

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

Decision notice

Date: 19 December 2017

Public Authority: London Borough of Bromley

Address: Civic Centre
Stockwell Close
Bromley
BR1 3UH

Decision (including any steps ordered)

1. The complainant has requested a copy of a legal opinion obtained by London Borough of Bromley (the Council) relating to an application to grant a certificate of lawfulness for a property.
2. The Commissioner is satisfied that regulation 12(5)(b) (course of justice) of the EIR is engaged and that the public interest in disclosure is outweighed by the public interest in maintaining the exception. However, as the Council had not issued a refusal notice within 20 working days, the Commissioner finds that the Council has breached regulation 14(2).
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 27 July 2017, the complainant wrote to the Council and requested information in the following terms:

"Can you please provide copy of legal opinion obtained by Bromley council in application to grant certificate of lawfulness ([application reference redacted]) for property address as [address redacted].

Unfortunately this document is not available on your website.

If you are reluctant to provide this document, please treat this email as a formal FOI (Freedom of Information) request and/or EIR (Environment Information Regulations) request."

5. The Council responded on 29 September 2017 stating that it decided against *"disclosing the information requested, on grounds of legal professional privilege LPP, under s42 of the FOIA."*
6. Remaining dissatisfied with the Council's response the complainant requested an internal review on the same date.
7. Following an internal review the Council wrote to the complainant on 1 November 2017. It stated that *"Since the request related to a planning matter I consider that the original decision should have been made under the Environmental Information Regulations 2004 (EIR) rather than FOIA. However, the result would have been the same since regulation 12(5)(b) of EIR contains an exemption from the obligation 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."*

Scope of the case

8. The complainant contacted the Commissioner 8 September 2017 to complain about the way his request for information had been handled. He disputed that the public interest in maintaining the exception outweighed the public interest in disclosure.
9. He also complained about the length of time the Council had taken to respond to his request.
10. The analysis below considers the Council's application of the exception provided under regulation 12(5)(b) to the requested information. The

Commissioner has also considered the timeliness of the Council's response.

Reasons for decision

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

11. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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 Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.

The Complainant's position

12. The complainant claims that the requested information should be treated as a part of planning matters and therefore it should be treated as part of public records. He maintains that, in this case, the legal opinion is not part of a planning enforcement matter, consequently it should be accessible to the public at large.
13. Furthermore, the complainant is of the opinion that the use of the legal opinion is not confined only to this particular case. According to him, since the planning officers are not expected to be qualified in legal matters, they will use it in other cases in similar circumstances and therefore it is in the interest of the public to have access to the withheld information.
14. Moreover, the complainant claims that the Council, when acting as a quasi-judicial decision maker in planning matters, should be required to disclose all relevant documents, including independent legal opinion, in order to prove it has acted fairly and lawfully. He maintains that it is in the interest of the members of the public to know whether the Council has acted accordingly.
15. In addition, the complainant alleges that the information no longer attracts legal professional privilege, since the Council has already included its substance in its Delegated Decision Report (the Report). In support of this argument, the complainant quoted the specific part of the Report, which, according to him, contains part of the legal opinion.
16. Finally, the complainant asserts that the legal opinion obtained by the Council was sought to assist the Council in making a decision on the planning application. Once the Council has made that decision, which it

has, the purpose of the legal opinion is complete. He maintains that that the legal opinion was not obtained for the purpose of assisting a party in a litigation procedure, as there was none.

The Council's position

17. The Council explained that the withheld information consists of legal advice obtained from a professional legal adviser which was sought for the purpose of considering and determining the planning application made by the complainant.
18. The Council confirmed that it considers that the withheld information attracts legal professional privilege as legal advice privilege.
19. Furthermore, the Council explained that, to date, the complainant has submitted 5 planning applications relating to the site, all of which have been refused. Two of them have also been dismissed on appeal, and one of these appeal decisions was also challenged in the High Court, which resulted with a dismissal.
20. With regards to the complainant's allegation that the Council has lost the legal professional privilege by disclosing the substance of the legal opinion, the Council rebutted this assertion by denying that any part of the legal opinion was published in any other document. The Council maintains that the Report does not even refer to the Council having obtained advice. In support of this argument the Council provided to the ICO, as part of withheld information, the legal opinion that it has obtained and also the Report which was published on the Council's website.

The Commissioner's view

Is the information covered by legal professional privilege?

21. With regards to the complainant's claim that the withheld information is not legally privileged as it has not been sought in connection with present or future litigation, the Commissioner reiterates that there are two branches of legal professional privilege, litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege is generally considered applicable where no litigation is in progress or contemplated. It is therefore not necessary for litigation to be in progress in order for a claim of legal professional privilege to be maintained. As such, ongoing litigation is not a requirement for the application of regulation 12(5)(b).

22. Having viewed the withheld information, the Commissioner is satisfied that it constitutes legal advice on a specific matter, and it has been provided by a qualified legal professional. Therefore, she is satisfied that the information is covered by legal professional privilege.

Adverse effect on the course of justice

23. The Council maintains that undermining the general principle of legal professional privilege would result in adverse effects on the course of justice. In applying this exception, the Council considers that based on the determination of the complainant to pursue this matter and the history of challenge to the Council's planning decisions and the likelihood of further challenges and litigation, the ability to respond to potential future applications and challenges would be adversely affected if it would be compelled to disclose the withheld information.
24. The complainant submitted that providing him access to the withheld information would not have an adverse effect, because as part of his application he submitted two legal opinions that he has obtained from two different legal professionals. Consequently, the Council were familiar with his arguments and, according to him, for the sake of fairness the Council should have disclosed the legal advice obtained in order to preserve a level playing field.
25. The Commissioner notes that the complainant voluntarily disclosed the legal opinions that he obtained and such a disclosure does not compel the Council to disclose information, which it considers is protected by legal professional privilege.
26. In the decision of *Archer v Information Commissioner and Salisbury District Council*¹ the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an adverse effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner*² - interpreted the word "would" as being "most probable than not".
27. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*³ the Information Tribunal cited legal professional privilege as being "*a fundamental condition upon which the administration of justice as a whole rests*". The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is

¹ Appeal No. EA/2006/0037

² Appeal No. EA/2005/0030

³ Appeal No. EA/2005/0023

disclosed on a regular basis under the FOIA or EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.

28. In the present case, the Commissioner considers that disclosure of legal opinion obtained by the Council would adversely affect the Council's ability to defend itself should it be faced with a legal challenge in connection with this issue. The Council has advised the Commissioner that the matter is still current and remains subject of threatened litigation.

Has the withheld information lost the legal professional privilege?

29. The Commissioner has examined carefully the legal opinion obtained by the Council and compared it with the Report 17/00273/ELUD of 16 May 2017. She concluded that the Report may have made references to case law, similar to those that the legal opinion has quoted.
30. However, no substantial part of the legal opinion which constitutes the withheld information was quoted in the Report. Therefore, it cannot be considered that there was an unrestricted disclosure of the information.
31. Moreover, the Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.

The public interest test

32. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then 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.
33. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the requested information

34. The complainant submitted that the Council acts as a quasi-judicial decision maker in planning matters and it is in the interest of the public to be informed about the fairness and lawfulness of this process.
35. In addition, the complainant considers that the Council, when exercising its quasi-judicial role as a decision maker in planning matters, does not have a position of its own, because it represents the public and should only protect the public interest. Therefore, disclosing the legal opinion obtained is in the interest of the public, because it will enable them to

ascertain whether the Council, as their representative, has applied the law correctly.

Public interest in maintaining the exception

36. The Council submitted that it is of a great importance for it to be able to obtain independent legal advice from qualified experts without jeopardizing the confidentiality of the communication.
37. Furthermore, the Council maintains that a public authority exercising a quasi-judicial function should not be forced to weaken its position and ability to implement planning law and policy by having to reveal information that no other body would have to release.

Balancing the public interest

38. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. Those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, the Commissioner's view is that the public interest in disclosure does not equal or outweigh the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
39. The Commissioner notes that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people, evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Upon inspection of the withheld information, the Commissioner could notice no sign of unlawful activity, evidence that the Council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
40. Therefore, the Commissioner has observed that the public interest in maintaining this exception is a particularly strong one in terms of not undermining the principle of legal professional privilege. To equal or outweigh that public interest, the Commissioner would expect there to be stronger opposing factors. In this case, the Commissioner considers that whilst there is a public interest in disclosure, it does not equal or outweigh the strong public interest that is inherent in maintaining the Council's right to obtain legal advice in confidence. Consequently, she

finds that the Council was correct to withhold the legal advice under regulation 12(5)(b).

Procedural matters

Regulation 14(2)

41. Regulation 14(1) states that if a request for information is refused by a public authority "*the refusal shall be made in writing*". Regulation 14(2) requires that "*the refusal shall be made as soon as possible and no later than 20 working days*", and regulation 14(3) states that the refusal "*shall specify the reasons not to disclose the information requested*".
42. In light of the complainant's concerns about the timeliness of its response, the Commissioner examined the chronology of the communication from submission of the initial request by the complainant until the date when the Council provided its response. The Commissioner found that it took the Council more than two months to provide a response to the complainant's initial request.
43. Therefore, from the evidence she has seen in this case the Council failed to respond to the complainant within the statutory time frame and so it is in breach of regulation 14(2).

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

Alun Johnson
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