

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 3 May 2022

**Public Authority:** Babergh District Council  
**Address:** Endeavour House  
Ipswich  
IP1 2BX

#### **Decision (including any steps ordered)**

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1. The complainant requested legal advice obtained by Babergh District Council ("the Council") which related to open space and surplus land requirements at a specific site. The Council withheld the information, stating that it 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 affect 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.

#### **Request and response**

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4. On 30 January 2021, the complainant wrote to the Council and requested information in the following terms:  
  
"Please provide copies and any associated documents of the legal advice and opinions obtained in respect of the open space and surplus land requirements at Belle Vue in Sudbury. The latest advice would have been obtained in 2020."

Please also provide the cost of the advice whether paid for directly by BDC or through an agent used by BDC.”

5. The Council responded on 18 February 2021. It refused to provide the requested information citing the exception under regulation 12(5)(b) of the EIR, that to disclose the information would adversely affect the course of justice.
6. Following an internal review the Council wrote to the complainant on 19 March 2021. It maintained its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 4 May 2021 to complain about the way their request for information had been handled.
8. During the course of the investigation, the Council disclosed the cost of the legal advice, which it had previously withheld. This decision therefore focusses on the “copies and any associated documents of the legal advice and opinions”.
9. This decision considers whether the withheld information has correctly been withheld under the exception at regulation 12(5)(b).

### **Reasons for decision**

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

10. This regulation 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.
11. 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.

12. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance<sup>1</sup> on the application of the exception, encompasses, amongst other types of information, material covered by LPP. This approach was supported by the Upper Tribunal in *DCLG v the Information Commissioner & WR* [2012] UKUT 103 (AAC) in which the Tribunal, as set out in the Commissioner's guidance, stated that, in the absence of special or unusual factors, an adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege.
13. In this case, the Council has explained that it considers that the information is covered by the type of LPP known as 'advice privilege' since it comprises two emails from its solicitors and one email from a Chartered Legal Executive at another council, which provides shared legal services to the Council, each of the three emails providing legal advice. In summary, its view is that the information comprises confidential communications between a client and its professional legal advisors for the purpose of obtaining legal advice.
14. The Commissioner is satisfied that the correspondence comprises confidential communications between 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.
15. He has considered whether the confidence attached to the information has subsequently been lost. Having considered the Council's arguments, and referred to the withheld information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
16. In addition, turning to the requirement to show that there would be an adverse effect on the course of justice from the disclosure of the information, 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.
17. With regard to the specific circumstances of the request, the Council has explained that in its view, at the date of the request, the information related to a 'live' matter. The site it relates to is still the subject of ongoing development works. The land disposal was not complete at the

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<sup>1</sup><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/>

time that the Council carried out its internal review, and, indeed, it is the Commissioner's understanding that whilst sale contracts have exchanged they have not formally completed.

18. 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**

19. 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.

#### Arguments in favour of disclosure

20. Under regulation 12(2) of the EIR, there is a presumption in favour of disclosure, which adds weight in favour of environmental information being disclosed under the legislation.
21. It is also well established that there is always a public interest in a public authority conducting its business in a transparent manner.
22. The complainant considers that the balance of the public interest lies in the disclosure of the information.
23. The complainant states that the Council held the land in question on statutory trust on behalf the public as "open space" under the Open Space Act 1906 and has since confirmed that position in its meetings.
24. They also state that the Council is a public body and the funds used to seek legal action are "taxpayers' funds" and the land in question is held by the Council as Trustees for a statutory trust, for public benefit.
25. They do not believe that the disclosure of legal advice sought in relation to a potential land sale, and the implications of The Open Space Act 1906, would obstruct the course of justice.

#### Arguments for the exception to be maintained

26. The Council's view is that the balance of the public interest lies in the exception being maintained in this case.
27. It has stressed the public interest in the preservation of confidence in the general principle of legal professional privilege.

28. It contends there is a high risk in the legal advice sought being used to inform another party and used in a claim against the Council, rather than that party seeking their own advice. Or in the advice, sought confidentially between the Council and its legal advisors, being publicised more broadly. It contends this would lead to a weakening of confidence in the general principle of legal professional privilege.
29. It also states that it has met the public interest in this matter since it has been transparent about the disposal of the asset more generally and information is available to interested parties via its website:  
<https://www.babergh.gov.uk/business/economic-development/sudbury-vision/>

#### The Commissioner's decision

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 Bellamy<sup>2</sup> 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...".
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 has made his decision in this case based on the contents of the information, and on the evidence he has regarding the Council's decision-making process and conduct in the relevant matters.

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

34. The Commissioner is not satisfied that any of the factors described in paragraph 32 above are present, such as would lend the required weight required to overturn the strong public interest in maintaining the exception. He therefore considers that the balance of the public interests favours the exception being maintained.
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 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).
36. As covered 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

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37. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**