

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 11 December 2019

Public Authority: Westminster City Council
Address: Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant submitted a request to Westminster City Council (the Council) seeking information about the judicial review of the Cycle Superhighway CS11. The Council disclosed some information but sought to withhold the remainder of the information on the basis of section 42(1) (legal professional privilege) of FOIA. The Council subsequently accepted that the request should have been considered under the EIR and sought to withhold the information under regulation 12(4)(e) (internal communications), regulation 12(5)(b) (course of justice) and 13 (personal data). The complainant sought to challenge the Council's reliance on regulations 12(4)(e) and 12(5)(b).
2. The Commissioner has concluded that some of the withheld information is exempt from disclosure on the basis of regulation 12(5)(b) and that in all the circumstances of the case the public interest favours withholding this information. She has also concluded that some of the withheld information is exempt from disclosure on the basis of regulation 12(4)(e) but that the public interest in maintaining this exception does not outweigh the public interest in disclosing the information. The Commissioner has also concluded that the Council breached regulation 11(4) by failing to complete its internal review within 40 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Provide the complainant with a copy of the Cabinet Briefing Note dated 25 June 2018.
4. The public authority 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

5. The complainant submitted the following request to the Council on 6 July 2018:

'I am writing, under Freedom of Information Act legislation, to request the following:

*All emails, minutes and notes of meetings relating to the decision to support an external judicial review, and launch a separate judicial review, of Cycle Superhighway CS11, to or with council leader Nickie Aiken present.'*¹

6. The Council responded on 1 August 2018 and provided her with some of the information falling within the scope of her request but explained that some information had been redacted from the documents disclosed and further information was being withheld on the basis of section 42(1) (legal professional privilege) of FOIA.
7. The complainant contacted the Council on 13 November 2018 and asked it to conduct an internal review of this refusal.
8. The Council informed her of the outcome of the internal review on 18 March 2019. The review upheld the application of section 42(1) of FOIA.

¹ CS11 Cycle Super Highway was originally proposed by Transport for London (TfL) and was located for the most part within the London Borough of Camden but bordering on some areas and some roads within Westminster City Council.

Scope of the case

9. The complainant contacted the Commissioner on 26 March 2019 in order to complain about the Council's decision to withhold information falling within the scope of her request. She was also dissatisfied with the Council's delay in completing the internal review.
10. Having received this complaint, the Commissioner advised the Council that in her view the requested information was likely to constitute 'environmental information' as defined by regulation 2(1)(c) of the EIR and therefore the request should have been considered by the Council under that access regime rather than under FOIA. This is because the request sought information on a proposal to build a new cycleway, and this is a measure, ie the proposed cycleway, likely to affect the state of the land as an element of the environment. Therefore, the Commissioner informed the Council that rather than rely on section 42(1) of FOIA to withhold information falling within the scope of the request, the Council should have considered the applicability of regulation 12(5)(b), ie the course of justice exception in the EIR.
11. In response, the Council accepted that the request should have been considered under the EIR rather than FOIA. The Council also clarified its position by explaining that it considered the withheld information to be exempt from disclosure on the basis of the following documents:
 - Regulation 12(5)(b) – the course of justice
 - Regulation 12(4)(e) – internal communications
 - Regulation 13(2A) – personal information
12. For clarity the Council has withheld one document in full, namely a Cabinet Briefing Note dated 25 June 2018 on the basis of regulation 12(4)(e). It has redacted information from two documents provided to the complainant, the first being an email dated 20 June 2018 sent by the Chief Executive of the Royal Parks at 11:26 and the second being an email sent by Kevin Goad, Director of City Highways at the Council, on 9 June 2018 at 13:19 on the basis of regulation 12(5)(b). It has also redacted information from the email of 20 June 2018 on the basis of regulation 13.
13. At the point that this decision notice is being issued, the complainant wishes to contest the Council's reliance on regulations 12(4)(e) and 12(5)(b) only.

Reasons for decision

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

14. The Council redacted the information from the two emails described above on the basis of regulation 12(5)(b). This 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. The threshold for establishing 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, ie 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.
15. The course of justice element of this exception is very wide in coverage, and can encompass, amongst other types of information, material covered by legal professional privilege (LPP).

The Council's position

16. The Council explained that at the time of the request it had submitted a judicial review of the proposed CS11 Super Highway, challenging TfL's proposals due to concerns over the impact on the borough of Westminster. The Council noted that the judicial review decision was issued on 13 September 2018 with the decision being to block CS11 and thus uphold the Council's challenge to it. In February 2019 TfL's appeal of the judicial review was turned down, with the original decision of 13 September 2018 upheld.
17. The Council explained that the withheld information contained discussions about its legal strategy in relation to the ongoing judicial review and in its view disclosure of this information would adversely affect the course of justice. This is because it would allow public access to the discussions and potential strategy in relation to a case which was still 'live'. This includes discussion of the Council's options, legal avenues and potential strategy. The Council argued that disclosure of information held in this regard would therefore have an adverse effect on its ability to discuss and formulate a strategy for such proceedings as it would be effectively showing its hand at a crucial juncture: it would put the Council's arguments into the public arena, laying clear any tactical strengths or weaknesses, and would thereby enable other parties to countermine them, thereby unbalancing the course the judicial review might otherwise have taken.

18. Additionally, it considered that disclosure would prejudice the process itself as it would inhibit the free and frank discussion between officers, councillors and other parties to the legal proceedings, on an ongoing basis.
19. More specifically, the Council argued that the information could attract litigation privilege.

The Commissioner's position

20. With regard to the applicability of legal professional privilege, litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
21. Having considered the redacted information the Commissioner notes that it is a summary of legal advice provided to the Council rather than direct communications between the Council and its legal advisers. However, the Commissioner accepts that the redacted information clearly summarises information which itself would attract litigation privilege. This is because the advice was given about contemplated litigation and was clearly given for the purpose of the judicial review. On this basis the Commissioner therefore accepts that the redacted information attracts litigation privilege. Furthermore, in the Commissioner's view disclosure of information which attracts litigation privilege presents a real risk of adversely affecting the course of justice.
22. Moreover, even if the withheld information did not technically attract litigation privilege, the Commissioner still accepts that disclosure of the redacted information would adversely affect the course of justice. This is because disclosure of the information would reveal details of the Council's discussions with its legal advisers about the CS11, and more specifically, about the options in respect of the judicial review. Given that the judicial review proceedings remained live and ongoing at the time of the request the Commissioner accepts that disclosing details about the Council's legal position could undermine its position in such proceedings and thus interfere with the course of justice.
23. Regulation 12(5)(b) is therefore engaged.

The public interest test

24. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception

outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

25. The Council acknowledged that there is a public interest in disclosure given that the CS11 is a proposal designed for use by the public and the resulting effect on them as well as relating to how the public purse is used for such proposals.
26. The complainant argued that the Council's actions in respect of CS11 have prevented the construction of a major cycling route and the decision impacts people in ways possible to overstate. In light of this she argued that there was a strong public interest in finding out what legal advice the Council sought that led to the decision that is keeping, in her view, Swiss Cottage and Regent's Park deadly for cycling, walking and air pollution.

Public interest in favour of maintaining the exception

27. The Council argued that disclosing information which attracted legal privilege risked undermining the protection that such privilege provides. This could result in the Council's ability to seek clear and frank legal advice being undermined.
28. The Council argued that as the withheld information related to an ongoing judicial review process, disclosure of the information would capture information that became part of its legal argument before the court. The Council argued that disclosure of the information would be detrimental to the public interest in preserving confidence in the judicial system and upholding the existing access regime provided by the court procedure rules.
29. The Council emphasised that the timing of the request was an important factor in terms of the public interest given that the judicial review was ongoing at the time of the request. It argued that the public interest is better served by allowing such court proceedings without the Council's ability to discuss legal options and strategy being undermined.

Balance of the public interest test

30. The Commissioner acknowledges that the CS11 scheme is clearly an important one, involving significant amounts of public money and moreover one that has the potential to have a significant impact on local residents, road users, and indeed on the environment. Furthermore, the Commissioner accepts that the Council's decision to seek a judicial review of the project, resulting in the halting of the project, is one that it

not without some controversy.² In light of this the Commissioner accepts that there is a public interest in the disclosure of information which would help the public understand the Council's decision making process in respect of the judicial review action. Disclosure of the information redacted on the basis of regulation 12(5)(b) would directly meet this interest.

31. However, in the Commissioner's opinion there is a very considerable public interest in protecting information covered by legal professional privilege in order to ensure that the confidence in this principle is maintained. Furthermore, in the circumstances of this case the legal advice clearly relates to a live and ongoing matter and in the Commissioner's view this adds significantly to the public interest in favour of maintaining the exception. Moreover, in the Commissioner's view there is a clear public interest in maintaining a level playing field in any legal proceedings and it would be unfair, and moreover undermine the administration of justice, if the Council's legal advice was disclosed prior to the judicial review proceedings taking place unless the Council had the corresponding benefit.
32. In light of the above, the Commissioner has concluded that the public interest in maintaining the exception contained at regulation 12(5)(b) outweighs the public interest in disclosure of the redacted information.
33. As noted above, 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).
34. For the reasons discussed 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.

² <https://www.theguardian.com/lifeandstyle/2018/jun/18/westminster-council-accused-of-playing-politics-over-bike-route>

Regulation 12(4)(e) – internal communications

35. The Council withheld the Cabinet Briefing Note dated 25 June 2018 on the basis of regulation 12(4)(e) of the EIR. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
36. The Commissioner is satisfied that the Cabinet Briefing Note clearly falls within the description of an internal communication and therefore is exempt from disclosure on the basis of regulation 12(4)(e).

The public interest test

37. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. As with regulation 12(5)(b), the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

38. The complainant's arguments to support her view that the withheld information should be disclosed are set out above at paragraphs 25 to 26.

Public interest in favour of maintaining the exception

39. The Council argued that it needed a safe space in which to have a free and frank exchange of views in relation to the CS11 and the judicial review action. It argued that disclosure of the information which it withheld on the basis of this exception would limit such discussions which in turn would have an adverse impact on its internal deliberations and decision making process. The Council also emphasised that at the point that the request was submitted the judicial proceedings were ongoing and thus the need for such a safe space remained necessary.

Balance of the public interest arguments

40. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the

Commissioner considers that the need for a safe space will be strongest when the issue is still live.

41. In the circumstances of this case, the issue in question, namely the judicial review proceedings regarding CS11 were clearly still live at the time of the request. Therefore, in theory, the Commissioner accepts that the Council needed a safe space at the time of request to debate such issues. However, the content and sensitivity of specific information has to also be considered in taking into account the weight that should be attributed to maintaining the exception. In the Commissioner's view the information contained in the Cabinet Briefing Note does not contain any particularly free and frank exchanges or sensitive details. Rather the document appears to contain factual details about the background to the issue and factual information regarding the issue. Therefore, despite the fact that the issue was live at the time of the request, the Commissioner is not persuaded that disclosure of the information would significantly invade the Council's safe space..
42. With regard to the public interest in favour of disclosure, in the Commissioner's opinion it is in the public interest to promote transparency and accountability in relation to the Council's decision making regarding the judicial review. As the Commissioner acknowledged above, the CS11 scheme is a significant one of considerable interest to the public. Whilst disclosure of the Cabinet Briefing Note, given its contents, is unlikely to add significantly to the public's understanding, disclosure of this would still provide the public with a better understanding of the Council's position at the time of the request.
43. In light of this, and given the limited weight that the Commissioner considers should be attributed to maintaining the exception, she has concluded that the public interest favours disclosing the Cabinet Briefing Note.

Regulation 11 - Representations and reconsideration

44. Regulation 11(4) of the EIR requires a public authority to inform a requester of the outcome of the internal review as soon as possible and not later than 40 working days after the date on which an internal review was requested.
45. In the circumstances of this case, the Council failed to complete its internal review within this timeframe and therefore it breached regulation 11(4) of the EIR.

Right of appeal

46. 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

47. 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.
48. 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

Jonathan Slee
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