

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 July 2022

Public Authority: Wealden District Council
Address: Vicarage Lane
Hailsham
East Sussex
BN27 2AX

Decision (including any steps ordered)

1. The complainant requested copies of communications between Wealden District Council ('the council') and a legal representative relating to a planning decision. The council applied Regulation 12(4)(a) (information not held) to some information, and Regulation 12(5)(b) to other information on the basis that the information is subject to legal professional privilege. A previous decision notice issued by the Commissioner has decided that the exception was correctly applied to the same information, but the Commissioner has taken into account changes in circumstances between the first and second request for information.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to withhold the information. He has also decided that it was correct to apply Regulation 12(4)(a) to the information which the council said that it did not hold.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 27 November 2020, the complainant wrote to the council and requested information in the following terms:

“1. all letters, emails and any other written communications (including electronic communications) concerning planning application [planning application reference redacted by the ICO] ('the application') that passed between (a) any employee or officer or elected member of Wealden District Council and (b) any solicitor or agent acting for Fairfax Acquisitions Ltd or that company itself during the period 1st February 2020 and 23rd July 2020 (inclusive);

2. all notes of telephone or other conversations, including face to face conversations, between any of the parties described at (a) and (b) above about the application that took place during the same period;

3. all entries in paper or electronic diaries used by any person described at (a) above that refer to any contact or communication about the application with any person who is one of, or represents in any capacity, the parties described at (b) above during the same period; and

4. all internal written communications, notes of conversations in person or by telephone or other device and notes or minutes of meetings between two or more of the people described at (a) above concerning the application that took place during the same period.”

5. The council responded on 22 December 2021. It disclosed some of the information in respect of part 4 of the request, with redactions made under Regulation 13 of the EIR (personal data of third parties).

6. In respect of the other information, it applied Regulation 12(4)(e) (internal communications), and Regulation 12(5)(b) (course of justice) to withhold the information.

7. On 13 January 2021 the complainant requested that the council carry out an internal review. He argued that:

1. The council overlooked the notes of telephone conversations between the Head of Planning and Environmental Services with representatives of Fairfax Acquisitions Ltd and its agent Rodway Planning;

2. The council failed to disclose letters from the Council to Pinsent Masons; and

3. The council should provide a copy of the Instruction to Counsel and advice as Regulation 12(5)(b) was not applicable.
8. Following an internal review, the council wrote to the complainant on 26 March 2021. It maintained its position but clarified that some of the requested information is not held (Regulation 12(4)(a)).
9. It said that it does not hold any notes in relation to the telephone conversations between the relevant parties named in point 1. It also confirmed that it did not respond to the letters received from Pinsent Masons and so does not hold this information.
10. Finally, it said that the instructions to counsel (re point 3) did not fall within the scope of the request, but confirmed that the instructions were provided verbally, and so no information is held by it.
11. The council listed the documents which were sent to counsel for consideration, but noted that this information was already available to the complainant, barring a small amount of correspondence which it also considered is subject to LPP and therefore also exempt from disclosure under Regulation 12(5)(b).
12. It noted that a reserved matters application was still to be decided and said that it considered the advice was therefore still 'live'.

Scope of the case

13. The complainant contacted the Commissioner on 25 June 2021 to complain about the way his request for information had been handled. He said that he wanted the council to disclose the instructions to counsel and counsel's advice.
14. The council argues that counsel's advice and a chain of emails which relate to the issue are subject to Regulation 12(5)(b). The withheld information is a copy of legal advice, received from a barrister, to the council, together with a chain of emails.
15. It said that the instructions to counsel are not held, but argued that, in any event, these would fall outside of the scope of the complainant's request for information. The Commissioner, however, considers that the instructions to counsel would, if held, fall within part 3 of the request.
16. The following decision notice therefore considers whether the council was correct to apply Regulation 12(5)(b) to withhold the information from disclosure. It also considers whether the council's instructions to counsel are held.

Reasons for decision

Background to complaint

17. The complainant requested a copy of the council's instructions to counsel and counsel's advice regarding a planning committee decision that was retaken without, he argues, a clear explanation for this being provided.
18. The complainant believes that a councillor may have been wrongly advised by the Monitoring Officer as to whether they had a pecuniary interest in a planning decision, which subsequently led to the planning committee having to revisit its decision at a later point. He is concerned that the council is withholding information in order to avoid admitting that the councillor was initially misadvised.
19. He accepts that the information may be subject to legal professional privilege (LPP), but notes that that status is not necessarily a determinative point in deciding whether withheld information should be disclosed in response to an EIR request.
20. The Commissioner notes that the same information was in question in a previous case relating to the same complainant. A decision notice was issued in that case, IC-79728-W9B3¹, on 6 December 2021, which found that Regulation 12(5)(b) had been correctly applied by the council to withhold this information.
21. In case IC-79728-W9B3 the request was made on 23 June 2020. The request in this case was 27 November 2020.

Section 1 – General right of access to information

22. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

¹ [ic-79728-w9b3.pdf \(ico.org.uk\)](#)

23. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
24. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
25. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

The complainant's position

26. The complainant argues that the council should disclose the instructions to counsel as this goes to the heart the issues which he has concerns about.

The council's position

27. The council argues that the instructions to counsel were provided verbally in a meeting with the relevant barrister at the council's offices. It provided the complainant with a list of additional information which counsel was provided with, and noted that this is all publicly available information. It clarified that a chain of emails was also provided, however it applied Regulation 12(5)(b) to this information in addition to counsel's advice.
28. In conclusion, it argued, therefore, that the instructions to counsel were never recorded, and therefore never held by it.

The Commissioner's conclusion

29. The Commissioner has considered the council's position, in conjunction with the request.
30. Whilst it is recognised by the Commissioner that the complainant may wish a copy of the council's instructions, the council has confirmed to the Commissioner that these were provided verbally and therefore were never recorded, nor held by the council.

31. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
32. On this basis the Commissioner has concluded that, on the balance of probabilities, the instructions to counsel are not held.

Regulation 12(5)(b) – Course of Justice etc

33. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – (b) 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.
34. The Commissioner considers that the course of justice element of the exception is wide in coverage and accepts that it can include information about civil investigations and proceedings.
35. The withheld information is a copy of the legal advice provided to the council by a professional barrister acting in his capacity as a legal advisor. Additionally, it includes a chain of correspondence which was relied upon by the legal advisor when the advice was drafted.
36. The legal advice is subject to legal professional privilege (LPP), and as the email chain was used by the barrister when formulating his advice, the correspondence also falls within the scope of LPP.
37. The complainant argues that, even if the information is subject to LPP, the council cannot demonstrate that a disclosure of the information would have an adverse effect, and that this is required in order for the exception to be engaged. He noted that matters relating to the issue were over by the time of his request for review. He pointed out that there was no longer any prospect of litigation over the grant of planning permission in July 2020 because the time limit for a third-party challenge had expired and the applicant had obtained planning permission.
38. The Commissioner is satisfied that a disclosure of information subject to LPP falls squarely within the scope of the exception in Regulation 12(5)(b). The disclosure of information subject to LPP would have an adverse affect upon the course of justice in that it would undermine the general principle of confidentiality which exists between a client and their legal advisor. Such a disclosure would also affect the level playing field between one party and another in any legal proceedings.

39. The Commissioner also relies upon the detailed reasons for finding that the information is subject to LPP provided in decision notice IC-79728-W9B3.
40. The Commissioner is therefore satisfied that the council was correct in finding that the exception in Regulation 12(5)(b) was engaged by the withheld information.

The public interest

41. 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.
42. 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 favour of the information being disclosed

43. The Commissioner has also taken into account the factors towards the disclosure of the information outlined in decision notice IC-79728-W9B3.
44. The complainant notes that there were unusual circumstances surrounding the path of this planning application. The complainant believes that the council should not be able to withhold information about this on the basis that disclosure would cause council employees or members embarrassment.
45. He argues that there is a public interest in the information being disclosed as it may highlight issues relating to the actions of a councillor and the advice they received. He argues that there is also a strong public interest in the public knowing the advice which the council received on whether committee members can refuse a deferred application on grounds other than those upon which it was deferred previously. He also argues that there is a public interest in determining questions surrounding the extent to which a statement by a ward member at one meeting can be said to have an effect on a decision taken at a subsequent meeting.

The public interest in favour of the exception being maintained

46. The central public interest factors in favour of the exception being maintained have been outlined in the decision notice in case IC-79728-W9B3.

47. The council noted that there had been no significant changes in the situation since decision notice IC-79728-W9B3 was issued.

The Commissioner's decision

48. The Commissioner's decision follows the reasons provided in case IC-79728-W9B3. The changes in circumstances since the initial request was considered have not materially affected the Commissioner's previous analysis and deliberations on this issue.
49. The Local Government and Social Care Ombudsman was investigating issues at the time of, or shortly thereafter, the response. The Ombudsman's investigation subsequently found that the council was not at fault. The Ombudsman's decision was not, however, published until November 2021, after the council had responded to the request for information.
50. The council also highlighted that a reserved matters application had yet to be decided at the time of the review. The reserved matters application has now been decided, however this remained to be decided at the time of the council's response to the request.
51. The Commissioner therefore considers that although some matters had been completed by the time that the request was made, elements of the issue were still 'live' at the time that the council responded to the complainant's request.
52. The Commissioner notes that as decisions must be made based upon the circumstances at the time of the authority's response to the request, these changes in circumstances are not therefore relevant to the consideration of the request in this case.
53. Following the findings in decision notice IC-79728-W9B3, the Commissioner's decision is therefore that the public interest in maintaining the exception in this case outweighs that in the information being disclosed.
54. 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).

55. 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.
56. The council was not, therefore, obliged to disclose the requested information.

Right of appeal

57. 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

58. 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.
59. 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF