

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

Date: 27 June 2022

Public Authority: Burnham Overy Parish Council

Address: burnhamoverypc@gmail.com

Decision (including any steps ordered)

1. The complainant has requested copies of the legal advice provided to Burnham Overy Parish Council regarding the ownership of some land.
2. Burnham Overy Parish Council disclosed some information during the course of the investigation, however it withheld some information on the basis of regulation 12(5)(b) of the EIR.
3. The Commissioner's decision is that Burnham Overy Parish Council is entitled to rely on regulation 12(5)(b) to withhold the information, and that the balance of the public interest favours maintaining the exception.
4. The Commissioner does not require any steps.

Request and response

5. On 1 April 2021 the complainant requested information from Burnham Overy Parish Council ("the council") in the following terms (numbering added for reference):

"...[1] all correspondence relating to the legal advice, advice from Open Spaces Society and any others that had an input into the "Recommendation report of Burnham Overy Parish Council Advisory Group on 77 Acres and half island". This should include all correspondence between the Council and its representatives and Holkham Estate. [2] I wish to know the full voting procedure and numbers involved in making the decision to accept the Report."
6. The council gave a response to part [2] on 1 April 2021. It stated "The information you seek on co-option is in the public domain however, in this instance, as it is a simple matter for me to answer, I can tell you that three of the six councillors present were co-opted. Whilst the Parish Council does not therefore have the general power of competence, it does have the power to own land, investigate ownership of land and make related decisions."
7. The council responded to the remainder of the request on 4 May 2021. It didn't confirm whether or not information was held, nor did it cite an exception, but stated "We have conducted the required research. We have found no correspondence that we have a duty to disclose under the legislation."
8. The complainant requested an internal review on 8 May 2021.
9. The council sent the outcome of an internal review on 28 May 2021 in which it revised its position. The council refused to provide the information on the basis of section 42 (legal professional privilege) and section 21 (information accessible to applicant by other means).
10. During the investigation the council concurred with the Commissioner that the request should have been considered under the EIR. It substituted regulation 12(5)(b) (legal advice privilege) to part [1]. It advised that a response had been given to part [2] on 1 April 2021.

Scope of the case

11. The complainant contacted the Commissioner on 23 June 2021 to complain about the way their request for information had been handled by the council. They were satisfied that part [2] of the request had been

answered, but dissatisfied that the information in scope of part [1] was being withheld.

12. During the course of the investigation on 1 April 2022 the council decided to disclose some further information to the complainant, being in scope of request part [1]. This being information directly related to the legal advice that was referenced by direct quotation in the Recommendation Report:

1. Extract from the email of 11:30 of [Solicitor] dated 22 January 2019.

2. Extract from the email from [Solicitor] to [Parish Clerk] dated 22 January 2019.

3. Extract from the email of 10:25 from [Solicitor] to [Parish Clerk] dated 22 Council dated 12 July 2019.

4. Extract from the email of 17:23 from [Solicitor] to [Parish Clerk] dated 22 Council dated 26 February 2021.

13. The scope of the case, therefore, is to consider whether the council were correct to withhold the remaining information which is in scope of the request part [1] on the basis of regulation 12(5)(b).

Reasons for decision

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

14. This regulation 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.

15. The threshold for establishing an 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; that is, 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.

16. The “course of justice” element of this exception is very wide in coverage, and, as set out in the Commissioner’s guidance¹ on the application of the exception, encompasses, amongst other types of information, material covered by legal professional privilege (“LPP”). This approach was supported by the Upper Tribunal in *DCLG v the Information Commissioner & WR* [2012] UKUT 103 (AAC) in which the Tribunal, as set out in the Commissioner’s guidance, stated that, in the absence of special or unusual factors, an adverse effect upon the course of justice can result from the undermining of the general principle of LPP.

Is the exception engaged?

17. The council explained that it understood the request to be covering the following scope:

- Correspondence having input into the Recommendation Report of March 2021.
- Including all:
 - Correspondence relating to legal advice.
 - Correspondence with The Open Spaces Society.
 - Correspondence with Holkham that had input into the Recommendation Report.

18. The Commissioner confirmed that the correspondence with Holkham had already been provided to the complainant in 2018, therefore it is not considered any further here.

19. The council considers that the withheld information is covered by the type of LPP known as legal advice privilege. It explained that the withheld information consists of:

- communications between the council and its solicitor.
- communications between the council and the Open Spaces Society who provide them with legal advice under their membership to the scheme.

20. The council confirmed that the communications were made for the sole and dominant purposes of obtaining legal advice; and that information

¹ [Regulation 12\(5\)\(b\) – The course of justice and inquiries exception | ICO](#)

was communicated by the solicitor and the Open Spaces Society in their professional capacities.

21. Having viewed the withheld information and referred to the council's submissions the Commissioner is satisfied that the withheld information is subject to LPP in the form of advice privilege and that it therefore falls within the scope of the exception.
22. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
23. The Commissioner asked the council whether LPP had been lost in any of the communications by virtue of disclosure to the public. The council therefore considered the effect of references to the solicitor's advice which were made in the published Recommendations Report. It stated that:
 - The advice had been paraphrased, however there was no disclosure of the full advice;
 - The only quotations are limited and partial, often being incomplete sentences within a wider summary which does not reveal the full legal advice and does not address the reasoning behind any advice which is detailed in the original advice and of much wider scope;
 - The council had reconsidered and released the information that was referenced by direct quotation in the Recommendation Report by way of the disclosures made, during this investigation, to the complainant on 1 April 2022.
24. Where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected by LPP. If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its LPP protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.
25. The Commissioner has reviewed the remaining information, in light of the disclosures in the Recommendation Report. He is satisfied that the legal advice has kept its quality of confidentiality.

26. The council advised that it considered that there would be an adverse effect on the course of justice because disclosure would undermine the principle of privilege allowing a client and their legal advisor to communicate freely, frankly and in confidence.
27. It stated that the advice given relates to a recent and operative decision by the council and not a historic or established matter. Additionally, the issues advised upon remains a matter of contention for the requester who is actively pursuing the issues outside of any litigation. It confirmed that no litigation is anticipated at present.
28. Regarding the requirement to show that there would be an adverse effect on the course of justice from the disclosure of the information, the Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
29. The Commissioner is satisfied that the correspondence comprises confidential communications between client and professional legal advisors, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
30. The Commissioner is therefore satisfied that Regulation 12(5)(b) is engaged.

The public interest test

31. Having concluded that the exception is engaged, the Commissioner must carry out a public interest test into the application of the exception as required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
32. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure identified in regulation 12(2) of the EIR. The public interest in the disclosure of the information.

Arguments in favour of disclosure

33. The complainant has stated there is a public interest in transparency of the advice received by the council, stating:
 - "The council is required by law to get the highest price for any property that it wishes to dispose of. In this case it seems quite simply to have allowed Holkham Estate to acquire the 77 acres for nothing and without reference to common right holders who also have a legal interest in the land"

- The advice seems out of kilter with both Holkham Estate and the definitive evidence.
- “Without further detail from the council to back up the veracity of their advice, it is difficult to take matters forward other than to ask for criminal proceedings against it.”

Arguments for the exception to be maintained

34. The Council’s view is that the balance of the public interest lies in the exception being maintained in this case.
35. It has stressed the public interest in the preservation of the general principle of legal professional privilege allowing a client and their legal advisor to communicate freely, frankly and in confidence.

The Commissioner’s decision

36. LPP is a fundamental principle of justice and it is the Commissioner’s well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
37. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy² case when it stated that: “...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 most clear case...”.
38. The Commissioner accepts that if disclosure were ordered, this would undermine the council’s ability to obtain legal advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. This would lead to advice that is not informed by all the relevant facts, and could result in poorer decisions being made because the council would not have the benefit of thorough legal advice.

² Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

39. The Commissioner acknowledges that the public interest in maintaining this exception is strong. The Commissioner has reviewed the withheld information in light of the published information in the Recommendation Report and the disclosures made during the course of this investigation on 1 April 2022. He could see no sign of unlawful activity, or evidence that the council had misrepresented any legal advice it has received.
40. For the reasons given above the Commissioner's conclusion is that the public interest in the maintenance of the exception provided by regulation 12(5)(b) outweighs the public interest in disclosure of the information requested by the complainant. The council was not, therefore, obliged to disclose this information.
41. 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).
42. As covered 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.

Right of appeal

43. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Janet Wyles
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