

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 September 2017

Public Authority: Forest of Dean District Council
Address: Council Offices
High Street
Coleford
GL16 8HG

Decision (including any steps ordered)

1. The complainant has requested information relating to planning applications. Forest of Dean Borough Council refused the request, withholding the information under the exception for adverse affect to the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Forest of Dean District Council:
 - failed to conduct an internal review within the time limit in breach of regulation 11(4), and
 - correctly applied regulation 12(5)(b) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 1 February 2017, the complainant wrote to Forest of Dean Borough Council (the "council") and requested information in the following terms:

(In relation to applications regarding 24b Meendhurst Road, Cinderford)

"...copies of all correspondence, emails, notes and minutes brought into existence as a result of my two applications. It is clear from the emails to myself that the girl dealing with my applications was being advised by others and I need to see who that was and what advice they gave. In particular I am interested in anything which indicates that the Council knew that my applications could not succeed before they took my fee payments."

5. The council responded on 27 February 2017 and confirmed that it was withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
6. On 1 March 2017 the complainant wrote to the council and asked it to review its handling of the request. On 2 March 2017 the council wrote to the complainant and advised that it would not conduct an internal review.

Scope of the case

7. On 20 March 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the course of her investigation the Commissioner directed the council to carry out an internal review of its handling of the request. The council took this step and wrote to the complainant with the outcome of its review on 13 September 2017. The council confirmed that it was now relying solely on regulation 12(5)(b) to withhold the requested information.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information under regulation 12(5)(b) of the EIR.

Reasons for decision

Regulation 12(5)(b) – Adverse affect to the course of justice

10. Under this exception a public authority can refuse to disclose information on the basis that *"...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"*.
11. The Commissioner's guidance explains that *'an inquiry of a criminal or disciplinary nature'* is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law¹. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that *'an inquiry of a criminal or disciplinary nature'* is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
12. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an *"adverse"* effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word *"would"* is *"more probable than not"*.

Is the exception engaged?

13. The council has explained that the communications sought consist of the advice given by its in-house legal advisers to its client, the planning department in relation to the fees to be paid on 2 applications for certificates of lawfulness, under the Town and Country Planning Act 1990, for which the council is the local planning authority. The council confirmed that it considered that the information constitutes legal advice and that it is subject to LPP.

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

14. The Commissioner accepts that the information is as characterised by the council and that it has not been more widely disclosed. However, whilst information subject to confidentiality provided by LPP does not in itself engage the exception – for this to happen it must be shown that disclosure would result in adverse affect to the course of justice.
15. The council has stated that the complainant has issued litigation against the council in an attempt to recover the planning fees referred to (in paragraph 14) above. It has explained that the complainant's claim suggests that the council acted fraudulently in requesting the fee.
16. The council has argued that, although the Court has at present dismissed the claim as not disclosing detailed grounds, the complainant has communicated his intention to appeal that decision. The council considers that, in view of this, disclosure would disadvantage the council by exposing and undermining its legal discussions and position.
17. Having considered the council's arguments, and reviewed the withheld information, the Commissioner recognises that the information relates to a live and ongoing inquiry and legal process undertaken by the council.
18. The Commissioner is of the view that disclosure of information of information subject to LPP, particularly in the context of a live legal dispute, will have an adverse effect on the course of justice. She considers the likelihood of this happening to be more probable than not. 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.
19. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure

The public interest test

20. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the requested information

21. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. In her view this helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. She considers that this is especially the case where the public authority's actions have a direct effect on the environment.
22. The complainant has alleged that the council has engaged in fraudulent activities in relation to the matter of fees for certificates of lawfulness. Disclosure of the information would serve the public interest in knowing whether a public authority has behaved lawfully in carrying out its duties as a local planning authority.

Public interest arguments in maintaining the exception

23. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought which, in turn, would have a negative impact upon the quality of decisions made by the council which would not be in the public interest.
24. The council has highlighted previous decisions issued by the Commissioner and decisions of the First-Tier (Information Rights) Tribunal which have found that LPP is fundamental to the administration of the course of justice and, therefore, any decision that could weaken the confidence in the protection that LPP provides should not be taken lightly.
25. The council has argued that the matter was live at the time of the request and that disclosure would, therefore, be more likely to have a severe impact on the course of justice. It has also directed the Commissioner to note that the matter relates to a private legal dispute with the complainant and that disclosure would not, in this case, serve the wider public interest.

Balance of the public interest

26. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: Safeguarding openness in all

communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.

27. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): “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”.
28. The Commissioner notes that the legal advice is still current. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council’s strategy in such scenarios. She acknowledges that this would result in adverse effect to the course of justice by revealing the council’s legal strategy to potential opponents and undermining the principle that legal advice remains confidential. . In the Commissioner’s view, this weighs heavily in the balance of the public interest test in this case.
29. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. She also notes that the complainant has concerns that the council has committed fraud. However, the Commissioner has not been presented with any compelling evidence that this is the case, nor does she consider that it falls within her remit to determine whether fraud has taken place. She also considers that the planning process and other dispute procedures provide mechanisms for such issues to be addressed and concerns about maladministration or fraud, can be progressed in other arenas than under the EIR.
30. In addition, whilst the Commissioner accepts the complainant’s interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
31. Furthermore, the Commissioner considers that the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant’s interests against those of the council and its ability to undertake planning matters and inquiries on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case. In reaching these conclusions the Commissioner has referred to the decision issued by the First-Tier

(Information Rights) Tribunal decision in EA/2013/0184, which she considers has parallels with and accords with the decision in this case².

32. 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).
33. 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.

Regulation 11 – internal review

34. Regulation 11 sets out public authorities' duties in relation to dealing with complaints about the handling of requests for information. The complaints handling process is commonly known as an "internal review".
35. Regulation 11(4) provides that any authority in receipt of a complaint should send the outcome of its internal review to a complainant within 40 working days of the date its receipt.
36. In this case the complainant requested an internal review on 1 March 2017 and the council, initially declined to conduct a review. On 13 September 2017, after being prompted by the Commissioner, the council sent the complainant its internal review decision.
37. The Commissioner has concluded that the council breached regulation 11(4) of the EIR.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1311/de%20Hussey,%20Rosemary%20EA.2013.0184%20\(16.06.14\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1311/de%20Hussey,%20Rosemary%20EA.2013.0184%20(16.06.14).pdf)

Right of appeal

38. 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

39. 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.
40. 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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