

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 February 2018

Public Authority: Croydon London Borough Council
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant submitted a request to the Croydon London Borough Council ("the Council") for information related to a planning enforcement complaint. The Council has refused the request under the exceptions in regulation 12(4)(e) (internal communications) and 12(5)(b) (Course of justice etc) of the EIR.
2. The Commissioner's decision is that both regulation 12(4)(e) and regulation 12(5)(b) are engaged and the public interest in maintaining the exceptions outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 26 March 2017 the complainant requested information from the Council regarding an advertising hoarding at 520A Purley Way, Croydon. The request read as follows:

"We would be grateful if you could provide the following information: Minutes of meetings and internal or external communications (sent or received by the council) on behalf of the council (save correspondence with Euro-tech (export) Ltd, which of course we hold) since March 2014 at or within which the above advertising hoarding was discussed or decisions made, together with any draft or final reports prepared regarding the above advertising hoarding."

4. The Council responded to the request on 21 April 2017 when it explained that the requested information was being withheld under the exemption in section 31(1)(g) (Law enforcement) of the Freedom of Information Act.
5. The complainant subsequently asked the Council to carry out an internal review of its handling of his request. In doing so he asked the Council to consider whether it ought to have treated the request as a request for information under the Environmental Information Regulations.
6. The Council presented the findings of its internal review on 19 June 2017. The review now concluded that the EIR was the correct regime to apply but found that the information fell within one of the exceptions under that legislation. It clarified that apart from emails with the complainant it did not hold any other correspondence between March 2014 and March 2015, neither did it hold minutes of meetings or draft reports. Therefore it said that the regulation 12(4)(a) (information not held) exemption applied to this part of the request.
7. Regarding the remainder of the request, the Council explained that excluding correspondence with the complainant it held 18 emails on the enforcement file which fell within the scope of the request. It now explained that these were being withheld under the exception in regulation 12(4)(e) (internal communications) and/or regulation 12(5)(b) (course of justice etc) and that the public interest in maintaining the exceptions outweighed the public interest in disclosure. In particular, it said that 8 of the emails were subject to legal professional privilege.

Scope of the case

8. On 23 July 2017 the complainant contacted the Commissioner to complain about the Council's refusal of his request.
9. The Commissioner considers the scope of her investigation to be to consider whether the Council was correct to refuse the request under the regulation 12(4)(e) and/or 12(5)(b) exceptions. The Commissioner has not considered the Council's application of regulation 12(4)(a) where it explained that some of the requested information was not held as this was not raised by the complainant and does not appear to be in dispute.

Reasons for decision

10. There are 18 emails falling within the scope of the request. There were an additional 2 emails contained within the Council's planning file, but since they do not discuss the advertising hoarding or any decisions made they are outside the scope of the request. 16 of the emails are internal to the Council and have been withheld under regulation 12(4)(e). Eight of these emails relate to legal advice and have been additionally withheld under regulation 12(5)(b). The remaining two emails are exchanges with external parties and have also been withheld under regulation 12(5)(b). The Commissioner has first considered the application of the regulation 12(4)(e) exception.

Regulation 12(4)(e) – Internal communications

11. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that it involves the disclosure of internal communications.
12. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. In this case the emails were all sent internally between members of the Council's staff in relation to a planning complaint. This information clearly falls within the definition of an internal communication and the Commissioner is satisfied that regulation 12(4)(e) is engaged. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exception against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

13. The complainant argued that the public interest favoured disclosure because it would help him to better understand decisions made by the Council and in particular why it had indicated that it intended to take enforcement action in respect of the planning complaint about the advertising hoarding but subsequently decided not to do so.
14. The Complainant has also suggested that in failing to take enforcement action in respect of the planning complaint the Council had ignored its own legal advice and that this was not in the public interest.

15. The complainant argued that it was in the public interest to ensure that the Council was properly enforcing the Town and Country Planning (control of advertisements)(England) Regulations 2007.
16. For its part the Council acknowledged there is "an inherent public interest in how public authorities consider the legal arguments for and against a particular courses of action a public authority may seek to take in respect of a planning applications and planning enforcement matters."

Public interest arguments for maintaining the exception

17. The Council explained that the internal communications were exchanged in the belief that they would be private. It argued that its Officers need to be able to exchange views on the issues of concern in an open manner to aide both the understanding of their relative positions but also with the aim of concluding the complaint in a reasoned manner, following deliberations of the facts and merits of the case. Therefore, it argued that the public interest favoured withholding the information to allow it to effectively perform its planning enforcement functions. The Council offered the following explanation of its position.

"Officers of the Council need to be able to consider options and advice as part of their deliberations on a particular matter. This is a fundamental part of the ability to consider a range of options and arrive at a reasoned view, when attempting to resolve matters such as raised within complaint. This is considered especially so when contemplating the use of formal powers available under the planning and planning enforcement regimes. The use of such powers needs to be contemplated in safe space to enable reasoned decisions to be reached after taking into account the circumstance of the case. The provision of the requested information would prejudice this process. Without this ability decisions risk being taken without a proper debate and without these debates being fully recorded. This could only serve to undermine the Council's ability to undertake statutory functions such as planning and planning enforcement."

"These emails detail specific considerations of the officers views on the enforcement options available. The emails clearly show that officers deliberations on the various courses of actions available, and releasing these into the public domain would hinder the Council's ability to undertake a proposed enforcement actions in respect of this matter, should the circumstances warrant it. Further the release of these deliberations could undermine the similar considerations other complaints in the future, as this information may be of advantage to those who would wish to use it in an effort to undermine the planning and planning enforcement process for which the Council is responsible."

The Council in managing issues such as are considered here, needs not only to apply the planning and planning enforcement regimes in accordance with its powers to do so but also balance its actions to ensure that it does so for the benefit of all its residents. This would be undermined if the requested information was provided, as it would serve to limit the Council's ability to act for the greater public benefit in such cases."

18. The Council also said that it considered that the disclosure of the internal emails would inhibit free and frank discussions in the future. It argued that this loss of frankness and candour would damage the quality of deliberation, particularly in respect of discussing legal advice, and that this would ultimately impede sound decision making.

Balance of the public interest arguments

19. The Commissioner has considered the competing arguments and accepts that there is a public interest in disclosure in promoting transparency and accountability around decisions made by public authorities and also allowing the public to better understand how these decisions are reached. However, the Commissioner is also aware that the complainant has been kept informed about the Council's investigation of his complaint at all stages and it has fully explained the reasons behind its decisions. Furthermore, the Council provided the complainant with a summary of the investigation in response to his request. In the Commissioner's view this goes some way towards meeting the public interest in disclosure although she accepts that there will still be a public interest in releasing the information in order to show the 'full picture' around how the decision was reached.
20. However, any public interest in disclosure has to be balanced against the prejudice that would be caused to the ability of the Council to carry out its responsibilities around enforcing planning regulations. The Commissioner has reviewed the withheld information and she is satisfied that disclosure would make it harder for the Council to carry out any future action on this matter.
21. The Council referred to the need for a 'safe space' to consider the planning complaint and decide what action to take. The 'safe space' argument usually refers to the need for a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This argument will generally only apply to live issues where there is a need for a safe space to prevent debate being hindered by external comment or media involvement. The Council has said that at present the complaint is no longer live, however, it did say that there is potential to revisit the case in the future and that therefore the safe

space for discussion needs to be retained. Having reviewed the withheld information the Commissioner would accept that there is a real possibility that the Council may choose to revisit this issue in future and disclosure would reveal the strengths and weaknesses of the Council's position with respect to the planning complaint. Therefore, the Commissioner has attached some weight to this argument. The Commissioner would also accept that disclosure would be likely to encourage anyone who disagrees with the Council's position to pursue this matter further and would distract the Council from its functions.

22. The Council has also argued that disclosure would inhibit the frankness and candour with which it discusses planning complaints of this kind. Having reviewed the withheld information the Commissioner has found that the information was relatively recent at the time of the request and the information comprises a free and frank exchange of views on the merits of the different courses of action. Therefore, the Commissioner would accept that disclosure would be likely to have at least some chilling effect on the ability of the Council's staff to discuss these kind of issues openly in the future and if it proves necessary to revisit this planning complaint at some point in the near future. This would lead to poorer quality decision making and this is not in the public interest.
23. Finally, the Commissioner has found the withheld information to be revealing about the options open to the Council in similar cases involving alleged breaches of the Town and Country Planning (control of advertisements)(England) Regulations 2007. Therefore, there is a real possibility that disclosure would prejudice the Council's ability to take similar enforcement action in the future or else might encourage breaches of planning regulations.
24. The Commissioner has concluded that there is a strong public interest in allowing the Council to perform its enforcement functions and this outweighs the limited public interest in disclosure. Consequently the Commissioner has decided that the public interest favours maintaining the regulation 12(4)(e) exception.

Regulation 12(5)(b) – Course of justice etc

25. Eight of the emails withheld under regulation 12(4)(e) relate to legal advice and the Council has argued that this information also falls under the regulation 12(5)(b) exception as it is subject to legal professional privilege. Regulation 12(5)(b) provides that a public authority may refuse to disclose information where disclosure would adversely affect:

(b) 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;

26. "The course of justice" can have a wide meaning and the Commissioner accepts that this covers information which is subject to legal professional privilege. Legal professional privilege is the concept which protects the confidentiality of communications between a lawyer and client. It has been described 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 [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."*¹

27. There are two types of legal professional privilege. Litigation privilege applies where litigation is proposed or contemplated and advice privilege applies where no litigation is contemplated. Advice privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports. What matters is that information must have been created for the dominant (main) purpose of giving or obtaining legal advice. The Commissioner has reviewed the information to which regulation 12(5)(b) has been applied and she is satisfied that it relates to legal advice provided by the Council's legal adviser in a professional capacity and the information was created for the dominant purpose of providing legal advice.
28. The information clearly attracts legal advice privilege and so the next thing to consider is whether disclosure would adversely affect the course of justice. On this point the Council said, as the Commissioner referred to above, that disclosure would reveal the strengths and weaknesses of the different options available in respect of possible enforcement action. This would make it harder for the Council to take action in future if it proves necessary to revisit this matter. It argued that disclosure would prejudice its ability to seek and use legal advice because it would "adversely affect the Council's ability to undertake investigations into complaints and then act upon its findings". This would, it said, make it

¹ Bellamy v Information Commissioner and Secretary of State for Trade and Industry, [EA/2005/0023], para. 9.

harder to undertake formal enforcement action in respect of this matter should it be required. The Commissioner accepts that disclosure would adversely affect the course of justice as it would have the potential to undermine the Council's position and therefore unbalance the level playing field under which adversarial proceedings are meant to be carried out.

29. There is a separate adverse effect in that disclosure of information would undermine the principle of legal professional privilege which is of fundamental importance to the legal system as a whole. For these reasons the Commissioner is satisfied that the regulation 12(5)(b) exception is engaged in respect of the eight emails subject to legal professional privilege and so she will go on to consider the public interest test.
30. Before the Commissioner considers the public interest test she must also address the two remaining emails which were sent outside of the Council and therefore are not covered by the regulation 12(4)(e) exception and are not subject to legal professional privilege. This comprises an email from the Council to the land agent of the individual who was the subject of the planning complaint, and their response. In replying to the Commissioner it was unclear on what basis the Council was withholding this information. However, the Commissioner notes that at the internal review stage the Council explained to the complainant that disclosure of these two emails would adversely affect the course and administration of justice and so were being withheld under regulation 12(5)(b). It said that the information involved the principle of duty of confidence, which it said was "of fundamental importance to effective enforcement". As she will go on to explain, the Commissioner considers that regulation 12(5)(b) would also apply to this information.
31. As the Commissioner has explained, regulation 12(5)(b) can apply to information subject to legal professional privilege. However, this exception has a potentially very wide application and can also apply to information related to various law enforcement investigations or proceedings. This is reflected in the Commissioner's guidance on regulation 12(5)(b) which describes the types of information which might fall under this exception.

"...information about law enforcement investigations or proceedings. This would cover the obvious example of information about a police investigation but could also include information about other types of civil and criminal investigations and proceedings, such as those carried out

under planning or charity law, or those related to tax collection, immigration controls and health and safety regulations.”²

32. Therefore, the Commissioner’s view is that regulation 12(5)(b) can apply to information held in respect of the Council’s planning enforcement functions where disclosure would adversely affect these interests.
33. The arguments for withholding the information essentially reflect the public interest arguments for maintaining the regulation 12(4)(e) exception and so it is not necessary to repeat them in full here. The Commissioner has already said that she accepts that disclosure would make it harder for the Council to take any action on this matter in the future and to take enforcement action in similar cases. Therefore she also finds that disclosure of these two emails would adversely affect the course of justice for the same reasons.
34. The Commissioner will now go on to consider the public interest test in respect of these two emails and the information subject to legal professional privilege.

Public interest test

Public interest arguments in favour of disclosure

35. The arguments for disclosing the information are the same as were considered under regulation 12(4)(e) and discussed above.

Public interest arguments for maintaining the exception

36. The Council argued that the public interest favoured maintaining the exception due to the importance of the principle of legal professional privilege in our legal system. It also argued that disclosure would not be in the public interest as it would adversely affect the course of justice by making it harder for it to take enforcement action in cases like the one which is the subject of this decision notice.
37. The Council added that as the enforcement authority, it is responsible for ensuring that proceedings are conducted in such a manner as to ensure that no party is prejudiced and that all considerations are dealt

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

with in an even handed manner. Therefore disclosing the information would not, it said, be in the interests of justice, neither would it facilitate fairness of any likely enforcement actions that may be contemplated in future for the benefit of local residents and the environment.

Balance of public interest arguments

38. As regards the emails relating to legal advice, in balancing the public interest the Commissioner's view is that there is an inbuilt public interest in withholding information which is subject to legal professional privilege. Therefore, the Commissioner's approach, backed by successive tribunals, is to afford an initial weighting in favour of maintaining the exception. Only in very clear cut cases will the public interest in disclosure outweigh the public interest in protecting the principle behind legal professional privilege, i.e. safeguarding openness in all legal communications to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
39. As well as the inherent public interest in the principle of legal professional privilege the Commissioner will also take into account the particular circumstances of the case. For instance, where the information is live or recent there will be an even stronger case for withholding the information. This is because the advice is still being relied upon or else is still likely to be used in a variety of decision-making processes and the Commissioner accepts that such processes would be likely to be affected by disclosure.
40. In this case the legal advice is still live in the sense that the Council has said that it may need to revisit this case in future at which point it may need to rely on the advice again. The information was also very recent given that it was less than 2 months old at the time of the request. In light of this the Commissioner considers that the arguments for maintaining the exception carry significant weight.
41. As regards the public interest in disclosure, the complainant has suggested that the Council had failed to act upon its own legal advice when deciding not to take enforcement action following his complaint about the advertising hoarding. However, the Commissioner has not seen anything to show that the Council ignored its legal advice or otherwise acted inappropriately in handling this case. Therefore the arguments for disclosure attract only limited weight. Balancing this against the importance of maintaining the principle of legal professional privilege, the fact that the legal advice was very recent at the time of the request and there was a possibility of future enforcement action, the Commissioner has decided that the public interest strongly favours maintaining the exception.

42. For the two external emails, the Commissioner is satisfied that disclosure would add very little to the public's understanding of the reasons behind the decisions taken by the Council beyond what it has already explained to the complainant. Given the limited public interest in disclosure, and for the reasons the referred to above in relation to regulation 12(4)(e), the greater public interest lies in allowing the Council the space to undertake its enforcement functions effectively.
43. The Commissioner has decided that the public interest in maintaining the regulation 12(5)(b) exception outweighs the public interest in disclosure.

Right of appeal

44. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Paul Warbrick
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