

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

Date: 4 December 2018

Public Authority: City of York Council
Address: West Offices,
Station Rise,
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested legal advice relating to a planning application. York City Council refused the request, citing the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that City of York Council has failed to carry out an internal review and breached regulation 11(4) but that it correctly applied regulation 12(5)(b) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 16 May 2018, the complainant wrote to York City Council (the "council") and requested information in the following terms:

"On 6th December 2017 the Information Commissioner (Reference: FS50689987) ruled on the disclosure of legal advice in respect of my planning application for the above property; in particular the demolition prior notice.

However, now that the consent has been granted and the actual buildings on site demolished some many months ago, this argument is now patently redundant.

Therefore in the interests of transparency and openness referred to by the Commissioner and which is the Councils stated democratic objective, please now issue me with a copy of the legal advice and its instructing letter as originally requested on 13th April 2017."

You will read from the attached that paragraphs 28 onwards detail the Commissioners thinking behind the ruling against disclosure. At the time York council argued (para 28) that disclosing the legal advice could affect the negotiations and put it in a weaker position over the redevelopment of the site!!"

5. The council responded on 5 June 2018. It stated that some of the information (the letter instructing the legal advice) was not held and that it was withholding the advice itself under the exception for the course of justice – regulation 12(5)(b).
6. On 6 June 2018 the complainant wrote to the council and asked it to conduct an internal review of its handling of the request. At the time the complaint was submitted to the Commissioner, the council had not completed an internal review.

Scope of the case

7. On 4 July 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information under regulation 12(5)(b) and whether it had complied with its obligations in respect of internal reviews.

Reasons for decision

Regulation 11 – internal review

9. Regulation 11 of the EIR sets out public authorities' obligations in relation to the carrying out of internal reviews of the handling of requests for information.
10. Regulation 11(3) provides that any authority in receipt of representations by a complainant in respect of its handling of a request should consider them and decide if it has complied with the requirements of the EIR.
11. Regulation 11(4) requires authorities to notify a complainant of its decision in respect of regulation 11(3) within 40 working days of the date of receipt of any representations.
12. In this case the complainant submitted their internal review representations on 6 June 2018 but the council failed to issue a response within 40 working days.
13. The Commissioner finds, therefore, that the council breached regulation 11(4) of the EIR.

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

14. The council has withheld the requested legal advice under regulation 12(5)(b).
15. Under this exception a public authority can refuse to disclose information on the basis that "...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".
16. The Commissioner's guidance explains that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
17. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained

that there must be an “adverse” effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word “would” is “more probable than not”.

Is the exception engaged?

18. In this case, the matter relates to the question of whether a second application to demolish a building is necessary. The complainant is of the view that this additional procedural step is a waste of the council’s time and, as the matter relates to their own interests and application, a waste of their time.
19. The council has stated that it received legal advice regarding the status of the prior approval application and had decided that a further application was required. The complainant considers that they are entitled to see the legal advice in question.
20. The complainant’s request and the council’s submissions highlight that the Commissioner has issued a decision notice in relation to a previous request (by the complainant) for the same information. The decision notice in question was issued on 6 December 2017 and found that the council had correctly applied the exception to withhold the requested legal advice¹.
21. The council has confirmed that it considers that circumstances had not changed at the time the complainant submitted their new request for the information (16 May 2018) and that the conclusions reached in the decision notice, therefore, still stand.
22. Having considered the council’s submissions and referred to the Commissioner’s previous decision notice issued in relation to a request for this information, the Commissioner is satisfied that the information is subject to Legal Professional Privilege (LPP) and that its disclosure would result in adverse effects to the course of justice. The Commissioner

¹ The decision notice is published on the ICO website here: <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172869/fs50689987.pdf>

transposes the reasoning for these conclusions from her decision notice issued on 7 December 2017, ICO reference: FS50689987².

Public Interest Test

23. Regulation 12(5)(b) is subject to a public interest test. As the timing of a request can be relevant in considering the relative harm which disclosure of information would cause, the Commissioner asked the council to explain whether circumstances had changed between the time of the issuing of the decision notice and the time of the new request.
24. The Commissioner notes that the decision notice issued in respect of case reference FS50689987 stated (in relation to the council's position):

*"...(disclosure) would place it in a weaker position in the current negotiations over the redevelopment of the site. It said that it would also put the Council in an unfair position to defend itself should legal challenges arise in respect of the redevelopment."*³
25. The Commissioner put it to the council that, at the time of the new request, planning permission had been granted for redevelopment of the site. The Commissioner suggested that this might mean that the advice was no longer "live" and that disclosure, therefore, might not result in the same degree of harm.
26. The council confirmed that the granting of planning permission does not alter its position that its general responsibilities as Local Planning Authority in relation to regulating the development and ongoing future negotiation with developers would be prejudiced, placing it at an unfair advantage if the information subject to LPP were to be disclosed.
27. The council has further submitted at, as the legal requirement for the prior notification is debated in the legal advice and the law is open to interpretation, disclosing this advice would not be in the public interest. The council has argued that the advice would also be of general application to other sites in the same circumstances, and would put the council at an unfair disadvantage in carrying out statutory functions as Local Planning Authority with developers, including the complainant (a local developer), if it were to be generally disclosed. The council confirmed that, for these reasons, it considers the public interest factors

² Ibid., paragraphs 13-19.

³ Ibid., paragraph 27.

cited in the decision notice issued under case reference FS50689987 remain valid and that the same decision should be reached.

28. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. She also considers that the planning process and other dispute procedures provide mechanisms for such issues to be addressed in other arenas than under the EIR.
29. In addition, whilst the Commissioner accepts the complainant's interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
30. Furthermore, the Commissioner considers that the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake planning duties on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.
31. The Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. She has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
32. For the reasons set out in the previous decision notice issued in relation to this request and those set out above, the Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Right of appeal

33. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Andrew White
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