

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 March 2013

Public Authority: Camden Council
Address: Camden Town Hall
Judd Street
London
WC1H 9JE

Decision (including any steps ordered)

1. The complainant has requested the instructions given to Counsel by Camden Council for specific legal advice and all records connected with this.
2. The Commissioner's decision is that Camden council has applied regulation 12(5)(b) of the EIR appropriately.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 19 July 2012, the complainant wrote to Camden council (the Council) and requested information in the following terms:

'Earlier this year, Camden Planning Department refused to release the legal advice they had received in relation to an application for a Certificate of Lawfulness (2011/3054/P) subsequently granted, on the grounds that it is privileged information that they did not have to release under the Act. I dispute this, and request that this decision be specifically in relation to the circumstances of this application.

I further request under the Act that the request itself from the Planning Department for advice from legal counsel (as separate to the actual advice) be provided to me. Please send me all records held by Camden

Council in which legal advice is requested in relation to this application, including but not limited to email, fax, memos or meeting minutes.'

5. The Council responded on 7 August 2012. It stated that it was withholding the information under regulation 12(5)(b).
6. Following an internal review the council wrote to the complainant on 21 August 2012. It stated that that it was upholding its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 12 September 2012 to complain about the way her request for information had been handled.
8. The Commissioner notes that the complainant confirmed to the council on 7 August 2012 that the outstanding issue was that she wanted the wording of the question whereby legal advice was requested.
9. The Commissioner will consider whether the council has applied regulation 12(5)(b) appropriately to the instructions it gave to Counsel regarding legal advice it sought in connection with a Certificate of Lawfulness.

Background

10. The application for the Certificate of Lawfulness (2011/3054/P) was for a Proposed Use or Development for the erection of two separate single storey rear extensions at ground and first floor levels to a house.

Reasons for decision

11. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information if its disclosure would adversely affect the course of justice, the ability to receive a fair trial or the ability to conduct an inquiry of a criminal or disciplinary nature. It is also subject to the public interest test under regulation 12(1)(b): in all the circumstances of the case, the public interest in maintaining the exception outweigh the public interest in disclosure. Under regulation 12(2) there is a presumption in favour of disclosure.
12. Regulation 2(1) defines environmental information as follows :

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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;

...

(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) and (b) as well as measures or activities designed to protect those elements.'

13. A Certificate of Lawfulness is a certificate which establishes that the use or development of land is lawful. The Commissioner considers that a request for the instructions sent to a lawyer requesting legal advice regarding a Certificate of Lawfulness is environmental information under the terms of regulation 2(1)(c). He considers that the Certificate of Lawfulness is a measure that will affect the elements and factors referred to in regulations 2(1)(a) and (b).
14. The withheld information consists of the instructions given to Counsel for legal advice and emails between an in-house solicitor and members of staff about these instructions.
15. The Council applied regulation 12(5)(b) to the withheld information. Regulation 12(5)(b) states that:

'a public authority may refuse to disclose information to the extent that 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.'
16. The Commissioner accepts that this exception includes information that would be covered by Legal Professional Privilege ('LPP').
17. In order to ascertain whether regulation 12(5)(b) has been applied appropriately in this case, the Commissioner will consider the following three questions.
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour maintaining the exception?

Is the information covered by LPP?

18. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or being contemplated but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
19. The council argued that the withheld information is exempt under regulation 12(5)(b) as the information attracts legal advice privilege and disclosure would adversely affect the course of justice.
20. Having considered the withheld information the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential, were made between a client and professional legal advisers acting in their professional capacity and were made for the sole or dominant purpose of obtaining legal advice. The Commissioner is therefore satisfied that the withheld information is subject to LPP – in this case, legal advice privilege.

Would disclosure have an adverse effect on the course of justice?

21. The council argued that disclosure of the instructions to Counsel for legal advice would undermine the important common law principle of legal professional privilege. It explained that forsaking this principle would undermine a lawyer's capacity to give full and frank legal advice. The council also explained that disclosure would discourage people from seeking legal advice.
22. It is the Commissioner's view that any disclosure of information subject to LPP would have an adverse effect on the course of justice simply through the weakening of the doctrine. He agrees that this would, in turn, undermine a legal adviser's capacity to give full and frank legal advice and would have the effect of discouraging parties from seeking legal advice.
23. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a prejudicial effect and that, as a result, regulation 12(5)(b) is engaged. He has therefore gone on to consider the public interest test.

The public interest test

24. Regulation 12(1)(b) requires that, where an exception 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 his assessment of the public interest test, the Commissioner is mindful of the presumption on disclosure, under regulation 12(2).

Public interest arguments in favour of disclosing the information

25. The complainant argued that disclosure of the information was necessary in this case. She explained that the council had a history of numerous repeated and costly mistakes including a decision overturned at judicial review; therefore, the public benefit of the council being seen to conduct itself properly was overriding. The complainant went on to explain that there was a widespread perception that the council's planning department was biased in favour of applications on the site in question and had given advice to the development committee that was biased or untrue.
26. The complainant also explained that the council's planning department presented advice to the development committee as having been approved by legal counsel. However, the complainant explained that she had been informed in writing by the council's legal adviser, that the legal advice sought from Counsel was to clear the wording of a report prepared for a Members Briefing. The complainant argued that if the legal advice given was purely related to the wording and not the content of the delegated report on which the development control committee based its decision to grant the application, then the process was clearly flawed, as the advice itself was presented to the committee as having been approved by legal counsel.
27. The complainant also pointed out that the legal advice had been paid for with public money and that the safety of homes was an issue. For these reasons, the instructions to Counsel should be disclosed.

Public interest arguments in favour of maintaining the exception

28. The council acknowledged that there was an interest in disclosure with regards to transparency and openness. However, it argued that at the time of the request, it was relying on legal advice, of which the requested instructions to Counsel were part.
29. The council also argued that disclosure of the instructions to Counsel would make it possible to determine what information the request for legal advice was concerned with. It also explained that it considered that

if legal professional privilege applied to both the seeking and obtaining of legal advice, the instructions to Counsel for legal advice should be included.

30. If forced to disclose this information, the council argued that the essence of the confidential nature of discussions between a client and solicitor and the knowledge that this confidence encourages clients to seek legal advice and allows for full and frank exchanges, would be lost.

Balance of the public interest arguments

31. The Commissioner has considered the public interest arguments for and against disclosure. He has also taken account of the presumption in favour of disclosure under regulation 12(2).
32. The Commissioner acknowledges that there is a strong public interest in public authorities being accountable in relation to matters such as extensions to houses. He also believes there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions; the Commissioner acknowledges that this would create a degree of accountability and would also enhance the transparency of the process through which such decisions are made. The Commissioner considers this is especially the case where the public authority's actions have a direct effect on the environment.
33. The disclosure of the instructions to Counsel for legal advice and emails in which the instructions are discussed, would also provide a degree of transparency and reassurance to interested parties that the council's actions were in the best interests of the community. Disclosure may assist the public in understanding the legal basis for the actions and decisions taken by the council.
34. The Commissioner notes the complainant's comments about the safety of houses. He is of the view that any extensions carried out in this planning application would have to be passed as legally safe, by the Planning Department of the council.
35. In reaching a view on the balance of the public interest in and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information.
36. The Commissioner believes it is important that the council should be able to consult freely and frankly with its legal advisors and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.

37. The Commissioner also considers that the timing of the request means that significant weight should be attributed to the "live" nature of the legal advice. He notes that the date of the instructions and emails is October 2011 and the request was made in July 2012; he also notes that the council has confirmed that it was still relying on the legal advice at the time of the request.
38. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
39. The Commissioner also considered the complainant's argument about the wording and not the content of the report being the subject of legal advice. He considers that if there was something wrong in the report, any legal advice would point this out.
40. In reaching a decision in this case, the Commissioner has given significant weight to the general public interest in preserving the principle of LPP, the "live" nature of the advice and the timing of the request.
41. Whilst the Commissioner considers that the arguments in favour of disclosure have weight he has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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

Jon Manners
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