

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

Date: 31 March 2022

Public Authority: Buckinghamshire Council

Address: access2information@buckinghamshire.gov.uk

Decision (including any steps ordered)

1. The complainant requested a copy of the legal opinion in respect of a particular planning application. Buckinghamshire Council (the Council) withheld the information under regulations 12(4)(d) (material in the course of completion), 12(4)(e) (internal communications) and 12(5)(b) (course of justice). At the internal review stage the Council withdrew reliance on regulation 12(4)(e) and it also withdrew reliance in regulation 12(4)(d) during the Commissioner's investigation. The Commissioner's decision is that the Council is entitled to rely on Regulation 12(5)(b) and that the balance of the public interest favours maintaining the exception. The Commissioner does not require any steps to be taken.

Request and response

2. On 11 January 2021, the complainant wrote to the Council about planning application reference number CM/0002/20 and requested information in the following terms:

"Furthermore, as the legal opinion of counsel referred to in your email of 16 October is important, I would be grateful if you could let me have a copy of it and further and [sic] surrounding advice. As it was discussed with the applicant's agent, I believe any privilege that was attaching to it has been waived. It is also an advice to BCC with regard to how this

planning application should be properly decided and therefore a 'public' document that interested parties are entitled to see".

3. The Council issued a refusal notice on 16 February 2021 stating that the information requested was exempt under regulations 12(4)(d), 12(4)(e) and 12(5)(b).
4. On 8 March 2021 the complainant requested an internal review of the Council's decision not to provide the information requested.
5. The Council provided the outcome of its internal review on 7 April 2021. The Council withdrew reliance on regulation 12(4)(e) but maintained that the information requested was exempt under regulations 12(4)(d) and 12(5)(b).

Scope of the case

6. The complainant contacted the Commissioner on 9 April 2021 to complain about the way their request for information had been handled.
7. During the course of the Commissioner's investigation the Council withdrew reliance on regulation 12(4)(d) but maintained that regulation 12(5)(b) applied to the withheld information.
8. The scope of the Commissioner's investigation into this complaint is to determine whether the Council has correctly applied regulation 12(5)(b) to the withheld information.

Reasons for decision

Background

9. The Council provided the Commissioner with background information in the form of a chronology of events relating to the planning application/site that the request in this case relates to, as detailed below.
 - April 1984 Buckinghamshire County Council granted itself planning permission for "Household Waste Site, collection for final deposit elsewhere."
 - March 2019: The County Council developed and operated the site until March 2019, when it was closed as part of a reorganisation of household waste services.
 - January 2020: Bedlow Ridge HRC CIC, a community interest company, submitted the planning application described as "proposed continuation of the use of the land as a Household

Waste Recycling Site as currently consented by planning permission CC/3/83.”

- March 2020: application due to be considered by Buckinghamshire County Council; delayed due to outbreak of the pandemic.
 - April 2020: Buckinghamshire Council then vested on 1st April 2020 as a shadow unitary authority (the County Council ceases to exist).
 - June 2020: Scott Lyness QC written draft opinion provided, to enable the Council to prepare a report as necessary to a future committee meeting.
 - October 2020: planning officer writes to the applicant’s agent referencing the Counsel’s opinion but not supplying a copy of it or any detail other than the headlines of the grounds and the top level outcome.
 - January 2021: an appeal lodged with the Planning Inspectorate for non-determination of the planning application.
 - August 2021: planning appeal was dismissed and planning permission refused on 27 August 2021. A separate cost claim against the Council was dismissed.
10. The Council explained that the legal opinion was originally sought as successor planning authority to understand how it should deal with the planning application that it had inherited. The request was made in January 2021, which was at the point that the planning applicant’s agent had issued appeal proceedings with the Planning Inspectorate. The Council advised that this added to its considerations of the sensitivities of the material.

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

11. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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.
12. 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. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
- the withheld information relates to one or more of the factors described in the exception,

- disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.
13. The Commissioner's guidance on the application of regulation 12(5)(b) confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would result through the disclosure of, otherwise confidential, information covered by LPP.
14. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* (Bellamy) as:
- "... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
15. There are two categories of LPP – litigation privilege and 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 when no litigation is in progress or contemplated. 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.

Is the exception engaged?

16. The withheld information in this case consists of a draft legal advice provided by a QC. The Council considers that the withheld information attracts legal advice privilege because it constitutes a communication prepared by a professional legal adviser to his client, the Council, for the dominant purpose of obtaining legal advice. The Council pointed out that the information was clearly sent by the legal adviser in their professional capacity, and it is signed by the QC and cites their chambers.
17. The Council advised the Commissioner that, at the time that the opinion was sought the Council it was seeking to understand how best to procedurally deal with a particular planning application and planning

rules relating to the site in question. No litigation or appeal proceedings were in progress at the time the information was created, although the Council believes that litigation was a prospect in light of the risks of adopting any particular option. The planning matter was subsequently referred to the Planning Inspectorate in January 2021.

18. 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.
19. 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.
20. The complainant has alleged that the legal advice which the Council has obtained has been discussed with the planning applicant in an email dated 16 October 2020 and referred to in the Planning Officer's Appeal Position Report. As such the complainant is of the view that any privilege has been lost. The complainant also considers that, as the withheld information is legal advice to the Council with regard to how the planning application should be decided, it constitutes a 'public' document that interested parties should have sight of.
21. The Council's position is that the content of Counsel's opinion has not been discussed with the planning applicant agent beyond the content of emails which have been published as part of their planning appeal statement. The Council acknowledges that the email of 16 October 2020 explained the existence of some legal complexity concerning the planning application and confirms that Counsel's opinion had been sought and that the legal position was not clear. However, the Council contends that no detail was given in terms of the advice given by Counsel and confirmed that a copy of the opinion has not been disclosed to the planning applicant.
22. The Council advised that, shortly after the email dated 16 October 2020, the planning applicant decided not to follow the advice given and lodged an appeal against the non-determination of the application. As such, jurisdiction for the appeal passed to the Planning Inspectorate. Once such an appeal has been lodged the Council has the opportunity to set out how it would have considered the matter had it been able to do so. The Council stated that it was only at this point that the case officer and senior officer involved with the planning application reach a settled view. This view was set out in the Planning Authorities appeal statement and published on the website.

23. The Commissioner has viewed the withheld information and he is satisfied that a disclosure outlining the existence of legal complexities and an outline of the issues on which legal advice was sought does not constitute an unrestricted disclosure of the legal advice itself to the world at large. He therefore considers that the confidentiality attached to the information has not been lost and it remains subject to LPP.
24. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. He considers the likelihood of this happening to be more probable than not.
25. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, 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. The Commissioner is therefore satisfied that disclosure of the requested information would have an adverse effect on the course of justice and he therefore finds that the exception at regulation 12(5)(b) is engaged.

Public interest test

26. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) 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 her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested Information

27. The Council acknowledged that disclosure of the withheld information in this case will provide the public with a better informed understanding of the planning complexities around the potential future use of the site in question as a household waste recycling centre.

28. The Council also accepts that the existence, or otherwise, of a household waste recycling centre at the site is of general interest to the local community and there are strong views both in favour of, and against the proposal.
29. The Council also confirmed that it took into account the presumption in favour of disclosure under regulation 2(2) when deciding where the public interest lies in this case.
30. The complainant has not submitted any specific reasons as to why they consider the public interest favours disclosure in this case. However, as mentioned earlier in this notice, they considered that privilege had been lost in respect of the legal advice and they also pointed out that as the legal advice was being relied on for the purpose of the planning appeal and submissions within the appeal, the legal advice should be regarded as a public document.

Public interest arguments in favour of maintaining the exception

31. The Council referred to the strong public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. Full and frank advice ensures that the Council is able to make fully informed decisions.
32. The Council considers that there is an inherent public interest in it having the private space to seek and obtain legal advice to inform its legal responsibilities as planning authority. Legal advice ensures that the Council is able to make fully informed decisions, and it is the planning decisions which are then placed in the public domain by means of planning appeal statements.
33. At the time of the request planning matters relating to the site were ongoing as an appeal had been lodged with the Planning Inspectorate. The Council believes that disclosure of the legal advice would prejudice its ability to defend the planning appeal under consideration. In addition, the Council pointed out that the legal advice which was sought relates to the site itself and planning rules relating to it, and how planning applications relating to the site should be determined. As such the legal advice was intended to inform not just the planning application that was under consideration at the time but any similar application that may be submitted in the future. As such, the Council considers the legal advice to remain 'live'.
34. The Council does not consider that it is in the public interest that its "duly considered actions as planning authority should be subject to unnecessary procedural challenge".

35. The Council considers that the public interest is served by it being able to provide considered advice to elected members, planning applicants, and objectors. It pointed out that private individuals or third parties are free to obtain their own legal advice on planning matters.

Balance of the public interest test

36. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. He recognises that there may be a need for enhanced transparency and scrutiny of decision making in planning cases. The Commissioner also accepts that consideration of planning matters relating to a new household recycling centre is likely to attract strong interest from the local community, both in favour of and against the proposal.
37. However, in line with previous decisions of the Information Tribunal, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is, in turn, fundamental to the course of justice.
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.
39. The Council has stated that the planning application to which the request and the legal advice relates was ongoing at the time of the request and was subject to a planning appeal. The Commissioner is therefore mindful that, at the time of the request, the withheld legal advice was still live and it is also relevant to any future similar planning applications that may be submitted.
40. In considering the balance of the public interests in the disclosure of information which has been withheld under an "adverse effect" exception, however, the Commissioner must be mindful of those matters which the exception is designed to protect: in this case, allowing the course of justice to run smoothly, including the importance of the principle of LPP.
41. It would not, generally, be in the public interest to allow the smooth running of the course of justice to be adversely affected; in particular, in relation to damaging the confidential nature of the relationship between

client and lawyer. However, all circumstances, and particularly the contents of the withheld information, must be taken into account.

42. The Commissioner acknowledges that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest may involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following her inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the Council had misrepresented any legal advice it has received or evidence of a significant lack of transparency
43. Having considered the facts of this matter, the Commissioner considers that it is highly likely that disclosing the information would damage the Council's ability to undertake its planning duties effectively and compromise its legal position. It is clear to the Commissioner that the matters to which the withheld information relate were live at the time of the request. Disclosure at this time, therefore, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice.
44. Whilst he accepts that the arguments in favour of disclosure in this case carry weight the Commissioner does not consider that they outweigh the arguments in favour of withholding the information.
45. 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).
46. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information. 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

47. 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

48. 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.
49. 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

Joanne Edwards
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