

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **8 November 2022**

Public Authority: **Stockport Metropolitan Borough Council**

Address: **1st Floor Stopford House**

Stockport

SK1 3XE

Decision (including any steps ordered)

1. The complainant has requested legal advice obtained by Stockport Metropolitan Borough Council in relation to a planning application to build dwellings, including affordable units, within the Green Belt. Stockport Metropolitan Borough Council refused the request under Regulation 12(5)(b) of the EIR on the basis that disclosure would adversely affect the course of justice.
2. The Commissioner's decision is that Stockport Metropolitan Borough Council has correctly applied Regulation 12(5)(b) of the EIR.
3. The Commissioner does not require Stockport Metropolitan Borough Council to take any steps to ensure compliance with the legislation.

Request and response

4. On 11 November 2021 the complainant wrote to Stockport Metropolitan Borough Council (the Council) and requested information in the following terms:

"It has come to my attention that a Brownfield site was put forward for 100% affordable homes on a piece of previously developed land at the former compound for the site formally known as Moorend Golf Course. I am aware the applicant was asked to delay a submission until the Council's Planning Department has sought the advice of a Planning Barrister on the matter of providing affordable housing on the site which lies within the Green Belt. We have been reliably informed that this

Barrister advice was given and after a request to see this advice it has not been forthcoming. I have an interest in this site: in the interest of openness and fairness and in consideration of the Freedom of Information Act please could this Barrister's opinion to be provided to me".

5. The Council responded on the 9 December 2021. It stated that it held the requested information but was withholding it in its entirety under Regulation 12(5)(b) of the EIR on the basis that disclosure would adversely affect the course of justice.
6. As the complainant was dissatisfied with the Council's response, he requested an internal review on 13 December 2021.
7. Following an internal review, the Council wrote to the complainant on 5 January 2022. It stated that it was upholding its original decision.

Reasons for decision

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

8. Regulation 12(5)(b) states that a public authority may 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.
9. The threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not; that is, a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
10. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance¹ on regulation

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception>

12(5)(b), encompasses, amongst other types of information, material covered by legal professional privilege (LPP).

11. The Council has confirmed it holds the requested information which it argues is subject to both legal advice privilege and litigation privilege. Referencing the Commissioner's guidance, the Council stated LPP is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase course of justice.
12. The Council has stated LPP is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence. Disclosure of information which is subject to LPP will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis in response to information requests. The Council and its adviser's confidence that discussions will remain private will become weaker and discussions may therefore become inhibited.
13. Having considered the withheld information the Commissioner is satisfied that it represents confidential communications between a client and professional legal advisors, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
14. The Commissioner has also considered whether the confidence attached to the information has subsequently been lost or waived through a disclosure of the advice to the world at large. Having considered the Council's arguments, the Commissioner is satisfied that the legal advice remains subject to LPP.
15. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
16. Although the actual planning application which precipitated the barrister's advice is no longer live, the Council has argued that the advice is still relevant to any similar planning applications which may be submitted in the future and the wider consideration of applications and proposals in its Green Belt.
17. 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.

The balance of the public interest

18. Regulation 12(5)(b) is a qualified exception, and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exception being maintained.

Public interest arguments in favour of disclosure

19. Regulation 12(2) of the EIR provides a presumption in favour of disclosure, which adds weight in favour of environmental information being disclosed in response to an EIR request.
20. There is always a public interest in a public authority conducting its business in a transparent manner.
21. The Council has argued it is committed to being transparent about its services, actions, decisions, structures and relationships relevant to the public domain. It recognises that disclosing the requested information would comply with this commitment.
22. The complainant believes there are very strong public interests in favour of the requested information being disclosed. He has pointed out that information relates to proposals to develop brownfield land for additional housing within the Council's borough. This is important because he believes the Council is chronically short of housing land with a land-supply of around 2.5 years when it should be providing a five-year rolling supply. Therefore, any proposal for additional housing units would be in the public interest, especially if this included affordable housing which the complainant believes is also acutely lacking in the borough.

Public interest arguments in favour of maintain the exemption

23. The Council has stated that the requested information is subject to LPP and relates to matters which are still current and relevant to planning matters.
24. The Council has also argued it is in the wider public interest that it should be able to consult with its lawyers in confidence to obtain legal advice. The disclosure of such advice would be likely to affect the free and frank nature of current and any future legal exchanges between the Council and its advisers to its detriment. It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion where the authority serves the public.
25. The Council's view is that the balance of the public interest lies in the exception being maintained in this case. It believes the importance of

the factors favouring non-disclosure outweigh those considerations favouring disclosure. As the advice is still current and relevant the Council believes the potential harm of disclosure outweighs any public benefit. Furthermore, the Council believes there is no further community benefit in disclosing the requested information.

The Commissioner's view

26. The Commissioner's role does not include commenting on or making a decision in relation to the merits of any planning application submitted which may be relevant to the information requested. His role is limited to deciding whether the Council was correct to refuse to provide the requested information for the reasons it has stated.
27. The Commissioner recognises there is a public interest in a Council being transparent about its actions, so it is accountable for them.
28. The Commissioner also accepts the complainant's view that there is a public interest in matters that relate to a potential shortage of housing land and housing stock particularly if it concerns affordable housing.
29. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
30. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
31. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy² case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest. It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...."

² Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

32. 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.
33. The Commissioner's decision is that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
34. The Commissioner has made his decision in this case based on the contents of the information, the complainant's arguments and on the evidence he has received from the Council.
35. 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 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

36. 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

37. 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.

38. 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

**Laura Tomkinson
Group Manager
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Wycliffe House
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