

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 February 2023

Public Authority: Mid Suffolk District Council
Address: Endeavour House
8 Russell Road
Ipswich
IP1 2BX

Decision (including any steps ordered)

1. The complainant requested various information regarding a legal consultation in respect of the service of a section 215 notice under the Town & Country Planning Act from Mid Suffolk District Council ('the Council'). The Council withheld the information citing regulation 12(5)(b) (the course of justice) of the EIR. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) to the withheld information. The Commissioner does not require the Council to take any steps.

Request and response

2. On 10 June 2022, the complainant wrote to the Council requesting the following information:

"In April 2021 the Communities webpage created for the Fisons site in Bramford included a section "What is Mid Suffolk District Council going to do?" ...It mentions specifically that legal advice was being sought regarding the service of a s215 notice under the Town & Country Planning Act. The revised webpage published in April 2022 implies that such action may not succeed and be of a significant cost to the taxpayer...leading to the decision that this action will not be taken. Please provide the evidence gathered during the legal consultation to

support the decision not to pursue formal action in respect of the site. Specifically the case law or other justification to believe that such an action may not succeed ...and the estimated cost to the taxpayer in such an event.”

3. Following an internal review the Council upheld its original decision to refuse the request on the basis of regulation 12(5)(b) (course of justice) of the EIR.

Scope of the case

4. The complainant contacted the Commissioner on 7 September 2022 to complain about the way their request for information had been handled.
5. During the course of the Commissioner’s investigation, the Council revisited its response to the complainant and informed them that it was also relying on regulation 12(5)(f) (interests of the person who provided the information) to refuse some information. The Commissioner was unclear whether this information fell within the scope of the request and asked the Council to confirm whether it was:

“...evidence gathered during the legal consultation to support the decision not pursue formal action in respect of the site”
6. As the Council subsequently confirmed that it was not part of the evidence gathered, the Commissioner has not therefore included this information within the scope of his investigation, which is limited to the Council’s application of regulation 12(5)(b) of the EIR.

Reasons for decision

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

7. Regulation 12(5)(b) of the EIR states that information is exempt if 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 or a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
8. In this case, the Council has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP.

9. The Tribunal in Woodford v IC (EA/2009/0098) confirmed that the test for adversely affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

“There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice.”

10. Consideration of the specific circumstances is however required when addressing the public interest test.
11. Regulation 12(5)(b) will be engaged if the information is protected by LPP and this claim to privilege could be maintained in legal proceedings.
12. There are two types of 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. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
13. The Council informed the Commissioner that at the time of the request, it was relying on advice privilege as there was no litigation in progress, although officers were considering what options were available to them regarding the future management of the site.
14. The Council also confirmed that the communications were between a professional legal advisor and a client and were made for the sole or dominant purpose of obtaining legal advice. It added that the advice was sought in order to advise officers of the most appropriate and correct legal course of action to take when managing the site.
15. It further confirmed that that the information has not been disclosed to anyone outside of the project group and that privilege has not therefore been waived.
16. The withheld information consists of three emails, and having viewed the information in question, the Commissioner is satisfied that it represents confidential communications between a client and legal advisor acting in their professional capacity, and made for the sole purpose of obtaining legal advice. The Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of this

information and has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

17. The Commissioner is mindful that under regulation 12(2) of the EIR, that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure, and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
18. The Council has acknowledged the general public interest in favour of transparency and accountability. It also accepts that disclosure would provide greater transparency of its planning decision making process to the general public.
19. The Council also recognises that disclosure would allow an informed and involved public debate. The Commissioner would add that disclosure may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.

Public interest arguments in favour of maintaining the exception

20. The Council considers that disclosure of the information would damage the safeguarding of openness in all communications between an officer and lawyer to ensure access to full and frank legal advice. It believes that this would weaken confidence in the general principle of LPP.
21. The Council considers that this factor holds considerable weight as it is important to safeguard the principle of LPP. In support of this view, it highlighted the case of [DCLG v Information Commissioner & WR \[2012\] UKUT \(AAC\) \(28 March 2012\)](#). The case concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of LPP is a public interest factor of very considerable weight in favour of maintaining the exception, and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
22. The Council has further argued that disclosure of the information may also prejudice any future enforcement proceedings which may arise.
23. The Council has confirmed that the advice was current (and continues to be so), as the site it relates to remains the subject of ongoing consideration, with communications between the site owner remaining open as various options are explored.

24. The Council has further argued that it has been transparent about the site and provided considerable information on its website covering many of the concerns, including future options.
25. The Council has also stated that there are no unusual factors to justify not giving the appropriate weight to arguments against disclosure outlined above.

The balance of the public interest test arguments

26. As stated in paragraphs 17 of this notice, the Commissioner acknowledges the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR. He would also reiterate comments in paragraph 19 of this notice that weight must be given to the general public interest in transparency and accountability in relation to the decisions made by public authorities.
27. However, the Commissioner is mindful that at the time of the request, the advice was recent and the issue remains live. Additionally, given the particularly strong public interest in safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, there would need to be particularly strong public interest factors in favour of disclosure of the information.
28. This would usually include factors 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. The Commissioner's investigation of this case, has provided no obvious signs that these factors were present to tip the balance in favour of disclosure.
29. The Commissioner has therefore concluded that in all the circumstances of the case, the balance of public interest is weighted in favour of maintaining the exception and consequently, that the Council was justified in its reliance on regulation 12(5)(b) of the EIR in respect of the legal advice.

Right of appeal

30. 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

31. 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.
32. 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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF