

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 May 2021

Public Authority: Bristol City Council
Address: The Old Council House
Corn Street
Bristol, BS1 1

Decision (including any steps ordered)

1. The complainant has requested information relating to Stoke Lodge Playing Fields. Bristol City Council disclosed some information and withheld other information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
 2. The Commissioner's decision is that Bristol City Council has correctly applied regulation 12(4)(e) and regulation 12(5)(b) to withhold the requested information and that the public interest favours maintaining the exceptions.
 3. The Commissioner does not require the public authority to take any steps.
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Background

4. Bristol City Council (the "council") has advised that it owns the freehold of Stoke Lodge Playing Fields and explained that when Cotham School became an academy, it was granted a 125 year lease for use of the playing fields.
5. According to the council, the school, as an academy, is responsible for health and safety issues in relation to the playing fields and in 2014 it conducted a risk assessment relating to dog fouling and the dangers that this posed to the school children/teaching staff and concluded that it would be necessary to erect a fence.
6. The council has advised that there is a local group, We Love Stoke Lodge (WLSL), which opposes the council's position and which was dedicated initially to keeping Stoke Lodge Playing Fields as an open space for use by the community and now to the removal of the fence. It explained that, to date, there have been three applications to designate the playing fields as Town or Village Green (TVG).
7. The complainant disputes the council's decision making in relation to this matter and, within this context, sought information associated with the council's internal and external correspondence, notes and minutes of meetings or other discussions, involving/relating to Stoke Lodge Playing Fields and/or Cotham School.

Request and response

8. On 9 May 2020, the complainant wrote to the council and requested information in the following terms:

"Please provide all internal and external correspondence, notes and minutes of meetings or other discussions, from 1 January 2018 to date, to/from or involving referencing either or both of (a) [REDACTED] and (b) [REDACTED], and which relates to Stoke Lodge Playing Fields and/or Cotham School."

9. The 21 July 2020 and disclosed some information. It withheld other information under the exceptions for the course of justice (regulation 12(5)(b)) and personal data (regulation 13).
10. Following an internal review the council wrote to the complainant on 23 August 2020 and confirmed it was maintaining its original position in relation to regulation 12(5)(b). It also confirmed that it was additionally

relying on the exception for internal communications (regulation 12(4)(e)) to withhold information.

Scope of the case

11. On 2 December 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. During the course of the complaint the council disclosed some additional information to the complainant.
13. The Commissioner agreed with the complainant that her investigation would determine whether the council had correctly withheld information contained in the outstanding correspondence.

Reasons for decision

Regulation 12(4)(e) – internal communications

14. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
15. The exception for internal communications is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exception. However, such factors might be relevant when considering the balance of the public interest.

Is the exception engaged?

16. The information withheld in this case are an email ("email 26") and a briefing note.
17. The council confirmed that the information was exchanged internally between council officers and that the information relates to the subject of the request.
18. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the exception is engaged. She has gone on to consider the public interest.

Public Interest in disclosing the information

19. The council has acknowledged that there will always be a public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters and more effective participation in environmental decision making.
20. The council has, more specifically, noted that in the circumstances of this case, there is a public interest in knowing the options considered by the council further to complaints about the playing fields not being designated as a Village Green.
21. The complainant considers that the council has acted wrongly in the consideration of the substantive matter. The complainant has pointed to an investigation carried out by the Local Government and Social Care Ombudsman (LGSCO) in relation to a complaint about the council's conduct in relation to the erection of a fence on the location in question¹. Although the LGSCO report finds no evidence of fault in the council's decision making processes, the complainant believes that the council withheld information which might have altered the LGSCO's decision in this matter. They have speculated that disclosing the withheld information would provide evidence of this and that disclosure would, therefore, serve the public interest in transparency and accountability.

Public interest in maintaining the exception

22. The council has argued that there is a strong public interest in ensuring that internal deliberations regarding complaints about this highly contentious matter relating to the site remain free and frank. The loss of frankness and candour in the course of such deliberations is highly likely to damage the quality of advice to decision makers and consequently inhibit the public authority's ability to make informed decisions further to complaints about the site.
23. The council has argued that some additional, specific weight to the withholding the information is provided by the fact that there remains ongoing concerns about the site. It has argued that local residents feel they had a claim to the land and there was apparently occasional disruption of school games lessons and, most problematically, ongoing

¹ The report is published here: https://www.lgo.org.uk/decisions/planning/other/19-000-400?fbclid=IwAR3kJ45d1d8miY69sBoLv8f9X6_BzHi_t-_4kJzLKjVRJs_a3QducVx6KZw

issues with dog excrement, which teachers were having to clear up ahead of lessons. The council has stated that matters got increasingly acrimonious between the school and WLSL which resulted in the school putting up a fence on Health & Safety grounds. It has clarified that gates are opened in the evenings and on weekends, when the playing fields are not in use, but WLSL want the fence taken down completely.

Balance of the public interest

24. The Commissioner considers that the underlying rationale for the exception is to protect a public authority's need for a private thinking space. The Commissioner considers that the extent to which disclosure would have an impact on such processes is contingent upon the particular information in question and the specific circumstances of the request.
25. The Commissioner recognises that the need to provide a safe space for public authority decision making will be strongest when the issue under consideration is still live. However, recently made decisions may also need protection as authorities will need to explain and account for their actions.
26. In this case, it is clear that the matters to which the information relates remains live and that the council's decision making is the subject of an ongoing dispute. On the one hand, the council considers that disclosing the information would invade the safe space needed to protect the candour and effectiveness of its decision making. On the other hand, the complainant considers that disclosure would force the council to be accountable for its decisions in this matter.
27. In relation to the complainant's argument regarding the relevance of the information to the investigation carried out by the LGSCO, the Commissioner is not convinced that this carries any weight. Firstly, the argument is speculative and secondly, and more importantly, the Commissioner considers that any concerns about the council's conduct in the matter of the LGSCO should more properly be raised with the LGSCO itself. The Commissioner does not consider it appropriate to engage in speculation about the integrity of another regulator's investigation.
28. Having considered the arguments and the withheld information the Commissioner considers that, in this case, it is clear that disclosing the information, which relates to an ongoing dispute, would damage the council's ability to make and defend its decisions in this matter. Whilst she acknowledges the complainant's genuine interest in the matter, she does not consider that the public interest in disclosing the information in this case outweighs the interest served by the application of the

exception. She has, therefore, concluded that the council has correctly applied the exception to the withheld information and that the public interest in this case favours maintaining the exception.

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

29. Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect the course of justice, the ability of a person to receive a fair trial and the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
30. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to Legal Professional Privilege (LPP) and information about investigations or proceedings carried out by authorities.

The withheld information

31. The council has withheld 2 emails under this exception – email “24” and “25”.
32. The council has confirmed that the information in questions contains legal advice that has been provided by an in-house council lawyer in relation to Stoke Lodge Playing Field. It confirmed that it considers the information is subject to both LPP and to litigation privilege.

LPP and Litigation Privilege

33. LPP exists to ensure complete fairness in legal proceedings and protects advice given by a lawyer to a client and confidential communications between them about that advice.
34. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. In order for it to be applicable 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 purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties providing that they are made for the purposes of the litigation.

Is the exception engaged?

35. The council has explained that both withheld emails contain lawyer’s advice relating to the matters under dispute. They confirm that the communications were made between their in-house Lawyer and Council Officers (the Council being the client.) It confirmed that the in-house

lawyer's advice in the emails were in contemplation that litigation was likely, as proved to be the case when the council received a pre-action letter on behalf of WLSL on 6 February 2019 three months later.

36. The council has confirmed that the advice has not been disclosed externally nor indeed more widely within the council, or otherwise treated in any way that has waived the privilege. It maintains that the confidentiality attached to the withheld information has not previously been lost.
37. Having considered the council's submissions and referred to the withheld information, the Commissioner considers that disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information when the matters to which the information relate are still 'live'. The Commissioner considers that disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.
38. The Commissioner has also referred to the decision of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011, which confirmed that in considering whether information subject to LPP engaged the exception, it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case.
39. Taking all of the above factors into account, the Commissioner has concluded that, in this case, disclosing the information would result in adverse effects to the course of justice, specifically by disclosing information subject to LPP and litigation privilege. She has gone on to consider the public interest.

Public interest in disclosure

40. The council has acknowledged regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.
41. The council has accepted that there is always some public interest in disclosure to promote transparency and accountability of public authorities, greater public understanding of their operations and decision making. It further acknowledges that disclosure would facilitate the development of public debate via the free exchange of views and public participation in such matters.

42. The council has further recognised that it is obliged to provide reasoned explanations for decisions and actions and to allow the public to understand the rationale behind its decisions. It has acknowledged that there may be a need for enhanced transparency in relation to public parkland and open spaces, which have special protections.
43. The complainant disputes the council's position that the matter is still live and considers that legal avenues in respect of the council's decision making regarding the field have been exhausted.

Public interest in maintaining the exception

44. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice. Central to this is the importance of the principle enshrined in LPP and litigation privilege.
45. The council has argued that here is a public interest in ensuring that public authorities have reached decisions on the basis of sound advice. It considers that there is stronger, public interest in public authorities not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain.
46. The council considers that disclosure would have an adverse impact upon the extent to which legal advice is sought which, in turn, would have a negative impact upon the quality of decisions made by the council which would not be in the public interest. The council has emphasised that the live nature of the issues enhances the public interest in withholding the information.
47. The council has argued that it is highly likely that disclosing the information would compromise its legal position and that this, in turn, would pose an unwarranted interruption of the legal process and would result in specific damage to the course of justice. It considers that disclosure would put the council in an unfair position to defend itself should legal challenges arise.
48. The council reiterated that the advice is relevant to current or future TVG applications and that disclosure would have tangible adverse effects on the council's ability to carry out its legal and planning functions. The council has suggested that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's strategy in scenarios such as this. The council considers that this would result in adverse effect to the course of justice

by revealing the council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential.

Balance of the public interest

49. In essence, the complainant considers that the matters to which the withheld information relate are no longer live and that, in view of their misgivings about the council's conduct in relation to its decision making, the balance of the public interest favours disclosure.
50. The council considers that the matters to which the withheld advice remain live and that, therefore, there is an enhanced need to protect the integrity of information subject to LPP and litigation privilege.
51. The Commissioner is not required in this case to adjudicate on the question as to whether legal remedies still remain open in relation to the substantive matter. Whilst she does not doubt the complainant's good faith in claiming the matter is no longer live she equally has no concrete reason to challenge the veracity of the council's position. What is clear, however, is that the advice in question is recent, not stale and its disclosure would impact on the council's ability to explain or defend its legal position in these matters.
52. In addition, as both the Commissioner and the Upper Tribunal have consistently found and, as noted above, it is relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case.
53. In order to justify precipitating these adverse effects the Commissioner considers that there should be reasonable grounds for believing the public interest in disclosure counterbalances any such damage to the course of justice. In this case, whilst the Commissioner acknowledges the complainant's genuine interest in the matter, she is not convinced that their arguments in favour of disclosure are predicated on a correct understanding of the nature of the withheld information or the operation of the exception.
54. In considering this matter the Commissioner has had regard for a previous decision notice issued to the council in 2019 in relation to a

request for related information about Stoke Lodge Playing Fields². In that instance the Commissioner found that the council had correctly withheld information subject to LPP under this exception. Whilst the complainant disputes the specific relevance of this to the current case it is clear to the Commissioner that there is a pattern of objections to the council's decisions being played out via requests for information.

55. The EIR is, of course, intended to facilitate public access to environmental information and in certain circumstances it is entirely appropriate that information exposing wrongdoing or flawed decision making be made public.
56. Whilst the Commissioner accepts the complainant's interest in this matter, she does not consider that the arguments in favour of disclosure meet the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP. Whilst not a deciding factor, she is additionally mindful that public concerns in this case are not monopolised by WLSL as, in addition to the interests of the council, there would seem to be a public interest in protecting the pupils and staff of Cotham School.
57. The Commissioner has concluded that, in this case, the arguments in favour of disclosure in this case do not carry significant, specific weight.
58. She 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).

² Published on the ICO website here: <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616540/fs50854326.pdf>

Right of appeal

59. 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

60. 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.
61. 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

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