

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 March 2023

Public Authority: Harrogate Borough Council
Address: Civic Centre
St Luke's Avenue
Harrogate
HG1 2AE

Decision (including any steps ordered)

1. The complainant has requested information held by Harrogate Borough Council (the council) about planning permissions that relate to the opening times of a particular business.
2. The council provided some information in response to the request. It withheld the remaining information under regulation 12(5)(b) – course of justice, of the EIR.
3. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(b) as its basis for refusing to release part of the information that is relevant to the request.
4. However, as the council failed to issue a refusal notice within 20 working days, and did not carry out an internal review within 40 working days, the Commissioner has found a breach of regulation 14(2) and 11(4) of the EIR, respectively.
5. The Commissioner does not require further steps.

Request and response

6. On 11 May 2022, the complainant wrote to the council and requested information in the following terms:

"1 - Around January 2017 Myers were granted planning permission to open a builders' yard at HG5 ODB. One key condition was that they could not open before 8.00am. When they opened they publicised their working hours as beginning at 7.00am. This had, and continues to have, a disastrous impact upon the amenity of the largely residential local area. When residents asked planning enforcement to enforcement to intervene, they were told that planning enforcement could not do anything about this and were acting on the advice of HBC's solicitor. This meant that residents were excluded from a voice in decisions impacting on their daily lives. I would like copies of all correspondence between HBC and Myers as regards the decision to change the opening hour and between HBC and any other parties on this matter and HBC's internal correspondence on this matter.

2 - Prior to Myers being given planning permission to open a building yard at HG5 ODB in 2017, NYCC Highways initially made strong objections to this on the grounds of the inappropriate nature of surrounding roads. NYCC subsequently qualified these objections. I would like to see all internal and external communications and documents HBC hold as regards this change in NYCC's position, this to include communications with HBC's solicitor, NYCC, Myers and any other relevant party."

7. The council provided the complainant with some information in response to their request; it also directed the complainant to information published on its website.
8. The council then subsequently confirmed to the complainant that it held a further document which it was withholding under regulation 12(5)(b) of the EIR.
9. At the internal review stage the council upheld its decision to withhold information under regulation 12(5)(b), and confirmed that it believed that the public interest favoured maintaining the exception.

Scope of the case

10. The Commissioner will decide whether the council is correct to withhold information under regulation 12(5)(b) of the EIR; he will also consider the timeliness of its responses, as requested by the complainant.

Reasons for decision

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

11. 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.
12. 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.
13. The council has said that the information is subject to legal advice privilege, and that its disclosure would be likely to adversely affect the course of justice as it would result in public access to privileged information about an enforcement matter which (at the time of its response to the Commissioner) was still "live".
14. The council has argued that the disclosure of legal advice would discourage openness between a client (the council) and legal adviser and have an adverse impact on its ability to access full and frank legal advice.
15. The Commissioner has seen the withheld information and is satisfied that it forms communications between a solicitor and officers, and was created for the purpose of obtaining and providing legal advice.
16. In addition, the Commissioner has found no evidence which would indicate that the legal advice has been shared with any third party and he has therefore determined that the confidentiality attached to the information has not been lost.
17. The Commissioner, having considered the complainant's submissions, regards it to be appropriate to clarify that when a public authority refuses to provide copies of legal advice that it holds in response to a request, it is not a requirement that it provides evidence that

enforcement action is being contemplated, or taken, for regulation 12(5)(b) to be engaged.

18. In the case of [DCLG V Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\)](#), the Upper Tribunal considered the significance of LPP under the EIR. It 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.
19. 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.
20. 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.
21. 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 relevant information.

Public interest test

The complainant's position

22. The complainant has argued that there is a public interest in understanding a planning decision which has had an impact upon a public amenity.
23. The complainant has said that there has been no ongoing enforcement, and that it was made apparent by council officers some time ago that there was never going to be. Furthermore, the complainant has indicated that, in their view, the recent vacation of Myers (the business to which the request relates) from its commercial premises weakens the council's claim that the public interest favours maintaining the exception.

The council's position

24. The council has said that it considers that there will be some public interest in the disclosure of the information to promote transparency and accountability of public authorities' decision making.

25. However, the council has gone on to say that whilst it therefore accepts that there will be some public interest in the release of planning information, this is outweighed by the negative impact of disclosure in this case. The council has said that it would discourage openness between the client and legal adviser; this would have a negative impact on the council's ability to access full and frank legal advice, which would not be in the public interest.
26. The council has argued that it should be able to protect its position with the ability to seek confidential legal advice in relation to any of its functions, especially if any of the issues should become live again. The council has said that if it were not able to do this, it would be placed in the unfair position of having to disclose its own legal advice without any such disadvantage to its opponents.

The Commissioner's decision

27. The Commissioner is required to only consider what the public authority did, or should have done, at the time that the request was received.
28. At the time of the request, Myers was still operating at the relevant commercial premises. Given this, it is the Commissioner's view that it could not be said with absolute certainty at that time that the council would never take any action against that business. Furthermore, he considers that disclosure of the legal advice setting out the council's position at the time of the request would have placed the business at an unfair advantage; it would have revealed the council's legal position on a matter which had not yet been formally resolved.
29. The Commissioner appreciates that there is a public interest in public authorities being as accountable as possible in relation to their decisions. He also accepts there is a strong public interest where those decisions concern planning activities, and have an effect on local residents.
30. 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. 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.
31. 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.

32. The Commissioner has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure in this particular instance.
33. 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.
34. 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).
35. As covered 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 to the complainant's request.

Procedural matters

36. The complainant submitted their information requests on 11 May 2022. The council responded on 10 June 2022, providing some information to the complainant.
37. However, it was not until 28 June 2022 that the council confirmed that it held further information which it was refusing to disclose under regulation 12(5)(b) of the EIR. As the council failed to issue a refusal notice within 20 working days, the Commissioner has found a breach of regulation 14(2) of the EIR.
38. The complainant requested an internal review on 18 July 2022. On 23 September 2022, the council asked the complainant to clarify what parts of the response they remained dissatisfied with; the council then provided its internal review response on 4 October 2022.

39. It is the Commissioner's opinion the complainant had already been sufficiently clear as to why they were requesting an internal review. As the council failed to meet its obligations to provide an internal review response within 40 working days, the Commissioner has found a breach of regulation 11(4) of the EIR.

Right of appeal

40. 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

41. 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.
42. 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

Suzanne McKay
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Information Commissioner's Office
Wycliffe House
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