

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

Date: 30 July 2024

Public Authority: Shrewsbury Town Council
Address: Livesey House
7 St John's Hill
Shrewsbury
SY1 1JD

Decision (including any steps ordered)

1. The complainant requested specified correspondence, dates of meetings and legal advice relating to a named site in Shrewsbury, following the judgment of the Supreme Court in March 2023. Shrewsbury Town Council (the 'Council') ultimately provided the dates and the legal advice, but refused to provide the requested correspondence, citing section 42 of FOIA – the exemption for legal professional privilege.
2. The Commissioner's decision is that the requested information is environmental as defined by the EIR and that the Council, therefore, incorrectly applied section 42 of FOIA. However, he finds that the Council has engaged Regulation 12(5)(b) of the EIR. By failing to provide its internal review result within the statutory 40 working days, the Council has breached Regulation 11(4) of the EIR.
3. No steps are required as a result of this notice.

Background

4. The request in this case relates to the proposed development of a site known as Greenfields Recreation Ground in Shrewsbury. A judgment¹ was handed down by the Supreme Court on Wednesday 1 March 2023 in which the Supreme Court has reached a different view to the Court of Appeal and High Court decision, and accordingly quashed the planning permission previously granted by Shropshire Council in 2018 for 15 dwellings on land off Greenfields recreation ground in Shrewsbury.
5. The Commissioner understands that the Council had sold the land to CSE Developments (Shropshire) Limited in 2017 with a view to the land being built upon. However, following opposition from local residents and ultimately the Supreme Court judgment which overturned permission to develop this land for housing, the Council repurchased the land from CSE Developments. Further context can be found in the Council's published 'Frequently Asked Questions' document.²
6. The Commissioner is aware that the complainant had made an earlier related request on 10 November 2023 which was not answered by the Council under FOIA, but which was addressed at a Full Council meeting on 13 November 2023 (see 'Scope' section below for further details).

Request and response

7. On 19 December 2023, the complainant wrote to the Council following the Supreme Court Judgment of 1 March 2023, and requested information in the following terms:

"Can a further request be made not just for dates and times of meetings between Shrewsbury Town Council and the developers representatives but the content of the correspondence, emails and letters please?

Can I also request that the legal advice to cease mediation with the Greenfields Community and Shrewsbury Town Council is also made public in all legal advice given, as well as advice given by [name redacted] QC [Queen's Counsel] in 2022 is also made public similarly emails and letters in all matters?"

¹ <https://www.supremecourt.uk/cases/docs/uksc-2021-0031-judgment.pdf>

² <https://www.shrewsburytowncouncil.gov.uk/wp-content/uploads/Greenfields-FAQs.pdf>

8. The Council responded later that day. It explained that the complainant's request had been discovered by chance when the Council's recipient had located two emails from the complainant in her junk folder on 19 December 2023. The Commissioner understands from the Council's substantive response that the complainant's email address had been blocked by this particular officer due to her issues with the tone, content and impact of his previous emails, and that the complainant had been given an alternative officer to address his correspondence to. However, the complainant had continued to address his emails to the officer who had blocked them.
9. As referenced in the 'Background' section above, the complainant had originally requested the dates and times of the meetings specified in his current request on 10 November 2023. The Council did not receive this request given it was sent to the officer who had blocked the complainant's email address. However, this request had been picked up from Facebook and answered at the Full Council meeting on 13 November 2023. The information was also published in the subsequently issued minutes.³
10. Therefore, on 19 December 2023, the Council told the complainant that it had already provided the information regarding the scheduling of the meetings (**part 1** of his request). With regard to the requested "correspondence, emails and letters" at **part 1** of the request, and the legal advice requested at **part 2**, the Council cited section 42 of FOIA – the exemption for legal professional privilege.
11. The complainant requested an internal review on 15 January 2024.

Scope of the case

12. The complainant contacted the Commissioner on 13 March 2024 to complain about the way his request for information had been handled. At this stage, no internal review outcome had been provided.
13. The Council confirmed to the Commissioner that it had provided the previously withheld legal advice to the complainant on 10 April 2024, and that no recorded information was held for "similarly emails and letters in all matters" relating to the named QC (both **part 2** of his request).

³ <https://www.shrewsburytowncouncil.gov.uk/wp-content/uploads/23.11.13-Full-Council-Minutes.pdf>

14. The Council carried out an internal review and wrote to the complainant with the review outcome, late, on 2 May 2024. It maintained that section 42 of FOIA applied to the "correspondence, emails and letters" at **part 1** of the request.
15. Following correspondence with the complainant to clarify his specific grounds of complaint, the Commissioner finalised the scope of his investigation on 18 June 2024. The complainant confirmed that he had now received the information in relation to the meeting dates (**part 1**) and the previously withheld legal advice (**part 2**). It appeared that his only remaining concern was the information being withheld under section 42 of FOIA (**part 1**).
16. On 18 June 2024, the Commissioner asked the complainant to confirm whether he agreed with the intended scope of the Commissioner's investigation, namely to consider the Council's reliance on section 42 of FOIA for the remainder of **part 1** of his request (ie for correspondence, emails and letters).
17. In the absence of any final confirmation from the complainant, the Commissioner has considered whether the Council was entitled to rely on section 42 of FOIA for the remainder of **part 1** of his request. Given the subject matter, he has also determined whether the request should have been considered under the EIR and if so, whether the original arguments advanced by the Council to withhold it have been engaged.

Reasons for decision

18. In its responses to the complainant and the Commissioner, the Council has maintained its reliance on FOIA and in particular, the exemption under section 42. The first question for the Commissioner to determine is the appropriate legislative regime applicable to the complainant's request.

Withheld information

19. The Council told the Commissioner that the correspondence falling in scope of the remainder of **part 1** of the complainant's request was produced between June 2023 and May 2024. The request was submitted on 19 December 2023, so the correspondence that postdates the request is out of scope. This means that the Commissioner can only consider correspondence between June 2023 and 19 December 2023. Of the twelve attachments emailed to the Commissioner by the Council, only six email chains are within scope of the request. At the Commissioner's request, the Council also provided the attachments referred to in the 'in-scope' email chains. Having reviewed those in detail, many of them again post-date the request. The Commissioner

has therefore only considered the withheld information dated up to 19 December 2023 (the date of the request).

Is the requested information environmental as defined by the EIR?

20. Regulation 2(1) of the EIR defines environmental information as being information on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

21. Although the Council maintained that the request should have been handled under FOIA, the Commissioner has a different view. As the request is for information relating to the proposed development of a site which affects land and landscape, the Commissioner believes that the requested information is likely to be information on Regulation 2(1)(a), the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

22. As the requested information relates to a planning/development issue, the Commissioner is satisfied that it constitutes a measure under

Regulation 2(1)(c) and that the request falls to be considered under the EIR.

Section 42(1) – legal professional privilege

23. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege ('LPP') and this claim to privilege could be maintained in legal proceedings.
24. 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 DTI (EA/2005/0023)*⁴ 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".
25. There are two categories of LPP – litigation privilege and legal 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. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. 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.
26. Communications made between adviser and client in a relevant legal context will, therefore, attract privilege.
27. The Commissioner's view is that for LPP to apply, the information must have been created or brought together for the dominant purpose of litigation, or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information

⁴ <https://www.casemine.com/judgement/uk/5a8ff78460d03e7f57eae14e>

must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

28. In its substantive response, the Council reflected the above and told the complainant that:

“LPP protects information shared between a client and their professional legal advisor (solicitor or barrister, including in-house lawyers) for the purposes of obtaining legal advice or for ongoing or proposed legal action. These long-established rules exist to ensure people are confident they can be completely frank and candid with their legal adviser when obtaining legal advice, without fear of disclosure.”

29. As the requested information is environmental, the Commissioner has considered this request under the EIR. The comparable provision to section 42 of FOIA under the EIR is Regulation 12(5)(b).

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

30. Regulation 12(5)(b) 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”.

31. ‘Adversely affect’ means that there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, 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, ie 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, the exception is not engaged.
32. The Council relied on section 42 of FOIA to withhold the remaining requested information as it believes it was covered by LPP. The Commissioner accepts that the exception under Regulation 12(5)(b) of the EIR is designed to encompass information that would be covered by LPP.
33. The Council said it was relying on ‘litigation privilege’. The confidential communications (which include emails and the comments made on the repurchase of Greenfields Recreation Ground) were made for the sole or dominant purpose of seeking and/or giving legal advice in contemplation of litigation and are therefore covered by LPP on the basis of litigation privilege.

34. The Council has provided the name of the legal advisor (which is a law firm) utilised by the developers representatives and that of its' solicitor. It clarified that no meetings took place between it and the developers representatives, and that the correspondence was between its solicitor and theirs.
35. The Council argued that whilst it had bought back the land (ie Greenfields Recreation Ground) from CSE Developments (Shropshire) Limited, there are specific provisions within the associated Settlement Agreement which require that all negotiations remain confidential. The Council provided the Commissioner with the relevant extract from the Settlement Agreement which sets out this requirement.
36. The Council also said if it were to:
- "disrupt the provisions within the Settlement Agreement in any way we may be subject to further litigation from CSE and have been advised that this may result in an amount considerably higher than that paid for the repurchase of the land and associated costs this year."
37. Additionally, the Council explained that it is pursuing other parties involved in the original sale of the land and argued that any disclosure of the requested information:
- "could hugely prejudice these negotiations, again having a very negative impact upon the public's financial interest. Your [the complainant's] grounds of complaint state 'there is no further legal action and details of this advice can be provided without fear of prejudice. This is absolutely **not** the case. In fact the opposite is true".
38. It told the Commissioner that it believes there is a "real likelihood" that CSE Developments would pursue compensation if it breached the terms of the Settlement Agreement, and explained that there is still a live case in relation to other third parties as set out above.
39. With regard to the issue of timing, it is important to note that the Commissioner's role in considering complaints is limited, (in accordance with case law), to considering the circumstances as they existed at the time of the request. In any event, in view of the Council's submissions above, the Commissioner accepts that, at the time of the request, (and now), the matter is live in relation to negotiations and potential litigation with the third parties that were involved in the original sale of Greenfields Recreation Ground.
40. The Commissioner accepts that there is also a risk that CSE Developments would seek redress if the Council were to breach the terms of the Settlement Agreement.

41. The Commissioner accepts that the withheld information relates to an ongoing and live issue as opposed to matters that have been concluded.
42. The Commissioner also accepts that disclosure of such information during the course of ongoing negotiations, could dissuade further involvement or or co-operation by parties in future unrelated cases. If the parties in question thought that their correspondence with the Council could potentially be disclosed under the EIR during the course of an ongoing negotiation and potential legal action, it would have an adverse affect.
43. The Commissioner notes that the Council has used term such as "a real likelihood", "could hugely prejudice" and so forth in its consideration of the adverse effect it envisages. However, the Commissioner's view is that the adverse effect is more likely than not, so he finds that the higher threshold of "would" is applicable in the circumstances.
44. On the basis of the above factors the Commissioner finds that the withheld information is exempt from disclosure on the basis of Regulation 12(5)(b).

Public interest test

45. Since the Commissioner has found that the exception at Regulation 12(5)(b) is engaged, he must go on to consider whether the associated public interest in maintaining that exception is sufficiently strong to outweigh the public interest in disclosure. He is also mindful that 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.
46. The complainant told the Commissioner that:

"I have already raised the key issues for this information through the undeniable public interest in this spending of public money but also why this information is relevant to the democratic process and outcome at the Supreme Court 2023."
47. The Council has not provided any specific public interest arguments in favour of disclosure.
48. However, the Commissioner recognises that there is normally a legitimate public interest in transparency and accountability as to how justice is administered, and that this may be furthered by the disclosure of the requested information.
49. He also considers that there is a public interest in creating transparency in relation to Greenfields Recreation Ground sale and repurchase matters.

50. The Commissioner appreciates that the complainant has a particular interest in this planning related matter. As a result, the Commissioner accepts that he has a genuine interest in understanding all aspects of the Council's decision making in respect of this issue, including its consideration of advice and information solicited and received from third parties. Disclosure of the withheld information would directly address the complainant's interest in this regard. More broadly, and more relevant to the wider public interest, the Commissioner accepts that disclosure of the withheld information would allow the public to scrutinise it and assess its value.
51. Nevertheless, the Commissioner accepts that there is a legitimate, and strong, public interest in the Council being able to engage in negotiations and to litigate against those it deems have acted inappropriately. This is particularly the case when the matter in question remains live and ongoing, as it is here. As part of this process it is essential that the Council be able to examine and consider information in a protected space.
52. The Commissioner further observes that the planning appeals process provides a route by which those involved in planning matters may scrutinise and challenge decisions. In this case, the Supreme Court has delivered its judgment overturning the original decision to allow the proposed development. This judgment is in the public domain, together with the associated FAQs detailed at footnote 2 of this notice. In the Commissioner's opinion, this lessens the weight of the public interest in disclosure of the withheld information in this case, especially where the Commissioner has already accepted that disclosure would have an adverse effect.
53. 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.
54. The Commissioner is cognisant that the risk of the disclosure of legally privileged information, will contribute to a weakening of confidence in the general principle of LPP. This is a public interest factor of "very considerable weight" in favour of maintaining the exception. He further notes that there would have to be special or unusual factors in a particular case to justify not giving it this weight. Given that the Council has complied with the Supreme Court's judgment, the Commissioner is of the view there are no such factors in this case.
55. 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 enable public access to privileged information when the

matter is still live. 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.

56. In conclusion, whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, in all the circumstances of this particular case, the public interest in maintaining the exception at Regulation 12(5)(b) outweighs the public interest in disclosure of the withheld information.
57. It follows that the Commissioner finds that the Council was entitled to withhold the remaining requested information originally withheld under section 42 of FOIA, but what should have been under Regulation 12(5)(b) of the EIR.

Regulation 11 – Representations and reconsideration

58. Under the EIR, the internal review is a statutory requirement. Regulation 11 of the EIR provides that, if a requester is dissatisfied with a public authority's response to a request, the requester can ask for a review. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt of the request for review.
59. The complainant requested an internal review on 15 January 2024.. The Council did not provide its internal review outcome until 2 May 2024.
60. The Commissioner is satisfied that the Council breached Regulation 11(4) of the EIR by failing to comply with the prescribed time limit for providing the internal review. He has made a separate record of this breach for monitoring purposes.

Other matters

61. The Commissioner would like to remind the Council of the importance of determining the correct legislative regime, particularly as he is aware of two decision notices⁵ issued on requests to this Council which relate both to Greenfields Recreation Ground and to its reliance on section 42 akin to Regulation 12(5)(b). In both previous cases, the Council had
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⁵ <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4018814/ico-110276-b7q4.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4018815/ico-110278-c6y4.pdf>

failed to recognise that the request should have been considered under the EIR.

62. The Commissioner would again like to draw the Council's attention to her detailed guidance on FOIA⁶ and the EIR⁷ on the ICO's website to assist it with considering whether any requested information is exempt.
63. The Council should also ensure that it only considers information up to and including the date of any request (EIR and FOIA). Any information which postdates the request is out of scope.
64. The complainant may wish to submit a further request for the remaining information that postdates his request (ie the six attachments and associated enclosures that are dated 2024 onwards). However, given the Commissioner's decision in this case, the complainant should be mindful that the remaining information may well be excepted under the EIR.

⁶ <https://ico.org.uk/for-organisations/foi/>

⁷ <https://ico.org.uk/for-organisations/eir-and-access-to-information/guide-to-the-environmental-information-regulations/>

Right of appeal

65. 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

66. 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.

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

Carol Scott
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