

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 October 2023

Public Authority: Kirklees Council
Address: PO Box 1720
Huddersfield
HD1 9EL

Decision

1. The complainant requested legal advice relating to a planning application. Kirklees Council (the "council") refused to provide the requested information citing the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(b) of the EIR to refuse to provide the requested information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 5 April 2023 the complainant made the following information request to Kirklees Council (the "council"):

"Following on from your response of the 13th July 2022,(29372 legal advice for E1831, 2021/62/92603) can you confirm whether the legal advice you previously confirmed had been sought by Mathias Franklin, Head of Planning and Development, from external chambers has been shared with any Kirklees Councillors or Kirklees Council officials? If the legal advice obtained by Mathias Franklin from external lawyers has been shared with those above mentioned persons then I ask that you supply all emails, reports, minutes and recordings, including the legal advice, relating to this matter. Furthermore, please supply all internal communications made by Kirklees Councillors and Kirklees officials that contributed to the seeking of external legal advice by Mathias Franklin with external lawyers. This includes internal communications between Mathias Franklin and Kirklees legal officers. I must remind you that legal privilege exists between the client and the external lawyer only. If the legal advice obtained has then been shared with other parties then legal privilege as in effect been waived."

5. The council responded on 18 May 2023 and confirmed that it was withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
6. On 5 June 2023 the complainant asked the council to review its handling of their request.
7. The council sent its internal review response on 9 August 2023. This upheld the original position.

Scope of the complaint

8. On 10 August 2023 the complainant made a complaint to the Commissioner about the council's handling of their request.
9. The Commissioner has considered whether the council was entitled to withhold the requested information.

Reasons for decision

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

10. The following reasoning explains why the Commissioner has decided that the council is entitled to rely on regulation 12(5)(b) of the EIR to refuse to disclose the requested information.
11. Regulation 12(5)(b) allows a public authority to 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.
12. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP, it may still fall within the scope of the exception if its disclosure would have an adverse affect upon the course of justice or the other issues highlighted.
13. The council explained that the information relates to a large and controversial planning application (for an Amazon Distribution Warehouse), on land identified within the council's Local Plan as site ES6. The application was refused in March 2023 and, at the time the request was received, the council considered that the planning application was highly likely to be subject to appeal¹.
14. The council has confirmed that, at the time of applying the exception, it considered that the information requested – which consists of legal advice sought from Counsel and associated internal communications relating to that legal advice, relates to a matter which was highly likely to be subject to legal proceedings. It also confirmed that the advice sought from Counsel relates to the wider implications of the development of the piece of land identified as ES6. The council has stated that the legal advice obtained will be relevant to the consideration of any future planning application relating to that site.
15. Having considered the withheld information the Commissioner is satisfied that it consists of a confidential communication between a client and a professional legal advisor, made for the dominant purpose

¹ The planning application is online here: <https://www.kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/detail.aspx?id=2021%2f92603>

of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege. Other withheld information consists of commentary on and discussion of the council's legal position in respect of the advice regarding land identified for development in the council's Local Plan.

16. The Commissioner has also considered whether the confidence attached to the information has subsequently been lost or waived through a disclosure of the advice to the world at large.
17. In this context, "unrestricted disclosure" refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean it could enter the public domain. "Restricted disclosure" means a disclosure of information to a limited audience, with restrictions on its further use; for example, a disclosure made on a confidential basis. The information would therefore remain confidential from the world at large, thus retaining its legally privileged status.
18. The complainant has alleged that the confidence attached to the advice has been lost because it was shared with various council departments and officers. However, the Commissioner has no evidence that the advice was shared in an unrestricted way. Having considered the available evidence, the Commissioner is satisfied that the legal advice remains subject to LPP.
19. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
20. Although the specific matter which precipitated the advice may no longer be live, the Commissioner accepts that the advice is still relevant to any similar scenarios which may arise in the future concerning the land in question.
21. The Commissioner also accepts that the council's duties in this matter constitute a formal statutory obligation within the framework of planning law and that disclosing information subject to LPP and discussion around its application would interfere with its ability to carry out these duties.
22. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

The public interest

23. Regulation 12(5)(b) requires the Commissioner to consider whether the balance of the public interest favours the disclosure of the information, or favours the exception being maintained.

Public interest in disclosure

24. Regulation 12(2) of the EIR provides a presumption in favour of disclosure, which adds weight in favour of environmental information being disclosed in response to an EIR request.
25. The council has acknowledged that there is a legitimate public interest in transparency and accountability as to how justice is administered, which would be furthered by the disclosure of the requested information.
26. The Commissioner agrees that there is a public interest in creating transparency in planning matters and in highlighting the work of the council relating to its planning functions.
27. The complainant has argued that the council wrongly allowed the submission of a planning application which did not conform to the Local Plan. They consider that the council failed to properly oversee this decision until local residents repeatedly raised the issue and legal advice was sought.
28. The complainant has argued that the proposed development was subject to significant local opposition. They consider that this, alongside the suggestion that the proposal did not comply with the terms of the Local Plan, provides strong grounds for disclosure in order to reassure the public of the council's probity.
29. The complainant has further argued that the advice received was not actually relied on by the council in its determining of the planning application so, therefore, disclosure would not impact on its position in respect of the decision made.

Public interest in maintaining the exception

30. The council has argued that there is a very strong public interest generally in maintaining LPP generally but more so when a matter is 'live'. In this specific case, the council considers that the requested information relates to an ongoing live matter, specifically, the status of a particular piece of land identified as site ES6 within the council's Local Plan. The council has argued that disclosing the information would prejudice its consideration of any future applications for development of site ES6.

31. The council has explained that the legal advice obtained from Counsel relates to the land and not directly to the planning application for the warehouse itself. As such, the council has argued that applications for development of the site can still be received and the advice that was sought is still relevant to any further applications for the proposed development of that land.

Balance of the public interest

32. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, including not prejudicing legal or statutory proceedings. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
33. The Commissioner understands the complainant's concerns and those of the wider community in relation to this matter; however, planning law provides remedies for addressing concerns about planning decisions. Whilst disclosure of the information might assist the public understanding of the council's position the Commissioner is not convinced that disclosure is necessary for accountability or understanding to be obtained.
34. The Commissioner does not consider that the purpose of the EIR is to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst he acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, he does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider. In reaching this conclusion the Commissioner is mindful that the council's decision in this case was to refuse the application and that the grounds for doing so have been published.
35. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

36. In considering this matter the Commissioner has referred to a decision notice issued to the council in relation to a previous request for the information². In that case the Commissioner concluded that the council had correctly relied on regulation 12(5)(b), noting that the information was still 'live', as it related to a planning application that had not been determined. He considers that, whilst the application has now been determined, for the reasons set out above, the information remains live and that the decision reached in this previous decision notice is also transposable here.
37. 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 above, in this case, the Commissioner's view is that the balance of the public interests 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.
38. As the Commissioner has decided that regulation 12(5)(b) applies to all the withheld information he has not gone on to consider the council's application of regulation 12(4)(e).

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022732/ic-190089-z7j5.pdf>

Right of appeal

39. 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

40. 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.
41. 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

Christopher Williams
Senior Case Officer
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