

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

Date: 11 September 2020

Public Authority: Elmbridge Borough Council
Address: Civic Centre
High Street
Esher
Surrey
KT10 9SD

Decision (including any steps ordered)

1. The complainant has requested from Elmbridge Borough Council (the Council) information in relation to legal advice that the Council received from external counsel. The Council confirmed that it held the information requested, however, it decided to withhold it citing regulation 12(5)(b) of the EIR. The Council stated that the withheld information was covered by Legal Professional Privilege (LPP).
2. The Commissioner's decision is that the Council correctly withheld the information under the exception at regulation 12(5)(b) of the EIR – adversely affects the course of justice – and that the balance of the public interest favours the exception being maintained.
3. The Commissioner does not require the Council to take any steps to comply with this decision notice.

Background information

4. The background to the request was described by the Council as *"in the course of its Local Plan preparation, the Council has instructed [counsel] to provide advice, amongst other things, on sound plan-making processes"*.
5. On 14 February 2020 a joint conference between Council officers and counsel took place, during which the issues raised by the Council were discussed and the legal counsel provided his advice on the matters related to the Council's Local Plan formulation. The discussion that took place during this conference was summarised in a written brief note which outlined the legal advice provided by counsel. This brief note was approved by counsel.
6. In the meantime, the complainant engaged in correspondence with a specific councillor who was involved in the Local Plan formulation. This councillor informed the complainant that the Council sought and received legal advice from external counsel specialised on planning matters.

Request and response

7. On 31 March 2020, the complainant wrote to the Council and requested information in the following terms:

"In a letter to me dated 3 March 2020, Councillor [name redacted] referred to his statement to Council on 26 February 2020 when he explained that a "senior Planning QC" had provided advice to Elmbridge BC.

May I have a copy of the instructions given to that QC please together with a copy of his advice."
8. On 2 April 2020, the Council responded and stated that *"under section 42 of FOIA, there is a specific qualified exemption for legal professional privilege. Having considered the public interest, the Department's decision is therefore to withhold the information."*
9. Remaining dissatisfied with the response received, on 7 April 2020, the complainant wrote to the Council, requesting an internal review. He stated:

"The reason for requesting a review is because, although I note the claim to privilege under Section 42 of FOIA, I argue that:

1. *There has been partial disclosure of the advice*
 2. *As a consequence, the advice is no longer confidential*
 3. *It is in the public interest to disclose the advice given the public reliance placed on it by Councillor [name redacted]."*
10. On the same day, the Council conducted the internal review and provided the complainant with its outcome. The Council changed its initial position in relation to the applicable access regime and the internal review found that the request should have been dealt with under the EIR rather than the FOIA. However, it did not change its position regarding the information withheld. The Council stated that regulation 12(5)(b) was the relevant EIR provision applicable in this case, because it considered that disclosing the information requested 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."*

Scope of the case

11. The complainant contacted the Commissioner 24 April 2020 to complain about the way his request for information had been handled.
12. The following analysis covers whether the Council was correct to refuse the request under regulation 12(5)(b) of the EIR.

Reasons for decision

Regulation 2(1) – is the information environmental?

13. The Council, in different phases, referenced both section 42 of the FOIA and exception 12(5)(b) of the EIR in its refusal notice and review of the complainant's request. Regulation 2(1) of the EIR defines environmental information as:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases

into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;”

14. The Commissioner has examined the withheld information. She notes that it consists of two parts: an email message sent from the Council to an external legal counsel with instructions to provide legal advice, amongst other things, on the planning processes and legal compliance; and the advice delivered to Council officers in a conference that took place on 14 February 2020, subsequently transcribed into a note and approved by the external legal counsel.
15. The Commissioner considers that this information relates to planning matters, and as such, considers that the information relates to activities that will affect, or be likely to affect, the state of the environmental elements such as “landscape”. The Commissioner considers that the information in question in this notice is environmental according to the definition in the EIR.

Regulation 12(5)(b) - the course of justice

16. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do 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.”

17. The Commissioner has issued guidance on the application of regulation 12(5)(b) – the course of justice and inquiries exception¹. This regulation will be likely to be engaged if the information is protected by legal professional privilege (LPP) , due to the adverse effect on the course of justice that may result through the disclosure of information otherwise confidential under LPP. Consideration of the specific circumstances is, however, required when addressing the public interest test. In addition,

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

a public authority must apply a presumption in favour of disclosure when considering firstly if the exception is engaged, and then whether it is in the public interest to withhold or disclose the information.

18. The Council considers the information it holds falling within the scope of the request is subject to LPP. Regulation 12(5)(b) does not make direct reference to LPP, but that information may be subject to LPP can be relevant when considering whether its disclosure would result in an adverse effect to the course of justice.
19. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023) (Bellamy)*² as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."

20. There are two categories of LPP – litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies when no litigation is in progress or contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

Is the exception engaged?

21. The Council has identified the withheld information as being subject to legal advice privilege.
22. In order to attract LPP, the information must be communicated confidentially in a professional capacity between a client and a professional legal adviser. However, not all communications from a

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http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

professional legal adviser will attract advice privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.

23. The Council stated that both pieces of information, the email message instructing the legal counsel and the notes of a conference during which the legal advice was provided, were communicated by a legal adviser acting in a professional capacity.
24. The Council added that *"the dominant purpose of the communication between the parties is plainly the seeking and providing of legal advice."*
25. As part of her investigation, the Commissioner has reviewed the withheld information. She can confirm that it is clearly a communication between the Council in the capacity of a client seeking professional legal services in the form of advice in relation to certain matters related to its Local Plan and external counsel in the capacity of the professional legal adviser. Part of the withheld information is the brief note of the conference between the Council and the external legal counsel. It is obvious that the sole purpose of the discussion held in the conference of 14 February 2020 was to obtain legal advice on the matters raised by the Council. In addition, the Commissioner notes that the brief note of the conference is clearly marked as confidential and summarises what was discussed in the conference where advice was provided.
26. The Commissioner is satisfied that the withheld information records confidential communications between a professional legal adviser acting in their professional capacity and a client. She is also satisfied that this communication was for the dominant purpose of obtaining legal advice.
27. The complainant argued that in the course of correspondence that he had with a named councillor, that councillor confirmed to him that advice had been sought and received by the Council and also provided him with a summary of the nature of the advice received. In this regard, the complainant stated *"I contend therefore that the information underlying the advice that Councillor [name redacted] has placed in the public domain has lost its confidentiality and is no longer subject to the protection of privilege."*
28. The Council disagreed with the complainant's argument stating that *"although Cllr [name redacted] may have alluded to the existence of the advice, and its broad cautionary thrust about avoiding predetermination in plan-making, he certainly did not disclose the detail of the advice and its fine balancing of risks going forward."*

29. In this respect, the Commissioner agrees with the Council. Having examined the withheld information, the Commissioner notes that it contains considerably detailed information and that a summary of its nature does not amount to unrestricted disclosure, which would result with a removal of the cloak of confidentiality relating to the advice. In relation to this, the Commissioner refers to her guidance on legal professional privilege³, which in relation to this issue it stated that *“a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.”*
30. Having found that the withheld information has the necessary characteristics for advice privilege and that the privilege has not been waived, the Commissioner accepts that this information is subject to LPP. Having examined the withheld information and in view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

Public interest test

31. 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 her 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 arguments in favour of disclosing the requested information

32. The Council acknowledged that there is a public interest in ensuring the fullest participation in the planning process, which would enable members of the public to be more familiar and better informed on the matters that would have an impact on their lives. The Council accepted that there may be a public interest in ensuring that public authorities have reached decisions on the basis of sound advice.

³ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

33. The complainant stated that disclosure of the information requested is in the public interest without elaborating further.

Public interest arguments in favour of maintaining the exception

34. The Council's view is that the balance of the public interest lies in the exception being maintained in this case.
35. The Council explained that the local planning processes are highly participative, followed extensive consultation and in a later phase planning decisions and proposals will be tested in public examination.
36. The Council argued disclosing the requested information at this stage may cause real harm to the local planning process. It explained that *"as the advice concerns an often-common tension between political aspirations and professional advice, its disclosure could provide ammunition to those parties who would wish to challenge the soundness of the Council's eventual plan."*
37. The Council maintained that the matters to which the information relates are still alive and ongoing, and the local planning process is at a sensitive stage. According to the Council, disclosing the legal advice would weaken its position in a potential legal challenge.
38. The complainant argued that *"there is no clear identifiable harm that would devolve the Council as a consequence of disclosure."*

Balance of the public interest

39. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. She recognises that there may be a need for enhanced transparency and scrutiny of decision making in planning cases. This is particularly the case where information relates to matters that affect large numbers of people or have specific environmental implications.
40. However, following previous decisions of the Information Tribunal, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is in turn, fundamental to the course of justice.
41. In the Commissioner's view, in this instance, weight must be placed on the Council's ability to carry out all aspects of the Local Plan adoption process effectively. She accepts that confidentiality may be needed at certain stages of the process, to ensure that proceedings are conducted

as effectively as possible. In the present case, she considers that disclosing the specific information requested would adversely affect this confidentiality.

42. She is also satisfied, as she has been in previous decisions, that, during the formal planning process, the public has the opportunity to engage openly with the Council.
43. Whilst the Commissioner considers that the arguments in favour of disclosure have some 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).
44. 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. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
45. As set out above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that 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

46. 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

47. 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.
48. 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

Ben Tomes
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