

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 February 2024

Public Authority: Woking Borough Council
Address: Civic Offices
Gloucester Square
Woking
GU21 6YL

Decision (including any steps ordered)

1. The complainant requested information held by Woking Borough Council (the council) about a "challenge" it had received to its proposal to adopt a draft Masterplan (which set out plans for the redevelopment of the town centre), and also the legal advice the council obtained following receipt of this "challenge".
2. The council refused the request, citing section 42 (legal professional privilege) of FOIA, but later confirmed to the Commissioner that if it was determined that the request was for environmental information, it considered that it would still be entitled to withhold all the information under regulation 12(5)(b) (course of justice) of the EIR.
3. The Commissioner has decided that the EIR is the correct information access regime, but that the council is entitled to rely on regulation 12(5)(b) as its basis for withholding only part of the requested information.
4. The Commissioner has also decided that the council is entitled to rely on regulation 13 of the EIR to withhold all third party personal information contained within that part of the requested information which he has found is not subject to the exception at regulation 12(5)(b).

5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the information contained within the representation and attachment (the legal advice) it received from the third party, with the exception of all third party personal information, which should be redacted.
6. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

7. On 27 July 2023, the complainant wrote to the council and requested information in the following terms:

"I am aware that the Town Centre Masterplan has effectively been shelved for a number of years (until the next refresh of the core plan) as a consequence of a legal challenge to the masterplan (and proposed SPD) that was received from developer(s) and legal advice that the Council has taken regarding it.

I am therefore requesting a copy of the legal challenge(s) (and any associated documents) and a copy of the legal advice that the Council received in relation to this as well as any other associated documents (other than those already published on the Council website)."

8. On 2 August 2023, the council issued a refusal notice, citing the exemption at section 42(1) of FOIA. The council then maintained this position at the internal review stage.

Scope of the case

9. The complainant has said that they do not accept that all of the information held by the council that is relevant to the request is exempt from disclosure.
10. The council has advised the Commissioner that whilst it considers it was correct to apply section 42 of FOIA to the withheld information, in the event that the Commissioner determines that the request is for environmental information, it considers that it is entitled to rely on regulation 12(5)(b) of the EIR as its basis for refusing the request.

11. The Commissioner will decide whether FOIA or the EIR is the correct access regime, and if the council is entitled to rely on either section 42 of FOIA, or regulation 12(5)(b) of the EIR, as its basis for withholding all of the information relevant to the request.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being any information on:
 - (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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).
13. The Commissioner considers that "any information on" as described by regulation 2(1) should be interpreted broadly. In addition, the term 'likely to affect' means that there is a likelihood the elements of the

environment would be affected, if the measure went ahead; the likelihood does not have to be more probable than not.

14. The council has said that it considers that the requested information relates to the decision making process about its obligations around setting planning policy as a SPD (supplementary planning document), rather than the planning policy itself, and therefore it does not fall within the definition of environmental information.
15. The Commissioner has considered the context in which the requested information is held. In his opinion, the information is not simply about legal advice which sets out how to determine what falls within the remit of a SPD; it relates directly to the Masterplan, and the purpose for which it was being used, that being an integral part of the plans and proposals for the redevelopment of the town centre. The representations that were submitted to the council, and the legal advice the council subsequently requested and then received, affected the decisions reached about the content and status of the Masterplan within the planning process, and therefore had a direct impact on the plans and proposals for the redevelopment of land.
16. The Commissioner is therefore satisfied that, in the circumstances of this case, the requested information is environmental and falls within regulation 2(1)(c).

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

17. Regulation 12(5)(b) of the EIR exempts information from disclosure if doing 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.
18. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to legal professional privilege (LPP) and information about investigations or proceedings carried out by authorities.

The complainant's position

19. The complainant has argued that the third party would have a reasonable expectation that their representation may be made publicly available.
20. The complainant has referred to the published Masterplan "[Consultation Summary Report](#)", which includes names and direct quotes from other representations that were received by the council as part of the consultation. The complainant says that any argument of third party confidentiality claimed by the council therefore lacks merit as it

contradicts the information published about other representations received.

21. The complainant has also argued that, given the information that is already in the public domain, any legal privilege which might have been attached to any part of the withheld information is likely to have been lost. They refer to the published records of the [Executive Meeting of 2 February 2023](#) and the [Executive Meeting of 13 July 2023](#), which set out details of the representations that were received, and the decisions that were reached following the council's request for legal advice on the status of the Masterplan as a SPD.

The council's position

22. The council has said that it considers regulation 12(5)(b) to apply to all the withheld information, although the Commissioner notes that its arguments focus primarily on the legal advice that it received from its own legal adviser.
23. The council has advised the Commissioner that it considers that all the withheld information attracts advice privilege and that in the future it is potentially likely to attract litigation privilege.
24. The council has referred to the case of [Kirkaldie v Information Commissioner and Thanet Borough Council \(EA/2006/0001, 2006\)](#), in support of its position, referring to the comment made by the Tribunal that the exception at regulation 12(5)(b):

"exists in part to ensure that there should be no disruption to the administration of justice.....it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation."

25. The council has said that its position would be undermined, should the withheld information be released. It says that the decision was taken to incorporate the work carried out in relation to the Masterplan into the next Local Plan and that it may therefore consider and utilise the evidence and legal advice received when considering its position and making plans and proposals. The council argues that the release of the withheld information would provide any opponents to the decisions reached by the council with access to information that would have an adverse effect on both its current and future legal position.
26. The council has argued that the privilege attached to the documents that have been withheld has not been lost. It states that whilst brief details of the decisions reached regarding the Masterplan have been published, the only reference made to legal advice is confirmation that it was sought following receipt of the representation from the third party.

The council has said that, as far as it is aware, there has been no wider publication or sharing of the withheld information, which has remained confidential.

The Commissioner's analysis

27. The council has claimed that all of the withheld information is subject to LPP, and that it is for this reason that the exception at regulation 12(5)(b) is engaged.
28. There are two types of LPP; advice privilege, which applies where no litigation is in progress or contemplated, and litigation privilege, which applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation.
29. For information to be covered by legal advice privilege the communications must be:
 - between a client and legal adviser;
 - made for the dominant purpose of obtaining or providing legal advice; and,
 - confidential in nature.
30. For information to be covered by litigation privilege, the information must be:
 - made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation;
 - there must be an ongoing or a real prospect or likelihood of litigation, rather than a fear or possibility;.
 - it must have been created for the dominant purpose of giving or obtaining legal advice or for lawyers to use in preparing a case for litigation; and,
 - confidential.

The information held relating to council's request for, and receipt of, legal advice

31. The Commissioner is satisfied that the council's request for, and receipt of, legal advice consists of communications between a council officer and a legal adviser, and was made for the dominant purpose of obtaining legal advice. The Commissioner has considered the information that is in the public domain (primarily that published by the council), and he is

satisfied that it does not reveal the substance of the legal advice received by the council. Given this, it is the Commissioner's view that there has been no loss of privilege in respect of the council's request for, and receipt of, legal advice, and that this information is covered by LPP.

32. The exception at regulation 12(5)(b) is only engaged if it is shown that the relevant information would, if disclosed, have an adverse effect on the course of justice. In the case of [DCLG V Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\)](#), the Upper Tribunal considered the significance of LPP under the EIR. It said that it was relevant to take into account any adverse effect on LPP (such as confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on a particular case. Whilst the Tribunal confirmed that it was not inevitable that the disclosure of information would adversely affect the course of justice, it suggested that there would need to be special or unusual factors in play for this not to be the case.
33. The Commissioner is therefore satisfied that disclosure of that part of the withheld information which covers the council's request for, and receipt of, legal advice would adversely affect the course of justice, and that regulation 12(5)(b) of the EIR is engaged in respect of that information.
34. As regulation 12(5)(b) is a qualified exception, the Commissioner will consider the public interest in paragraphs 47-66 of this decision notice.

The information received by the council from a third party

35. The remaining withheld information consists of a representation which was sent to the council by a third party (who was acting on behalf of a number of developers), and a document attached to the representation which sets out the opinion of a legal adviser about whether the Masterplan meets the requirements of a SPD.
36. It is the Commissioner's view that the representation and attached legal advice do not attract litigation privilege.
37. The Commissioner accepts that the representation raises concerns about the council's plans and proposals, and that the legal advice submitted confirms that the council could be challenged by judicial review, should it decide to adopt the Masterplan as a SPD. The Commissioner also accepts that litigation may have been a possibility at a future point, had the council decided to still adopt the Masterplan as a SPD following the public consultation.
38. However, having considered the content of the representation, and the fact that it was sent as part of a consultation, it is the Commissioner's

opinion that it is not intended to be treated as a formal objection to the process or plans, nor is it prior notice of impending legal action.

39. It is the Commissioner's view that there is insufficient evidence to conclude that litigation was a realistic possibility in this particular instance, and he therefore finds that the representation and attached legal advice received by the council from the third party as part of the public consultation is not covered by litigation privilege.
40. Furthermore, the representation submitted by the third party does not form a communication between a client and a professional legal adviser, and therefore does not attract advice privilege.
41. As the Commissioner has found that the information contained within the representation submitted by the third party does not attract advice privilege, or litigation privilege, it is not covered by LPP.
42. However, the Commissioner accepts that the document attached to the third party's representation to the council is a communication between a legal adviser and client, and that it contains legal advice.
43. Whilst the council has argued that the information provided by the third party was given in confidence, there is no evidence that the third party has explicitly expressed, nor have they inferred, that the information that they have provided should be treated in confidence.
44. LPP is founded on the principle that parties should be free to consult their lawyers without fear that their communications will subsequently have to be disclosed to third parties, who would then have an unfair advantage in legal proceedings. Whilst there are circumstances in which information can be shared and still maintain a confidential status, in this case, the third party has chosen to share the legal advice they have received with the one party that would be the subject of any future legal proceedings, that being the council.
45. The Commissioner also considers that, given the information published by the council about the consultation process, the third party would have had a reasonable expectation that the information that they submitted to the council as part of the consultation may be made available to the public. Given this, it is the Commissioner's view that the information submitted to the council by the third party was not a restricted disclosure, as it was given by that third party in the knowledge that it may be made more widely available.
46. The Commissioner has therefore decided that any advice privilege which may have previously been attached to the legal advice which was sent with the representation has been waived by the third party following its

submission to the council as part of the consultation. It is therefore not covered by LPP.

47. Given the above, the Commissioner concludes that the information contained within the attached legal advice document provided to the council by the third party is not covered by LPP.
48. Whilst the wording of the exception at regulation 12(5)(b) has a broad remit encompassing any adverse effect on the course of justice generally, the council's arguments to the Commissioner in support of the exception in this case focus solely on why information should be withheld on the basis that it is subject to LPP. As the Commissioner's view is that none of the information supplied to the council by a third party is subject to LPP, the reasoning of the council falls away. The Commissioner therefore finds that regulation 12(5)(b) is not engaged in relation to this information.

Public interest test

49. As the Commissioner has found regulation 12(5)(b) is engaged in respect of the council's request for, and receipt of, legal advice, he has considered the public interest test in relation to this information.

The council's position

50. The council has provided a number of arguments in support of the public interest in maintaining the exception. This includes the importance of being able to protect its position with regard to its ability to seek confidential legal advice in relation to its functions. It has also indicated that there may be a weakening of confidence in legal professional privilege, should the information be disclosed.
51. The council states that transparency and accountability in public decision making was considered to be relevant in respect of the public interest test, but it believed that release of the withheld information would have no beneficial impact on the public debate about the matter.
52. The council has said that "like any other individual or corporate entity", it should be able to preserve its legal advice as confidential. It goes on to say that its ability to engage in future deliberations about a similar planning policy or its ability to seek a second legal opinion at its discretion should "not be fettered."
53. The council has said that whilst a decision has been made that the Masterplan cannot be implemented as a SPD, it still needs to consider its legal and planning options as to how it should frame its vision for the town centre. It states that there are elements which may be relevant to future decision making and that developers may still come forward in

the future to legally challenge the council and therefore it considers that the withheld information relates to an issue that remains "live."

54. The council also argues that some weight can be attached to the potential harm that may occur to its future legal position. The council has said that its legal position may become undermined should developers in the future seek to challenge the council regarding the matter. It argues that it will suffer harm and prejudice, if the document is disclosed prematurely at this stage, and this would not be in the public interest.

The complainant's position

55. The complainant has said that the issue of tall buildings in the town centre has been a long standing issue which has generated significant public interest. They have said that the Masterplan was a key election pledge of the Liberal Democrat Party, and there was a strong public expectation that the Masterplan would be adopted.
56. The complainant says that, aside from a few major cities, no other councils in addition to Woking have approved buildings over 100 metres tall within their town centres. They state that there has been a lack of transparency regarding planning decisions that have been reached.
57. The complainant argues that it is important that the public are made aware as to why such a key document as the Masterplan was not adopted as expected following the representation that was made. They have said that planning permissions have recently been granted for new tall buildings that exceed the height limits set out within the Masterplan. The complainant has argued that this is causing concern amongst the local community. The complainant has said that the public has lost trust in the decision making processes, and that as the council has now been issued with a section 114 Notice (as its current expenditure exceeds the financial resources that it has available) it is even more important that there is full transparency and that the council is able to show to the public that the decisions that it is reaching on important matters such as the Masterplan are based on sound legal advice.
58. The complainant has said that they consider that the decision that the Masterplan is not to be adopted means that the issue is no longer "live" and that the council's arguments that disclosure of the requested information would be detrimental to its position no longer carries any significant weight.

The Commissioner's analysis

59. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's actions and decisions, as it helps create a degree of accountability and enhances the transparency of the process through which such disclosures are arrived at. This, in turn, can help to increase public understanding, trust and participation in the decisions taken by public authorities. The Commissioner is also mindful that regulation 12(2) requires the public authority to apply a presumption in favour of disclosure.
60. The Commissioner recognises that the council's decisions have had an important impact on the plans for the development of Woking town centre, and he accepts that the disclosure of the withheld information would provide further transparency in relation to this. It would enable the public to have greater insight into the legal advice that was sought and received, and the council's decision making process. This would serve the public interest as it would demonstrate whether proper processes were followed.
61. However, whilst the Commissioner recognises there is a specific public interest weighting in favour of disclosure in this case, he must weigh this against the broader public interest in allowing the council to consider and carry out its statutory obligations and its functions without these being undermined.
62. The Commissioner notes that the public interest inherent in the exception at regulation 12(5)(b) will always be strong due to the fundamental importance of the general principle of upholding the course of justice. Central to this is the importance of the principle enshrined in LPP.
63. The Commissioner has consistently recognised the principle that public authorities should be able to consult with their lawyers in confidence to discuss, and obtain, legal advice. Any fear of doing so from the result of disclosure, could affect the free and frank nature of future legal exchanges, or it may deter them from seeking legal advice.
64. The Commissioner also considers the information that has been published by the council provides some explanations about the decisions reached relating to the Masterplan.
65. Furthermore, whilst the decision was made not to adopt the Masterplan, the Commissioner accepts the council's argument that the details relating to the legal advice it requested and received are still relevant to a 'live' and ongoing issue, as the work carried out on the Masterplan will form part of the new Local Plan. It is the Commissioner's view that

disclosure of the council's consideration of its legal position would most likely be undermined, if the advice that it received was to be disclosed whilst matters relating to the Local Plan (and the work relating to the Masterplan) are still ongoing.

66. To equal or outweigh the public interest in disclosure of information that is covered by LPP, the Commissioner would expect there to be strong opposing factors. Whilst the Commissioner accepts that the arguments in favour of disclosure carry specific weight in this case, he does not consider that they outweigh the arguments in favour of maintaining the exception. His conclusion is, therefore, that the public interest in maintenance of the exception outweighs the public interest in disclosure.
67. 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).

68. 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 to the information covered in the preceding paragraphs.

Regulation 13 – third party personal information

69. Whilst the Commissioner has decided that the council is not entitled to rely on regulation 12(5)(b) in respect of any of the information that was provided by a third party, he is aware that some of this information is the personal data of third parties.
70. The Commissioner would not require a public authority to disclose information if to do so was likely to breach a data protection principle. He has therefore considered whether it is appropriate to apply regulation 13 to any of the withheld information provided by the third party in this case.
71. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

72. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
73. The Commissioner is satisfied that the withheld information identifies and relates to certain individuals, and as such is their personal information. As far as the Commissioner is aware, these details, in the context in which they are held, are not already known to the public.
74. The Commissioner has found difficulty establishing any legitimate interest in the disclosure of information that would identify individuals in this case, other than further transparency regarding information held by the council.
75. Furthermore, whilst accepting that the council has published names of some individuals who submitted representations as part of the consultation, the Commissioner is mindful that the representation relevant to the complainant's request was submitted by an individual on behalf of a number of developers/construction companies, and the legal advice was provided by the legal adviser directly to their client, rather than directly to the council. Given this, the Commissioner considers that the disclosure of the withheld information to the 'world at large' in response to an EIR request may not have been within the reasonable expectations of such individuals, and that the loss of privacy may cause unwarranted distress.
76. Therefore, it is the Commissioner's view that there is insufficient legitimate interest in this case to outweigh the relevant individuals' fundamental rights and freedoms, and that disclosure of the personal information contained within the representation and attached legal advice submitted to the council by the third party would contravene a data protection principle, as it would not be lawful.
77. The Commissioner therefore concludes that the council is entitled to rely on regulation 13(1) of the EIR as its basis for withholding the information which identifies individuals that is contained within the representation and attachment (the legal advice) provided to the council by the third party.

Right of appeal

78. 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

79. 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.

80. 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

Suzanne McKay
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