

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

Decision notice

Date: 27 February 2023

Public Authority: London Borough of Lewisham

Address: Laurence House
1 Catford Road
London SE6 4R

Decision

1. The complainant requested legal advice relating to an application for the designation of a Neighbourhood Area and Neighbourhood Forum in the Bell Green area. The London Borough of Lewisham (the "council") disclosed some information and withheld legal advice under the exemption for legal professional privilege (section 42 of the FOIA). The council subsequently reconsidered the request under the EIR and withheld the information under the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the council wrongly handled the request under the FOIA and breached regulation 5(2) and regulation 14(1) but that it is entitled to rely on regulation 12(5)(b) of the EIR to refuse to provide the requested information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 7 December 2022 the complainant made the following information request to the London Borough of Lewisham (the "council"):

"At the Mayor & Cabinet meeting today, 7th December 2022, Director of Planning, Emma Talbot stated that she sought the legal opinion from King's Counsel on the subject of the Bell Green Neighbourhood Area and Forum decision.

Please supply the following:

1. The KC's name, and their Chambers.
 2. The total cost.
 3. The date on which the opinion was commissioned, and the date it was received.
 4. The precise wording of Lewisham's instructions.
 5. A copy of the opinion."
5. The council disclosed the information in parts 1-3 of the request but withheld the information in parts 4-5 under the exemption for legal professional privilege (section 42 of the FOIA). During the Commissioner's investigation the council reconsidered the request under the EIR and confirmed that it was relying on the exception for the course of justice (regulation 12(5)(b)) to withhold the information.

Reasons for decision

6. This reasoning covers whether the council is entitled to rely on 12(5)(b) of the EIR to refuse provide the information requested in part 4 and 5 of the request.
7. Regulation 12(5)(b) of the EIR provides that information is exempt if 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 or a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
8. In this case, the request relates to a local community group in the Bell Green area in the Borough of Lewisham making an application seeking the designation of a Neighbourhood Area and the designation of a Neighbourhood Forum.

9. A designated neighbourhood forum is an organisation or group empowered by the local authority to lead the neighbourhood planning process in a neighbourhood area. A neighbourhood area is an area defined by the forum that they wish to create a neighbourhood development plan for. A community group has to submit an application to the local authority requesting the formal designation of both the neighbourhood area and forum status¹.
10. In this case the council declined the community group's application and the request seeks the legal advice which informed the council's decision.
11. The Commissioner has had sight of the withheld information and he is satisfied that it represents confidential communications between a client and legal advisor acting in their professional capacity, and made for the sole purpose of obtaining legal advice.
12. The Commissioner's established position is that an adverse effect on the course of justice can result from the undermining of the general principles of LPP and of the administration of justice.
13. Once it has been established that information falls within the definition of LPP, the next question that often arises is whether privilege has been lost.
14. In this case the complainant has argued that an officer of the council stated in an open meeting available 'to the world outside' via podcast, that the council's decision in relation to the community group application relies on the legal advice sought and that the advice gives the council "carte blanche to alter the boundaries of a neighbourhood forum". The complainant has argued that this constitutes a "waiver".
15. "Waiver" is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings.
16. However, arguments about waiver have no relevance in the context of considering disclosure of information under the FOIA and the EIR. This is because under the EIR we are concerned with disclosures to the world at

¹ <https://consultation.lewisham.gov.uk/planning/bellgreen/>

large rather than disclosures to a limited audience. In an EIR context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.

17. On the evidence provided the Commissioner does not see that confirming that legal advice provides the backing for a decision reveals anything of the specific content of the legal advice itself. He does not, therefore, consider that privilege in this case has been lost and he does not consider it is the case that the information can no longer be considered to be confidential.
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 information subject to LPP would have an adverse effect on the course of justice and therefore finds that the exception at Regulation 12(5)(b) is engaged. To clarify, he is satisfied that the instructions requested at part 4 of the request are also subject to regulation 12(5)(b) due to the (referenced above) broad reach of the exception.
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.
20. 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.
21. In this case the complainant disputes the council's decision to decline the local community group's application and the legal basis for this and has argued that disclosure would assist the local community in understanding the reasons for the decision. Disclosure, it is argued, would enhance transparency and accountability and facilitate local engagement in environmental decision making.
22. The council has argued that, in this case, it sought advice as the matter is controversial (and continues to be so). It explained that it was being challenged that the decision made in this matter was not legally possible so external advice from a barrister was sought. It considers that, in addition to disclosure resulting in adverse effects to the course of justice due to the undermining of the general principles of LLP, disclosure would also inhibit the council's ability to defend its position in a matter that remains live and controversial.

23. The Commissioner's role does not include commenting on or making a decision in relation to the council's stance the application for a neighbourhood forum and neighbourhood area. His role is limited to deciding whether the council was correct to refuse to provide the requested information for the reasons it has stated.
24. The Commissioner recognises there is a public interest in a council being transparent about its actions so it is accountable for them. The Commissioner also accepts the complainant's view that there is a public interest in matters that relate to the transparency and accountability of decisions made by a council. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
25. 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.
26. 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 or evidence of misrepresentation or unlawful activity. Disagreeing with a public authority's decision in a specific matter does not in itself constitute a legitimate public interest argument for disclosure.
27. The Commissioner recognises that the complainant has genuine reasons for requesting the information. However, he considers that other remedies are available for challenging the council's decision in relation to its decision on neighbourhood area and forum status; remedies that do not require the global disclosure of information subject to LPP.
28. Whilst, it is the case that authorities should be accountable for their actions and transparent in their decision-making, it is also appropriate that authorities' ability to defend decisions is not undermined by the disclosure of information which would inhibit this capacity. The Commissioner's established view is that disclosing information that is subject to LPP would undermine the course of justice and he does not consider that the public interest grounds for disclosure, in this case, justify the adverse effects which disclosure would produce.
29. 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.

30. 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.

Procedural matters

31. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR.
32. In this case the requested information relates to the status of and designation of land. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)* ("Kirkaldie").
33. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.
34. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.
35. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.

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: 0300 1234504

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

Christopher Williams
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