

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

Date: 30 November 2018

Public Authority: Vale of Glamorgan Council

Address: FOIUnit@valeofglamorgan.gov.uk

Decision (including any steps ordered)

1. The complainant has requested various items of legal advice provided to the Vale of Glamorgan's Planning Department in respect of a dangerous structure at the border of his garden. The Vale of Glamorgan Council refused the request in reliance on regulation 12(5)(b) of the EIR. The Commissioner's decision is that the Vale of Glamorgan Council was entitled to rely on regulation 12(5)(b) in respect of this information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 26 February 2018, the complainant wrote to the Vale of Glamorgan Council and requested the following information:
"Following the issue of an Informal Notice to Kez and Glebe House in 2008 under the Dangerous Structures of the Building Act 1984 by the Planning Department, can specifically the Legal Department and Conveyancers (not the Planning Department) confirm their advice provided to the Planning Department at this time and then further in 2013 that resulted in a letter dated 16 December issued by Planning to address the same works to residents. Any emails, minutes and correspondence and notes held would be received specifically in advising Planning on boundary ownership including Kez House and numbers 14 and 15 Bastion Close individually and respectively."
3. The Council responded on 26 February 2018. It stated that legal advice is covered by Legal Professional Privilege (LPP) and refused to provide

the information on the basis that it was exempt from disclosure under section 42 FOIA.

4. Following an internal review the Council wrote to the complainant on 11 April 2018. It stated that it was upholding its decision not to disclose the information as it is covered by LPP, this time citing regulation 12(5)(b) of the EIR.

Scope of the case

5. The complainant contacted the Commissioner 12 April 2018 to complain about the way his request for information had been handled. He was not satisfied that the Council had refused to provide him with the requested information and has argued that he has a specific requirement to see it.
6. As background information, he informed the Commissioner that the Council has deemed a retaining structure between his garden and the neighbouring property a 'dangerous structure' of which it considers he is the legal owner. He further informed the Commissioner that the Council has threatened to take him to court so he has therefore asked for evidence of his ownership.
7. The Commissioner notes that during the course of her investigation the Council confirmed that the matter has now been referred to the courts and a date for the court hearing has been scheduled for 13 November 2018. Consequently, it further informed the Commissioner that it now considers regulation 12(5)(d) EIR also applicable (disclosure would adversely affect the confidentiality of proceedings of that or any other public authority where such confidentiality is provided in law).
8. The Commissioner considers that the scope of her investigation is to determine whether the Council were justified in withholding the information in reliance on regulation 12(5)(b) of the EIR and would point out that any disclosure under the EIR is effectively into the public domain. Whilst she acknowledges the complainant's personal interest in the information, she must consider whether the disputed information is appropriate for disclosure to the world at large.
9. As she has concluded that regulation 12(5)(b) is engaged, she has not gone on to consider the Council's late reliance on regulation 12(5)(d).

Reasons for decision

Regulation 12(5)(b) – the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature

10. Regulation 12(5)(b) of the FOIA 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 of 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.
11. In this case, the Council has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP.
12. The Tribunal in *Woodford v IC* (EA/2009/0098)¹ 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."
13. Regulation 12(5)(b) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Consideration of the specific circumstances is, however, required when addressing the public interest test.
14. 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

¹ http://www.bailii.org/uk/cases/UKFTT/GRC/2010/2009_0098.pdf

in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

15. The Council has confirmed that it is relying on both litigation and advice privilege in respect of the disputed information, that the sole or dominant purpose of the information was to obtain legal advice, the information was created by a trainee solicitor under the supervision of a qualified solicitor in accordance with the Solicitors Regulation Authority requirements, and that it has not been distributed on an unrestricted basis.
16. The Commissioner has viewed the withheld information and is satisfied the information 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 Council has acknowledged that disclosure of the information would promote openness/transparency in its dealings.
18. Disclosure would also promote accountability in terms of the Council's dealings which may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.
19. The Commissioner would also highlight that the EIR clearly state under regulation 12(2) 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.

Public interest arguments in favour of maintaining the exception

20. The Council considers that disclosure of the legal advice would weaken confidence in the concept of legal professional privilege, and the Commissioner acknowledges the general harm to the principle of LPP from the disclosure of legally privileged information referred to in paragraph 10 of this notice. She is also mindful that it is important that staff are able to seek and receive legal advice in a free and frank manner without the advice being disclosed into the public domain, to ensure that it can carry out its function effectively in relation to Planning matters, and in this case, a dangerous structure.

21. The Council also confirmed that the issue remains live due to the then forthcoming court proceedings in November of this year, and referred to in paragraph 7 of this notice.

The balance of public interest test

22. In weighing the balance of public interest, whilst the Commissioner acknowledges the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR, and the general public interest in transparency and accountability in relation to the decisions made by public authorities, she is also mindful that the matter remains live, and acknowledges the general public interest in maintaining legal advice will always be strong due to the importance of the principle behind LPP: Safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice.
23. This is further reinforced by the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023)² which confirmed that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
24. The case of *DCLG v Information Commissioner & WR [2012] UKUT (103 AAC)*³ (28 March 2012) concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege 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.
25. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice.

² http://www.bailii.org/uk/cases/UKIT/2006/EA_2005_0023.pdf

³

<http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j3477/%5B2012%5D%20AACR%2043bv.doc>

26. Whilst the Commissioner has concerns regarding the record keeping of the Council, there is no evidence to suggest that any of the above apply. The Commissioner therefore considers that the balance of public interest is weighted in favour of maintaining the exception and that the Council was entitled to rely on regulation 12(5)(b) to withhold the information.

Other matters

(a) Record keeping and the Section 46 code of practice

27. The section 46 Code of Practice provides guidance to public authorities as to the practice in respect of records management and standards which in the Commissioner's opinion would be desirable for them to follow in respect of the keeping, management and destruction of records.
28. Section 8.4 of the Code states:
- "All staff should be aware of which records the authority has decided to keep and of their personal responsibility to follow the authority's business rules and keep accurate and complete records as part of their daily work. Managers of business units, programmes and projects should take responsibility for ensuring that the agreed records of the unit, programme or project's work are kept and are available for corporate use."*
29. During the course of the Commissioner's investigation of this case, her correspondence with the Council has raised concerns in respect of its record keeping of information relevant to the request, which she hopes are not representative of its wider records management.
30. On receipt of a copy of the withheld information, the Commissioner queried the date of an email forming part of the legal advice as it appeared to relate to advice given in June 2013 as opposed to December 2013 when the complainant received the letter which prompted his request. The Commissioner also queried whether there was any earlier information as the searches appeared to be focused over a narrow timescale.
31. The Council has stated that it holds no further information either in relation to the 2008 advice or legal advice which may have prompted its letter to the complainant of December 2013, as its legal department destroyed the file in accordance with its 10 year destruction policy. Having subsequently provided a copy of its certificate of destruction, the Commissioner notes that the file was destroyed promptly in January 2018. However, the Council has not provided any explanation regarding

why the advice relating to 2013 was destroyed despite the Commissioner specifically asking for clarity on this point.

32. Additionally, the Commissioner is concerned at the speed with which the file was apparently destroyed as the letter requesting legal advice in 2008 was dated 11 March, therefore the 10th anniversary had not been met at the time of its destruction.
33. The Commissioner is also concerned that the only information the Council has forwarded in respect of this request is from its Building Control file, yet the Building Control Department appears to be inconsistent with its record keeping in this case, having retained a copy of its request for legal advice in 2008, but not a copy of the advice itself. Similarly, whilst Building Control has retained a copy of the legal advice in June 2013, it does not appear to have retained any evidence of any legal advice which prompted the letter to the complainant in December 2013.

(b) Engagement with the Commissioner

34. As stated in paragraph 7 of this notice, the Council informed the Commissioner during the course of her investigation, that it was now also relying on regulation 12(5)(d) of the EIR due to the matter having been referred to the courts. It further stated that it did not wish to do anything which would undermine the jurisdiction of the Court.
35. The Commissioner would wish to highlight that whilst it is within a public authority's right to cite a late exception, she expects the public authority to provide details in support of the exception now being relied on, including full details of its public interest test.
36. Unfortunately, despite numerous requests from the Commissioner to the Council for it to provide its arguments in respect of regulation 12(5)(d) (including its public interest test), it failed to provide any further arguments in respect of this exception. Whilst the Commissioner is not required to undertake a full consideration of this exception as she has already concluded that regulation 12(5)(b) is engaged, had a full consideration been necessary, on the basis of the paucity of information in support of this exception, she would have had no alternative but to conclude that the exception was not engaged.

The Commissioner expects that the Council will engage with her more fully in the event of any future investigations.

Right of appeal

37. 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

38. 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.
39. 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
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