

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 30 May 2024

**Public Authority:** Cherwell District Council  
**Address:** Bodicote House  
Bodicote  
Banbury  
OX15 4AA

#### **Decision (including any steps ordered)**

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1. The complainant has requested information held by Cherwell District Council (the council) about legal advice it received in relation to a particular planning matter.
2. The Council issued a refusal notice, citing regulation 12(5)(b)(course of justice), of the EIR. The council confirmed that it also considered regulation 12(4)(e)(internal communications), of the EIR to apply to part of the requested information.
3. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(b) of the EIR in respect of all of the withheld information.
4. However, as the council failed to issue both the refusal notice, and its internal review response, within the statutory timeframes, the Commissioner has found a breach of regulation 14(2), and regulation 11(4), of the EIR, respectively.
5. The Commissioner does not require further steps.

#### **Request and response**

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6. A retrospective planning application was submitted to the council in relation to motorcross activities and events that were taking place on a particular area of land. This application was discussed at a planning

committee meeting (meeting) held on 13 July 2023; councillors subsequently voted unanimously to refuse the application.

7. On 13 July 2023, the complainant wrote to the council and requested information in the following terms:

"Today, Cherwell's Planning Committee decided to reject a retrospective planning application - Ref 21/00517/F - for Wroxton Motocross Track. The vote was 13-0 and was against the advice of planning officers.

Cherwell planning officer Nat Stock told the meeting that planners' principal reason for supporting the application was that the council had sought legal advice and had been told unequivocally by the lawyer consulted that, if the application was refused, the applicant would then succeed in an application for a Certificate of Lawful Existing Use.

I am a resident of Hornton who has been involved in the community's efforts to oppose this application and I was very surprised - particularly as I am legally qualified - that the legal advice was that unequivocal. Legal advice very rarely is and, certainly, the legal advice given to Hornton Parish Council is very different the advice that Mr Stock says Cherwell has received.

I therefore request, as Mr Stock has referred to this advice in public, in a council committee meeting, that it should be published under FOI to confirm that his public and unequivocal interpretation of this advice is correct.

To reiterate: in many cases, legal advice is withheld when requested under FOI but Mr Stock has (a) publicly revealed in a public council meeting that Cherwell has sought and paid for legal advice and (b) given his own interpretation of its supposedly unequivocal contents in relation to a certificate of lawful existing use, which it is in the public interest for us to scrutinise."

8. On 18 July 2023, the complainant contacted the council again to advise that, in addition to the above, they also required the following information:

"In addition to seeing the legal opinion obtained by Cherwell District Council, it is equally important for me to see the information provided to the lawyer and how the instruction was framed, so please can I also request any documents relating to that. This is for the very good reason that the answer a lawyer gives you depends upon the question you ask in the first place."

9. On 31 August 2023, the council contacted the complainant, advising that it considered that the exception at regulation 12(5)(b) of the EIR may apply to the requested information, but that it required further time to consider the public interest test.
10. On 6 September 2023, the council confirmed to the complainant that it was refusing the request under regulation 12(5)(b) of the EIR, and that it considered that the public interest favoured maintaining the exception in this case.
11. On 7 September 2023, the complainant requested an internal review. The council provided its response on 24 November 2023, upholding its original decision to withhold all of the requested information. However, the council now advised the complainant that it considered that it was also entitled to rely on regulation 12(4)(e) as its basis for withholding part of the requested information.

### **Scope of the case**

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12. The Commissioner will decide whether the council is entitled to rely on regulation 12(5)(b) as its basis for withholding all of the requested information.
13. If necessary, the Commissioner will go on to consider whether the council is correct to have withheld any part of the requested information under regulation 12(4)(e) of the EIR.
14. The Commissioner will also consider certain procedural matters.

### **Reasons for decision**

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#### **Regulation 12(5)(b) of the EIR – course of justice**

15. Regulation 12(5)(b) provides an exception from the obligation to disclose environmental information which 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.
16. 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.

17. The council has said that it considers that the withheld information attracts LPP, and that the public interest favours withholding the information in this case.

The complainant's position

18. The complainant has said that during the meeting held on 13 July 2023, council officers disclosed details of the legal advice that had been received by the council. They go on to say that this includes confirmation that if the retrospective planning application was refused by councillors, the track owners would still be able to apply for, and receive, a Certificate of Lawful Existing Use, on the basis of the time that the land had already been used for motorcross events.
19. The complainant has argued that as "significant parts" of the legal advice received was disclosed by council officers at the meeting, any confidentiality that may have previously been attached to such information was lost. The complainant has said that, given this, the council cannot claim that the requested information still attracts LPP, or that its disclosure would adversely affect the course of justice.

The council's position

20. The council has confirmed to the Commissioner that it is relying on the legal advice privilege limb of LPP (and not the litigation privilege limb as suggested in its internal review response) as its basis for refusing to provide the requested information.
21. The council has said that it has carefully considered the information that was shared by council officers at the meeting held on 13 July 2023. It says that whilst it acknowledges that it has disclosed that it sought legal advice, it has argued that the information provided at that meeting is not sufficient for any privilege attached to the withheld information to be waived, or for its confidentiality to be lost.
22. The council has said that the comments made by its officers at the meeting did not disclose any significant details of the legal advice received. It goes on to say that the legal opinion was not quoted from at the meeting and "detailed arguments were not rehearsed". The council has also said that the officers, when making comment about the council's position, "drew conclusions from the advice provided", and that whilst such conclusions were significant to the recommendations in hand, the detailed arguments and precedents underlying them were not revealed.

23. The council has also said that there have been no other circumstances where it has disclosed any information about its request for, and receipt of, the legal advice, and it considers that there is no part of the withheld information that is currently in the public domain.
24. The council has referred to the Commissioner's guidance<sup>1</sup> on section 42 of FOIA, (which is the comparable exemption under FOIA to the exception at regulation 12(5)(b)) of the EIR). It says that the guidance confirms that, when considering whether legal advice and associated information has lost its confidentiality, "part waiving or cherry picking arguments regarding privilege are not relevant."
25. The council has argued that the information sets out legal analysis, in depth, and that none of this information was revealed in the planning papers or to anyone outside the council. It states that this level of analysis, arguing the positions, is not appropriate to release, and goes against the strong protections for legally privileged communications.
26. The council has said that the disclosure of the detailed legal advice (as opposed to headline conclusions and opinions) would adversely affect the course of justice by compromising the council's ability to seek frank and full legal advice in the future. It says that, in effect, disclosure would provide a 'chilling effect' on its ability to request, consider and action legal advice due to a threat of required disclosure. The council argues that officers would be less likely to request legal advice, and are more likely to proceed without such advice, if they are aware that such information is likely to be disclosed to the public under the EIR.
27. The council states that a planning officer's purpose is to obtain an expert and independent second opinion on a complex or controversial matter and that this assists the officer in making either their delegated decision, or their recommendations to the planning committee.
28. The council has gone on to say that when an officer's recommendations are informed by legal advice, it is a reassurance to councillors making finely balanced or politically difficult decisions to be made aware of this. It states that if officers were not allowed to reveal that their recommendations were informed by legal advice, on the basis that if they did so, any confidentiality attached to the full legal advice received would be lost, then the value of that advice would be significantly reduced.

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<sup>1</sup> [Legal professional privilege \(section 42\) | ICO](#)

29. The council has also argued that whilst the retrospective planning application may have been refused, the withheld legal advice will be relevant to any future appeals, applications, certificates, or similar, relating to the use and activities carried out on the relevant land.

The Commissioner's analysis

30. The Commissioner, having viewed the withheld information, is satisfied that it forms communications between a solicitor and council officers, and was created for the purposes of obtaining and providing legal advice.
31. The council, in response to the Commissioner's investigation, has confirmed explicitly that no external party, including the planning applicant and their representative, have had sight of any part of the legal advice.
32. The Commissioner has given consideration to the recorded discussions which took place at the meeting and has compared this to the content of the withheld information. When doing so he has taken into account his guidance on legal advice privilege which says, "a brief reference to or summary of the legal advice that does not reveal its substance is unlikely to lead to a loss of privilege."
33. The council officers did make some references to the legal advice when setting out the council's position at the meeting, and the Commissioner acknowledges that by doing so, they have provided an insight into what the legal advice was about. However, in the Commissioner's opinion, the information communicated by officers at the meeting did not reveal the full context of the request for, or receipt of, legal advice, nor did it contain the thought processes behind any advice or options considered.
34. The Commissioner is satisfied that the substance of the legal advice was not disclosed and that the references made to such information in the meeting do not constitute a sharing of the communications between the council and its legal adviser. Given this, the Commissioner considers that the withheld information has kept its quality of confidentiality.
35. When considering whether the disclosure of the requested information would have an adverse effect to the course of justice, the Commissioner has had regard to the Upper Tribunal's comments in the case of DCLG V Information Commissioner & WR [2012] UKUT 103 (AAC) (28 March

2012)<sup>2</sup>. In that case, the Upper Tribunal considered the significance of LPP under the EIR, and said that it was relevant to take into account any adverse effect on LPP (such as confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on a particular case. Whilst the Tribunal confirmed that it was not inevitable that the disclosure of information would adversely affect the course of justice, it suggested that there would need to be special or unusual factors in play for this not to be the case.

36. The Commissioner accepts that, in the circumstances of this case, the disclosure of the legal advice would undermine the important common law principle of LPP. This would, in turn, undermine a lawyer's capacity to give full and frank legal advice.
37. The Commissioner is therefore satisfied that it is more probable than not that disclosure would adversely affect the course of justice and that regulation 12(5)(b) of the EIR is engaged in respect of the withheld information.
38. As regulation 12(5)(b) is a qualified exception, the Commissioner will go on to consider whether the public interest favours the disclosure, or withholding, the requested information.

### **Public interest test**

#### The complainant's position

39. The complainant has said that whilst certain motorcross events had been held on the relevant land in the past, they were extremely small scale, involved only the local community, and had minimal impact. The complainant states that the larger events that are now occurring at the ground (which was the reason for the retrospective planning application) are having a detrimental impact on the local community. They say that the events are causing high levels of noise in the area, they are making the area unsightly, and are generally unsuitable for the area where they are being held.

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<sup>2</sup> [DCLG v The Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\) \(bailii.org\)](#)

40. The complainant has said that they consider that there is a strong public interest in understanding the council's position, and the decisions that have been reached, given the impact that the motorcross events are having on local residents.
41. The complainant has said that the planning committee voted against accepting the retrospective planning application, and that this was against the advice of planning officers. The complainant has raised concerns about the references to the legal advice by council officers at the meeting, and whether their interpretation of, and references to, the legal advice, accurately reflected the actual advice that the council had received.
42. The complainant has also said that the comments made by council officers at the meeting indicate that the council's legal advice may differ to legal advice received by Hornton Parish Council with regard to the granting of a lawful development certificate. The complainant has said that given this, it is important the public is able to see the information that the council provided to the solicitors when requesting legal advice, and also how clear the legal advice was when setting out a position in response.
43. The complainant has also argued that as a decision has been reached about the retrospective planning application, the legal advice relates to a matter that is no longer live, and this weakens the council's arguments that the requested information should not be made available to the public.

#### The council's position

44. The council says that it recognises that the retrospective planning application in question has now been determined, and it is therefore no longer live. The council has also said that it has taken into account that there is a presumption in favour of disclosure when considering the public interest test under the EIR.
45. The council states that it recognises that there may be some cases where the public interest will be so heavily weighted in favour of transparency that it will be required to disclose legal advice. However, the council has said that it does not consider this to apply in this instance.
46. The council states that matters relating to the relevant land and its use for motorcross events are not fully resolved, and therefore the more general issue about the use of the land is still live. The council has also said that some options available to the planning applicant are not time limited. The council has said that, given this, at the time of the request,



the advice it received was still very much part of its consideration in respect of decisions taken in respect of the land.

47. In highlighting the weight that should be assigned to legal advice in regard to the public interest test, the council has referred to the case of DCLG V Information Commissioner & WR (previously referred to in paragraph 35 of this decision notice). The council has said that it considers that it must be permitted to be able to fully and frankly seek (and control dissemination) of legal advice, or it risks prejudicing the ability and desire of its officers to seek legal advice in the future on other similar matters, and this would lead to poor decision making and outcomes, which would not be in the public interest. The council states that it therefore affords weight to the general need to protect the space within which it can seek legal advice.
48. The council has argued that the public interest in transparency is not sufficient to "trump the council's ability to maintain the confidentiality of the advice that it has received," and therefore the public interest favours withholding the requested information.

#### The Commissioner's decision

49. The Commissioner recognises that there is a public interest in public authorities being accountable for decisions which concern planning activities, particularly when it relates to the use of land for activities which may have an effect on local residents, as described by the complainant in this case.
50. The Commissioner has also taken into account the complainant's concerns about the request for, and content of, the legal advice, and also the council's interpretation of that advice. The Commissioner considers that they do carry some weight in favour of disclosure for the purpose of accountability and transparency in relation to the planning process and decision making.
51. However, the Commissioner is satisfied from the explanations provided by the council that matters relating to the use of the land were not fully resolved at the time of the request, despite the refusal of the retrospective planning application.
52. The Commissioner considers that the request for, and receipt of, legal advice received by the council about matters relating to the use of the relevant land would provide a detailed insight into the council's consideration of relevant matters, its potential options, and its overall position. This would, at the very least, be useful information to the planning applicant in this case, and is likely to provide them with an

unfair advantage, if they decide to submit further applications regarding the use of the land in the future.

53. The Commissioner therefore considers that disclosing the withheld information would weaken the council's position, and affect its ability to carry out its statutory functions effectively, which would not be in the public interest.
54. In the Commissioner's view, the strength of the public interest that favours maintaining the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice and good quality decision making. Public authorities should be able to consult with their lawyers in confidence to obtain legal advice; any fear of doing so, from the result of disclosure, could affect the free and frank nature of future legal exchanges, or it may deter them from seeking legal advice.
55. The Commissioner is satisfied that disclosure in this case would be likely to affect the candour of future exchanges between the council and its legal advisers, and this could then lead to advice that is not informed by all the relevant facts. This would then be likely to result in poorer decisions made by the council as it would not have the benefit of thorough legal advice. In the Commissioner's view, this is a factor which carries significant weight in favour of maintaining the exception at regulation 12(5)(b) in this instance.
56. Furthermore, the council set out its position in relation to the retrospective planning application and associated matters at the public meeting. If the local community considers that the council has not acted properly in relation to the processes that it has followed, then there are appropriate mechanisms in place in which this can be challenged.
57. In the circumstances of this case, the Commissioner considers that the arguments supporting the release of the information are not sufficient to tip the balance in favour of disclosure. It is therefore the Commissioner's decision that the balance of the public interest favours the exception at regulation 12(5)(b) of the EIR being maintained in this case. This means that the council was not obliged to disclose the requested information.
58. 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.
59. As stated in the Upper Tribunal decision of *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).

60. As covered above, in this case the Commissioner's view is that the balance of the public interest 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 to the complainant's request.
61. Given that the Commissioner has decided that the council is entitled to rely on regulation 12(5)(b) as its basis for withholding all of the requested information, he has not found it necessary to consider whether regulation 12(4)(e) is engaged in respect of any part of the withheld information.

### **Procedural matters**

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62. The council did not respond to the request within 20 working days. When it did so, the council said that it required further time to consider the public interest test.
63. Regulation 7 of the EIR says that where a request is particularly voluminous and complex, a public authority may extend the time for compliance for making the information available from 20 working days to 40 working days. However, this only applies where the requester has asked for a large amount of information, and it would not be practical to provide the information or make a decision within 20 working days. Under the EIR there is no provision to claim an extension of time to specifically consider the public interest test.
64. In this case, the Commissioner does not consider regulation 7 is applicable, and he has found a breach of regulation 14(2) of the EIR as a result of the council's failure to issue a refusal notice within 20 working days.
65. The council also failed to provide its internal review response within 40 working days, and therefore the Commissioner has also found a breach of regulation 11(4) of the EIR.

## Right of appeal

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66. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

67. 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.
68. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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