

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 12 September 2016

Public Authority: East Hertfordshire District Council
Address: Wallfields
Peg Lane
Hertford
Herts
SG13 8EQ

Decision (including any steps ordered)

1. The complainant has requested information, including legal advice, in respect of the General Permitted Development Order Class Q agricultural buildings to dwelling houses, and paragraphs 108 and 109 of the Planning Practice Guidance. The council provided some information in response to this request, but stated that a portion was legal advice and was exempt under section 42 of the FOIA. During the course of the investigation, the council released an extract of the legal advice to the complainant. It also determined that the EIR was the appropriate legislation and therefore confirmed that it was withholding the remaining information under regulation 12(5)(b).
2. The Commissioner's decision is that East Hertfordshire District Council has correctly applied the exception at 12(5)(b) and the public interest favours maintaining the exception. However, in responding outside the statutory time frame, the Commissioner finds the council in breach of regulation 5(2).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 1 February 2016 the complainant requested information of the following description:

"This is to request any communications which have taken place between the Council, PINS, Counsel and/or any other legal advice be it internal to East Herts Council or external in respect of the General Permitted Development Order Class q agricultural buildings to dwelling houses and the guidance found at PPG paragraph 108 and 109 introduced March 2015. To aid the Council's response it is understood that this communication has taken place in December 2015 to present day but if this dates back further, then that communication also forms part of the request."

5. On 2 March 2016 the council responded. It provided information in respect of communications between the council and the Planning Inspectorate, with personal data redacted. It withheld information in respect of communications between the council and legal specialists, relying on section 42 of the FOIA as the information was subject to legal professional privilege.
6. The complainant requested an internal review on 3 March 2016. The council sent the outcome of the internal review on 23 March 2016, which maintained the original position.
7. During the course of the investigation, the complainant contacted the Commissioner to say that he was aware that the council had recently disclosed an extract of the withheld legal advice information. He advised that he only discovered this information through a search of the council's planning system. He explained that the information has since been disclosed to him in a decision notice from the council on his own prior approval application.

Scope of the case

8. The complainant contacted the Commissioner on 31 March 2016 complain about the way his request for information had been handled. In particular he was concerned that legal advice information had been withheld, and that the council had not responded within the 20 working day time frame.
9. The Commissioner considers the scope of the case to be to determine whether the council was correct to withhold the legal advice information

and also to record whether the council complied with the timescales of the EIR.

Reasons for decision

Environmental Information

10. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies this definition the request must be considered under the terms of the EIR rather than the FOIA.
11. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
12. The Commissioner has considered the nature of the information sought by the complainant. He has determined that the information is environmental information on the basis that it relates to legal advice provided to the council in respect of interpretation of a specific aspect of planning guidance and law relating to class Q conversion of agricultural buildings to residential dwellings. This legal advice has been relied upon for the council to refuse prior approvals in a number of cases, and has therefore had an impact on the land. The Commissioner therefore considers that the withheld information concerns an element of the environment.

Regulation 12(5)(b) – where disclosure could prejudice the course of justice

Is the exception engaged

13. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
14. The Council has explained to the Commissioner that the request relates to legal advice on the council's position that existing planning guidance (NPPG) is in conflict with requirements detailed in Planning Legislation (General Permitted Development Order – GPDO). The council's position

has been rejected by the Planning Inspectorate in a number of separate planning appeal cases.

15. The council has made clear to the Commissioner that at the time of the request, the withheld information was subject to legal advice privilege. The information consisted of communications between council officers in the planning department and legal counsel which were conducted for the sole purpose of obtaining and providing legal advice.
16. The council has also advised that during the course of this investigation, it has served papers to commence the application for a judicial review of a decision delivered by the planning inspectorate. This judicial review is concerned specifically with the council's reliance on the legal advice regarding what it perceives to be a conflict between the NPPG and the GPDO. It therefore maintains that the information now also attracts litigation privilege.
17. The Council therefore considers that disclosure of this information would likely prejudice the course of justice in a matter which is still very much live.
18. The complainant maintains that the council has disclosed part of the legal advice in its decision notices delivered against prior approval applications, and therefore that the legal professional privilege is lost as the information has effectively been made public.
19. The council disagrees with this position. It states that the legal advice in question goes into detail on the appropriateness of the council's decision in respect of the perceived conflict between the NPPG and the GPDO. The advice also makes recommendations as to future action on this matter and a strategic view of the processes to be followed in order to pursue a case for challenging the position of the Planning Inspectorate. The council therefore considers that the very brief summary of a small part of the legal advice does not render confidence lost.
20. The Commissioner's guidance on the matter of lost privilege states:

"If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its LPP protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal

advice that does not reveal its substance will not lead to a loss of privilege.”¹

21. Having seen the information, the Commissioner notes that the summary of legal advice which is included in the council’s planning decision notices is taken from one paragraph of the much more comprehensive legal advice document. The withheld information comprises the legal advice document, as well as correspondence between the council and legal counsel seeking the advice. The Commissioner is satisfied that the brief summary contained within the planning decision notices does not lead to a loss of confidence of the remaining information as it does not give the detail of the legal arguments behind the main thrust of the advice. Nor does it go into any detail relating to the other areas that the advice covers.
22. In order for the exception to be engaged, the council must demonstrate that disclosure of the information would adversely affect the course of justice.
23. The council cited the case *DCLG v Information Commissioner & WR* in its arguments surrounding the adverse affect of disclosure, specifically:

“50. Mr Bates and Miss John were at one in submitting that, in determining whether disclosure “would adversely affect the course of justice”, the IC or tribunal is not limited to considering the effect (if any) on the course of justice in the particular case in which disclosure is sought. The IC or tribunal can and must take into account the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisers will not be subject to disclosure. In our judgment that submission is correct.”²
24. The council stated that it believed that the general principles identified are persuasive, and indicate that the exception should apply.
25. The Commissioner is satisfied that the information is subject to a claim of legal professional privilege, and that disclosure of the information

¹ Paragraph 33 - Legal professional privilege (section 42) https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

² *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012),

would have an adverse affect on the course of justice and therefore that the exception at regulation 12(5(b)) is engaged.

The public interest test

26. 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 his 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 maintaining the exception

27. The council gives weight to the position outlined by the tribunal in the above mentioned case *DCLG v Information Commissioner & WR*; that the public interest in maintaining the exceptions lies in safeguarding the openness of all communications between client and legal counsel, to ensure that full and frank advice is provided. It also notes the position in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* which states that "*there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest*".³
28. The council also believes that disclosure would prejudice the high court case, and would also prejudice its position with regard to the continued handling of planning application decisions and subsequent appeal cases. The council relies on the Commissioner's decision notice FER0590324 which stated "*The council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.*"⁴
29. The Commissioner recognises that due to the ongoing high court case, the legal advice is still very much live and being actively relied upon by the council. It is also still being used as part of the council's responses to relevant planning application decisions. Therefore there is a

³ *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023)

⁴ Paragraph 19 – FER0590324 https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624461/fer_0590324.pdf

considerable public interest in maintaining the exception and allowing the council to be able to continue to rely on the advice and defend its position on the basis of sound advice.

Public interest in disclosure

30. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
31. The council states that it has been unable to identify any specific matters of public interest in disclosing the information.
32. The complainant states that in support of his argument for the release of information, an application for planning is a costly and time consuming process, therefore the council should not withhold information which could help an applicant decide whether or not to make an application. He considers that withholding the information is hindering applicants, resulting in unsuccessful and costly applications that could be avoided. He argues that disclosing the legal advice would allow for a thinning out of applicants, which would in turn save time and money for both individuals and the council.
33. The complainant has also stated that he believes the legal advice is general and not specific to an individual or business. He therefore considers that the information should be public knowledge.

Balance of the public interest

34. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions. However, having considered the withheld information as well as the wider circumstances of the matter, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the council's right to obtain legal advice in confidence.
35. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. 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.
36. In this case, the Commissioner acknowledges that the issue is a contentious one as the council is challenging the Planning Inspectorate's

interpretation of the law and guidance on a specific planning matter. However, there is no evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. It is clear to the commissioner that it is in contentious and difficult cases like this, that a public authority needs a safe space to seek and take legal advice in confidence.

37. In this particular case, the fact that the withheld information has been submitted as part of the bundle for a Judicial Review at the High Court, gives stronger weight to the maintenance of the exception, as the legal advice is very much live and in use. It is possible that over the time, the public interest in maintaining the exception will diminish, but at the present time, and at the time of the request, this is not the case.
38. The Commissioner's decision is that the exception at 12(5)(b) is engaged, and the public interest favours maintaining the exemption and withholding the information.

Regulation 5(2)

39. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) provides that this information should be made available within 20 working days following receipt of the request.
40. The complainant's original request was made on 1 February 2016 and a response was provided on 2 March 2016. The Commissioner therefore concludes that the council has breached regulation 5(2) by failing to make the requested information available within 20 working days following receipt of the request.

Right of appeal

41. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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
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