legal position in later cases or with later issues. It is in the public interest that the council is able to seek legal advice on a confidential basis in order to determine the legal robustness of its position in this, and other similar cases.
29. Finally, the Commissioner notes that the council has not misrepresented the advice which it received, and he accepts that it has been transparent about its reasons for reaching a decision not to defend its position.

The Commissioner's conclusions

30. The Commissioner notes a strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the English legal system.
31. The Commissioner has taken into account the circumstances surrounding the request, both party's arguments, the timing of the request and the nature of the withheld information. Although the council's arguments for the LPP being maintained are weakened to an

extent by the circumstance of this individual case, he is satisfied that the balance of the public interest remains with the exception being maintained in this instance.

32. 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. Whilst the Commissioner has taken into account the requirements of Regulation 12(2), he considers that the public interest that lies in favour of maintaining the exception clearly outweighs that in the information being disclosed in this instance. As the withheld information concerns an ongoing issue, and the legal advice would be relied upon by the council in future similar circumstances, the Commissioner does not consider that the presumption in regulation 12(2) tips the balance in favour of disclosure in this instance.
33. Therefore, 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.

Right of appeal

34. 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

35. 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.
36. 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

Ian Walley
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