

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

Date: 9 July 2019

Public Authority: Cotswold District Council
Address: Trinity Road,
Cirencester,
Gloucestershire, GL7 1PX

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed development. Cotswold District Council disclosed some information and withheld other information under section 42 of the FOIA and regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Cotswold District Council failed to respond to the request in time and breached regulation 5(2) and regulation 14(2), and that it correctly withheld information under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

Background

4. In January 2016, Bathurst Development Limited (BDL) submitted an Outline Planning Application to Cotswold District Council which included the erection of up to 2,350 residential dwellings on Land South of Chesterton, Cirencester.
5. On 16 January 2018 Cotswold District Council granted outline planning permission for the development.
6. In June 2018 it was reported that the council had sought legal advice from a QC in relation to the planning decision.
7. The complainant acts on behalf of "Save Our Cirencester", a campaign group opposed to the development.

Request and response

8. On 3 April 2018, the complainant wrote to Cotswold District Council (the "council") and requested information in the following terms:

"CDC has released figures showing that the costs for the QC employed at two special council meetings to discuss the Chesterton OPA was £30,865.

We note the following statement from a CDC spokesman:-

"The district council employed the QC for two full council meetings, and he also provided on-going services from September 2017 to January this year."

A) In relation to the above,

- 1. What instructions did CDC give to the QC ?*
- 2. What advice did CDC receive from the QC ?*

B) What role did the QC play in the preparation of the officer's report?

9. The council responded on 3 October 2018, disclosing some information and confirming that a further response would be forthcoming
10. The council provided a further response on 26 October 2018 in which it confirmed that it was withholding information request in part A of the request under the FOIA exemption for legal professional privilege

(section 42) and the EIR exception for the course of justice (regulation 12(5)(b)).

11. Following an internal review the council wrote to the complainant on 28 November 2018 stating that it was maintaining its position.

Scope of the case

12. On 9 January 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.
14. At the outset of her investigation the Commissioner noted that the council had handled the request under both the FOIA and the EIR. In view of the nature of the request it occurred to her that it was likely that the request was solely subject to the provisions of the EIR. She advised the council of this and the council agreed to provide submissions on the basis that the EIR alone was the relevant legislation.

Reasons for decision

Regulation 5(2) – duty to provide environmental information

15. Regulation 5(1) of the EIR states:

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
16. Regulation 5(2) states:

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
17. The complainant submitted their request to the council on 3 April 2018 and the council provided an initial response on 3 October 2018.
18. As the council failed to respond within 20 working days the Commissioner finds that it breached regulation 5(2) of the EIR.

Regulation 14 – refusal notice

19. Regulation 14(1) of the EIR states:

If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

20. Regulation 14(2) states:

The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

21. As the council failed to issue a refusal notice within 20 working days of the date of receipt of the request the Commissioner finds that it breached regulation 14(2) of the EIR.

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

22. The council has withheld the legal advice and instructions identified in part A of the request, namely:

"A) In relation to the above,

- 1. What instructions did CDC give to the QC ?*
- 2. What advice did CDC receive from the QC ?"*

23. 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".

24. 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

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

include information about investigations into potential breaches of legislation, for example, planning law or environmental law.

25. 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?

26. The council has stated that it considers that the information is subject to LPP, specifically advice privilege. It confirmed that the information relates to communications made between the council's external legal adviser - a Queens Counsel (QC) specialising in planning law - and the council. The council confirmed that these communications, which include legal advice, were made for the sole/dominant purpose of obtaining and receiving specialist legal advice pertaining to issues arising from the consideration and the determination of an application for outline planning permission. The council stated that the QC gave legal advice in their professional capacity.
27. Once a public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures.
28. The council confirmed to the Commissioner that the confidentiality attached to the information has not been lost and that it, therefore, remains, subject to LPP.
29. Having considered the council's arguments and referred to the withheld information and publically available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
30. The Commissioner is of the view that disclosure of information of information subject to LPP, particularly relatively recent legal advice which remains live and relevant, 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.

31. 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

32. 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 information

33. The council has stated that it appreciates and respects the general public interest in transparency and openness. It has acknowledged that there is an inherent public interest in general openness and transparency with regard to decisions made by public authorities. The council accepted that the central public interest in the information being disclosed in this case is in understanding the decision to grant planning permission for the Chesterton development. The council accepts that there is a public interest in providing information which demonstrates how it reaches decisions.
34. The complainant has argued that the refusal to disclose the information is out of kilter with the regulative consultation process underlying the local plan and subsequent application.
35. The complainant has further argued that they consider the consultation process undertaken by the council was inadequate and was criticised by the Inspector during local plan examination. They maintain refusal and subsequent upholding of the decision has further weakened trust in the council by the public.
36. The complainant has submitted that, though Save Our Cirencester was supported by and represented the opinion of the public, the council appears to have discriminated against the group, refusing the request on the basis of the identity of the requester rather than for legitimate reasons.
37. The complainant considers that, in the absence of public knowledge of the details of the QC's advice, it is difficult to accept the council's judgement that their refusal was balanced and in the public interest - especially as it is this council (as the planning authority) which has been the promoter of the local plan of which the application was the mainstay

and on which the QC's advice was sought. The impression left is that the refusal was in their own interest not the interest of the public.

Public interest in maintaining the exception

38. The Commissioner considers that there is a strong public interest in public authorities 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.
39. The council has explained that it obtained specialist advice from its appointed QC on the biggest proposal for development it has ever had to deal with. This application was an outline application with numerous matters that were reserved for later dates/phases of the development. The council resolved to grant planning permission on 16 January 2018 and, following a period of time during which extensive planning obligations were negotiated with the Applicant for planning permission, outline planning permission was granted on 3 April 2019.
40. The council has stated that the legal advice sought and received concerned a wide range of matters which were central to the issues raised by the application, and its approach to the consideration and the determination of those matters and the application generally, in accordance with the relevant legal and policy requirements. The advice therefore related to issues which were central to the determination of the application by the council.
41. The council has stated that, although the six week period available to interested parties to challenge the grant of planning permission by judicial review, as set out in the Civil Procedure Rules, has expired without claim being brought, given that the time limit is not statutory, the Court retains a discretion to extend the time period. The council explained that this discretion is exercised by the courts sparingly, but remains nonetheless.
42. The council further argued that, given that the planning permission in question is outline only, the council will in due course be asked to determine applications for approval of reserved matters and for the discharge of conditions attached to the outline planning permission. The council explained that given the scale and complexity of the proposed development, these applications are likely to be numerous and will continue to be received, and to be determined, by the council well into the future. The council confirmed that matters considered and on which advice was sought and given at the outline stage remain relevant to the

determination of these future applications and the subject matter of the privileged advice, therefore, has not been rendered redundant.

43. The council has submitted that, like any individual, it must be entitled to freely seek, where it considers necessary, legal advice and to receive that advice without the risk of it becoming public. It has argued that this consideration does not cease to be relevant and important simply because the decision to which it relates has been taken. The council also argued that, in accordance with well-established case law, significant weight should be attached to the maintenance of privilege (see *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)*, which concerned substantively similar provisions in the Freedom of Information Act 2000).
44. The Council has further submitted that the disclosure of the withheld information would enable those who are strongly opposed in principle to the council's decision, exercising its function as local planning authority, to have granted outline planning permission, to gain access to privileged legal advice given to the council when exercising its statutory functions in the interest of the public as a whole, and when the matters addressed in that advice are still "live". Such an outcome is, in the council's view, neither fair nor just.

Balance of the public interest

45. 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.
46. 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".
47. The Commissioner recognises that the complainant has genuine concerns about the development to which the information relates and legitimate reasons for having sight of the council's legal advice. In relation to the complainant's suggestion that the council's handling of the request was influenced by the identity of the requester she has no direct evidence that this is the case and, in any event her determination of where the public interest balance lies is solely based on relevant factual considerations.

48. The Commissioner is mindful that authorities must be able to engender trust amongst the population they serve and that even the perception of inadequacies or anomalies in decision-making processes can result in reputational damage. However, it is not the Commissioner's role to determine whether authorities have followed correct procedures in relation to planning matters; other remedies are available for such concerns to be addressed. The matter under consideration here is whether disclosure would serve the public interest to a greater extent than allowing the course of justice to be protected from harm.
49. 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.
50. The Commissioner further acknowledges that there is ongoing potential for legal challenge to the council's decision to grant outline planning permission. She also notes the ongoing relevance of the advice to subsequent decisions that the council will need to take well into the future arising from the outline planning permission, with the advice provided by the QC remaining material to those future decisions.
51. Whilst the Commissioner recognises there is a public interest weighting in favour of disclosure she must consider the broader public interest in allowing the council to consider and carry out its legal obligations without these being undermined. She considers that, given that the advice is relevant to current or future applications, disclosure would have tangible adverse effects on the council's ability to carry out its legal and planning functions. Whilst she is sympathetic to the complainant's concerns she considers that other remedies for challenging any decisions made by the council in these matters are available and disclosure via the EIR would circumvent and prejudice these processes.
52. 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.
53. 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).

54. 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.

Right of appeal

55. 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@justice.gov.uk

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

56. 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.
57. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF