

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

Date: 4 February 2021

Public Authority: Epping Forest District Council
Address: Civic Offices
High Street
Epping
Essex
CM16 4BZ

Decision (including any steps ordered)

1. The complainant has asked Epping Forest District Council for information which concerns Planning Application - EPF/2503/19. The Council responded to the complainant's request by refusing to disclose the legal advice it had obtained from its lawyer in reliance on Regulation 12(5)(b) of the EIR and by informing the complainant that it did not hold any further information other than that it had disclosed to him.
2. The Commissioner's decision is that Epping Forest District Council has complied with the provision of Regulation 5(1) of the EIR in respect of the information which the complainant has asked for, with the exception of legal advice which was obtained by the Council and which is relevant to the complainant's question 1. The Council is entitled to withhold the legal advice it holds on the grounds that it subject to the Council's correct application of Regulation 12(5)(b).
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 7 March 2020, the complainant submitted the following request for information via the WhatDoTheyKnow website¹:

"Please provide all information relating to Section 106 contributions and agreements relating to Planning Application - EPF/2503/19. All information is requested including that relating to negotiations and draft agreements.

In particular please ensure the following is included:

1. advice received from lawyers or independent consultants on the offers received from the developer;
 2. information relating to the ECC request for contributions to Early Years and Childcare;
 3. status reports and information indicating S106 matters have been agreed prior to issue of the planning officer's report;
 4. information to establish what independent checks and due diligence was conducted in relation to suitable providers and costs to provide a demand responsive bus service;
 5. information relating to the specific sustainable transport initiative that has been proposed;
 6. information relating to the Priority Habitat Restoration Project;
 7. information relating to potential contributions through the Community Infrastructure Levy."
5. The Council responded to the complainant's request on 6 April 2020, informing him of the following:

¹ http://www.whatdotheyknow.com/request/s106_information_planning_applic

"Firstly, the Council does not hold copies of any draft and/or finalised S106 agreements in relation to planning application EPF/2503/19 as none have been prepared.

Q.1. The Council has not received advice from independent consultants in respect of the S106 draft heads of terms and therefore does not hold this information. The Council is withholding legal advice received in relation to the application as this is subject to legal professional privilege. This is permitted under Regulation 12(5)(b) of the Environmental Information Regulations 2004.

Q.2. The committee report being referred to the District Development Management Committee (DDMC) on 22nd January 2020 contains information relating to the proposed S106 contributions, including Early Years and Childcare. The report can be viewed at:

<https://rds.eppingforestdc.gov.uk/ieListDocuments.aspx?CIId=749&MIId=10123&Ver=4>

Attached is an email from Quod dated 25/09/19; consultation responses from Essex County Council (ECC) dated 22/11/19 and 08/01/20; emails to/from the case officer and ECC dated 06/11/19 and 03/12/19.

Q.3. The Council does not hold the information requested as the final decision on the acceptability of the proposed S106 Heads of Terms would need to be made by the District Development Management Committee (DDMC). The committee report that was due to be referred to DDMC on 22nd January 2020 includes the officer recommendation only. A link to the document is enclosed in response to Question 2 above.

Q.4. Appendix 15 (attached) of the published Transport Assessment (31/10/19) includes information relating to the proposed demand responsive bus service. The attached Interim Travel Plan (17/12/19) has further information on the proposed bus provider Arriva, including examples of where the service has been successful previously.

The Council has not conducted independent checks in relation to the proposed demand responsive bus service and/or costs of running the service and therefore does not hold this information.

Q.5. The following information and correspondence relating to the proposed sustainable transport initiatives is enclosed: DDMC Committee Report 22/01/2020; Travel Policy (17/12/2019); Interim Travel Plan (17/12/19); Planning Statement (31/10/19); ECC responses dated 22/11/19 and 08/01/20; Natural England response dated 03/01/20.

Q.6. The following information relating to the Priority Habitat Restoration Project is enclosed: DDMC Committee Report 22/01/2020; Planning Statement (31/10/19); Draft S106 Heads of Terms (31/10/2019); Ecological Assessment (31/10/19); Appendix 13 Biodiversity Net Gain Calculator of the Ecological Assessment (31/10/19)

The Council does not hold information on specific Priority Habitat Restoration Projects identified in the District.

Q.7. The Council does not hold this information as we do not have an adopted Community Infrastructure Levy."

6. On 7 April 2020, the complainant wrote to the Council to ask for the following information or clarification as to what appeared to be missing information, with the exception to part 4.

"Q1. For regulation 12(5)(b) to apply to legally privileged information, the council must demonstrate that disclosure of the requested information would have an adverse effect on the course of justice. In addition, you must also apply the public interest test. The public interest test is required considering that: there are substantial sums concerned with the S106 agreement; the council has dismissed the need for an Early Years and Childcare contribution; and certain non-site specific S106 contributions may not be legally enforceable. Please either provide the information or detail the public interest test and effect on the course of justice test.

Q2. With regard to Early Years and Childcare the report to the DDMC of 22nd January 2020 in 13.369 states: "ECC have not provided any information on existing surplus or deficit in the local area". The planning application was submitted on 18th October 2019 and ECC responded on 22nd November 2019 with the required S106 contribution for Early Years and Childcare. None of the council documents provided show where the council responded to the ECC letter of 22nd November 2019 and requested the information on "surplus or deficit" or ECC's alleged failure to comply with "paragraph 122" of the Community Infrastructure Levy Regulations. Please either provide the information issued in response to the ECC letter of 22nd November 2019 or confirm if no further correspondence was issued.

Q3. Your response states that there is no information as S106 matters would not be agreed before a decision from the DDMC. This conflicts with the council report to the Cabinet Meeting of 18th November 2019 (ref: C-021-2019/20) providing an update on progress of planning applications which states in Appendix B that status of the S106

agreement for application EPF/2503/19 is "Agreed". If it was possible to submit such a report to the cabinet then the council must hold additional information. Please provide all information relating to this matter.

Q5. Having checked the council report to the DDMC of 22nd January 2020 in relation to this point the only reference that can be found is in 3.3 which states: "A minimum financial contribution of £150,000 towards a specific sustainable transport initiative {TBA}". Based upon the information you have provided and the "TBA" reference in the report it would appear that no "specific" proposal is yet in place. Please either provide information on the specific proposal or confirm that it has not yet been proposed.

Q6. The same issue as Q5 applies to the Priority Habitat Restoration Project. In addition, 13.318 of the council report to the DDMC of 22nd January 2020 refers to a 10ha development and there is no information to confirm that the proposal relates to the 14.7ha development that is the subject of application EPF/2503/19. Please either provide information on the specific proposal or confirm that it has not yet been proposed.

Q7. The council has referred to the Community Infrastructure Levy regulations as a reason for dismissing the ECC request for Early Years & childcare contributions (see Q1 above). Furthermore, the council report to the DDMC of 22nd January 2020 relies on the un-adopted draft Local Plan which also states that the council intends to introduce the Community Infrastructure Levy. Based on the information provided in your response there appears to have been no attempt by the council to negotiate an increased level of S106 contributions from the developer. Please review and provide the applicable information or confirm that the council has not made any negotiation or consideration of potential contributions through the Community Infrastructure Levy."

7. On 7 May 2020, the complainant asked the Council to conduct an internal review of its handling of his request.
8. On 11 August 2020, the Commissioner wrote to the Council asking it to carry out an internal review of this request.

Scope of the case

9. The complainant contacted the Commissioner 9 June 2020 to complain about the way his request for information had been handled.

10. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Epping Forest District Council has handled his request in accordance with the EIR, and specifically, whether the Council is entitled to rely on Regulation 12(5)(b) in respect of the information relating to his question 1. The Commissioner also advised the complainant that she would determine whether the Council holds any recorded information in respect of his questions 2, 3, 5, 6, and 7, which it has not disclosed.

Reasons for decision

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

Question 1 of the complainant's request.

11. The Council has confirmed to the Commissioner that it has not received legal or consultant advice regarding the S106 financial contributions offered by the applicant in respect of this planning application. Therefore, the Council holds the position that it does not hold information relating to part of the complainant's request at question 1.
12. The Council acknowledges that it has received legal advice on the planning application, and it is this information which is being withheld in reliance on Regulation 12(5)(b) of the EIR. It has confirmed that its reliance on this exception relates to information which the Council considers would likely prejudice 'the course of justice' if it was to be disclosed.
13. The Council considers the withheld information attracts legal advice privilege on the basis that it is comprised of a communication made between a legal adviser - a specialist Planning Solicitor, and the Council - the client. The Council accepts that the withheld information does not attract litigation privilege.
14. The Council has informed the Commissioner that the communication was made for the purpose of obtaining the legal advice from the Council's legal adviser acting in her professional capacity.
15. The information which is being withheld under Regulation 12(5)(b) has not been divulged to the public or a third party and therefore the Council holds the position that the privilege attached to the information has not been lost.
16. The Council has provided the Commissioner with the information it is withholding under this exception. The Commissioner has examined that

information and she is satisfied that it is comprised of a request for legal advice and the provision of legal advice.

17. Referring to her own guidance on the use of this exception², the Commissioner notes that, '*...an adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice*'.
18. The Commissioner also notes that position of the Upper Tribunal regarding the disclosure of privileged information. The Tribunal accepted that *it was not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; but suggested that there would need to be special or unusual factors in play for this not to be the case.*
19. To determine whether the disclosure of legal privileged information would adversely affect the course of justice, attention must be given to the particular circumstances of the case in question.
20. In this case, the Council argues that releasing the information into the public domain could adversely affect the way in which it determines the planning application and lead to a potential planning enquiry or judicial review of its decision once this is made.
21. Whilst the identified adverse effect is not a foregone conclusion, there is nothing in the circumstances of this case which suggests this particular planning application is special or unusual. It is clear to the Commissioner that disclosure would adversely impact the general principles of legal professional privilege and therefore the Commissioner has decided that the exception to disclosure provided by Regulation 12(5)(b) is engaged.
22. The Council's reliance on Regulation 12(5)(b) is subject to a consideration of the public interest test.
23. The Commissioner considers that weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
24. Access to publicly held information assists the public in understanding the mechanics of how public authorities make their decisions. This in

² https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

turn fosters trust in public authorities and may allow greater public participation in the decision-making process.

25. In this case, disclosure of the withheld information would help the public to understand some of the issues considered by the Council in respect of the planning application. In particular, disclosure of the withheld information would allow the public to consider the issues being considered by the Council and the quality of the legal advice it received.
26. Weighed against the above is the long-established principle at the heart of legal professional privilege, i.e., the safeguarding of openness in all communications between a client and their lawyer to ensure access to full and frank legal advice.
27. The Commissioner fully accepts the Council's need to obtain legal advice in confidence and she considers that it is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice.
28. In the Commissioner's opinion, should the legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so.
29. The Commissioner's published guidance on legal professional privilege states that "Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".
30. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, well established and important common law principle. The Information Tribunal affirmed this in the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) when it stated: "...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 clearest case..."
31. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

32. In this case the Commissioner considers that the weight given to the public interest favouring the disclosure of the Council's legal advice is not as strong as the arguments in favour of withholding the information. The Commissioner believes that the public interest in maintaining the exemption is clearly stronger as there is an overriding public interest in favour of maintaining the principle of legal professional privilege.
33. It is not in the public interest for the Council to be hampered in its ability to make a fully considered decision in respect of this planning application. The Commissioner is satisfied that the public interest is best served by maintaining the Council's right to obtain legal advice and for its lawyer to provide that advice in confidence. She takes this position on the grounds that the public interest in maintaining legal professional privilege is a particularly strong one.
34. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
35. The Commissioner has decided that the Council has properly applied Regulation 12(5)(b) to the legal advice it is withholding.

Regulation 5(1) – duty to make environmental information available on request

36. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
37. The Commissioner has sought to determine whether the Council holds any further information which is relevant to the complainant's request, particularly in respect of the complainant's questions 1, 2, 3, 5, 6, and 7.
38. In view of the Council's failure to conduct an internal review in this matter, the Commissioner asked the Council to respond to the questions put to it by the complainant in his email of 7 April 2020.
39. The Council provided the Commissioner with the following response:
 1. 'The Council has not received legal or consultant advice regarding the S106 financial contributions offered by the applicant and therefore does not hold the information requested. The Council received legal advice on the planning application. The Council is withholding this

advice under Regulation 12(5)b of the Environmental Information Regulations 2004.'

2. 'The Council's previous response provided all written correspondence between EFDC and ECC in relation to the Early Years and Childcare S106 request. The Council did not enter any further correspondence with the ECC Early Years Team in respect of this matter and therefore does not hold this information.'
3. 'The purpose of the report appendices for the Cabinet Meeting of 18th November 2019 (ref: C-021-2019/20) was to appraise Councillors of the progress being made on planning applications between applicants/agents and Council Officers. It does not convey or imply a decision by the Council. At the time of writing the Cabinet report, the applicant/agent had proposed a set of Draft S106 Heads of Terms as published on the planning application file and provided to you in your previous response. These were still in draft and no agreement had been reached by the Council on the final S106 Heads of Terms as that is a matter for the District Development Management Committee (DDMC).'
5. 'No specific project has been identified in respect of this matter.'
6. 'No specific project has been identified in respect of this matter.'
7. 'The draft DDMC report dated 22nd January 2020 sets out the reasons that officers recommended that the Early Years and Childcare contributions were not pursued in this instance. As noted in response to Q3 above, this is an officer recommendation only and the final decision rests with DDMC.

The Council does not have an adopted Community Infrastructure Levy (CIL) and therefore has no mechanism to seek financial contributions under this legislation.

Council Officers continue to negotiate with the applicant/agent in respect of the planning application. At present, Council Officers are not seeking to negotiate an uplift in S106 financial contributions over and above those set out in the draft S106 Heads of Terms (as provided previously) and as stated in the DDMC report dated 22nd January 2020.'

40. To make her determination of whether the Council holds any information relevant to the complainant's request, other than the information which the Council has already disclosed, the Commissioner is required to consider the facts of the case, as she understands them, against the balance of probabilities. This is the civil test which accords with the

approach taken by the First Tier Tribunal (Information Rights) when it has considered whether information is held in past cases.

41. The Council has told the Commissioner about the searches it has conducted by its planning officers dealing with the planning application of interest to the complainant. The Council said that searches were carried out of the officers' email correspondence and word documents, as the information would only have been held on their computers' systems.
42. The Council said that it had used search terms used for questions 2, 3, 5, 6 and 7 that reflected the terms used by the complainant in his specific questions. It added that, if the information was held it, would be held electronically.
43. According to the Council, the information would be held on a case officer's laptop, which is supplied by the Council and not the personal PCs of the case officer. The search was conducted on networked resources and emails.
44. The information asked for by the complainant in question 2 concerns a response to Essex County Council's letter of 22 November 2019. The Council confirmed to the Commissioner that it did not respond to that letter.
45. Regarding the complainant's question 3, the reference in the report, appendix B, that the status of the s106 agreement for application EPF/2503/19 is "Agreed", the Council meant that the heads of terms for the S106 had been agreed not the final s106 agreement. The Commissioner has been assured that these 'Heads of terms' were provided to the complainant on 6 April 2020.
46. In respect of the complainant's questions 5 and 6, the Council has confirmed to the Commissioner that that no specific proposal towards the sustainable transport initiative is yet in place, and that no specific project has been identified in respect of this matter.
47. Regarding the complainant's question 7, the Council told the Commissioner that it has not made any negotiation or consideration of potential contributions through the Community Infrastructure Levy. This is due to the Council not having an adopted Community Infrastructure Levy system in place at the moment.
48. The Council has assured the Commissioner that it has neither destroyed nor deleted any information which falls within the scope of the complainant's questions 2, 3, 5, 6 and 7. The Council has also provided the Commissioner with a copy of policy concerning the retention and disposal of council documents. Furthermore, the Council has assured the

Commissioner that, "If the information existed there would be a statutory requirement to retain it".

49. The Commissioner has considered the Council's representations in this matter. She considers those representations to be both credible and persuasive, and therefore, on the balance of probabilities, the Commissioner has decided that the Council has complied with Regulation 5(1) of the EIR in respect of the complainant's request.

Right of appeal

50. 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

51. 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.

52. 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

Andrew White
Group Manager
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SK9 5AF