

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

Date: 17 April 2024

Public Authority: Welwyn Hatfield Borough Council
Address: The Campus
Welwyn Garden City
AL8 6AE

Decision (including any steps ordered)

1. The complainant requested legal advice associated with estate management. Welwyn Hatfield Borough Council (the "council") refused the request, citing the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the council correctly applied regulation 12(5)(b) to the withheld information.
3. The Commissioner does not require further steps.

Request and response

4. On 4 December 2023 the complainant wrote to Welwyn Hatfield Borough Council (the "council") and requested the following information:

"I was reading the report from Chris Dale to the Estate Management Scheme Member Group dated 6th December 2021, available here: <https://democracy.welhat.gov.uk/documents/s18241/EMS%20Report.pdf>

Legal advice is referred to at points 1.2, 5.3, 9.2 and 9.3.

Please provide copies of all legal advices referred to at these points in the report."

5. The council responded on 18 December 2023 and confirmed that it was withholding the requested information under the exception for the course of justice (regulation 12(5)(b)).
6. On 18 December 2023 the complainant asked the council to review its handling of the request. The council provided its review response on 16 January 2024. This confirmed that it was maintaining its position.

Scope of the case

7. On 19 January 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner has considered whether the council correctly withheld the requested information.

Reasons for decision

Is the requested information environmental?

9. 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);
10. In this case, the requested information relates to the management of estate properties. The Commissioner considers that the requested information falls under regulation 2(1)(c). He has, therefore, assessed this case under the EIR.

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

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 Commissioner's guidance confirms that information that is subject to Legal Professional Privilege (LPP) falls within the scope of regulation 12(5)(b). The guidance goes on to note that the Upper Tribunal accepts that an adverse effect on the course of justice can result from the

undermining of the general principles of legal professional privilege and of the administration of justice¹.

13. Following the Upper Tribunal, whilst the Commissioner accepts that it is not inevitable that the disclosure of privileged information would adversely affect the course of justice; he considers that there would need to be special or unusual factors in play for this not to be the case.
14. The council has confirmed that the withheld information is legal advice and is subject to LPP. The advice relates to the operation of Welwyn Hatfield Borough Council's Estate Management Scheme.
15. The council has confirmed that the confidence attached to the advice had not been lost and that, therefore, LPP still applies to the information. The council noted that, as the complainant identified, the advice was referenced in a public meeting's agenda item but this reference did not detail the content of the advice itself, but the decisions it informed². On the available evidence, the Commissioner is satisfied that the withheld information still remains subject to LPP.
16. In relation to adverse effects to the course of justice, the council explained that the legal advice itself is a candid assessment of the council's Estate Management Scheme. The council considers that releasing the information would reveal details of its position and strategy which could be exploited by external parties.
17. The council has further argued that, if this information were to be released, it may set a precedent which may dissuade the authority (and other authorities that are made aware of this case) from seeking necessary candid legal advice due to a chilling effect and fear that the advice may be used against them. The council considers that this would undermine its ability to seek confidential legal advice and would prejudice the course of justice by setting an unfair precedent which would not affect bodies which do not have duties under the EIR.
18. 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. As the withheld information in this case is subject to LPP and relates to an ongoing matter, the Commissioner is satisfied that disclosure of the requested

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

² The relevant report, also referenced in the complainant's request, is published here: <https://democracy.welhat.gov.uk/documents/s18241/EMS%20Report.pdf>

information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

19. The Commissioner notes that the complainant asked the council to consider whether a redacted version of the information could be disclosed. The Commissioner accepts that, as the information in its entirety is subject to LPP and covered by regulation 12(5)(b), it would not be possible for the council to take this step.
20. Regulation 12(1)(b) requires that where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful that regulation 12(2) requires public authorities to apply a presumption in favour of disclosure.

Public interest in disclosure

21. The complainant has argued that the withheld advice relates to decisions which affect residents that are subject to the Estate Management Scheme. Disclosure, therefore, would provide transparency and promote public understanding of and engagement with decisions made in relation to these matters.
22. The council has also acknowledged that release of the information would increase the transparency and accountability surrounding its Estate Management Scheme.

Public interest in maintaining the exception

23. The council has suggested that the complainant's grounds for disclosure are focused on the interests of residents falling within the purview of its Estate Management Scheme and considers that, as this represents a minority of the wider district, the grounds do not carry much weight.
24. The council has further argued that it considers that the public interest in this matter is already served by a range of information about the scheme published on its website³.

³ <https://www.welhat.gov.uk/Welwyn-Garden-City-Estate-Management-Scheme>

Balance of the public interest

25. The Commissioner notes that the EIR carries a presumption in favour of disclosure when considering the public interest in maintaining an exception. He also recognises that in this case, there is a significant local interest in the Estate Management Scheme as it has a direct impact on a number of homes within the borough. In addition, there is also an inherent public interest in the transparency of decision making.
26. However, 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.
27. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that: "...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest... It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."⁴.
28. To equal or outweigh the public interest in maintaining a claim of LPP, the Commissioner would expect there to be strong opposing factors. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it has received or evidence of a significant lack of transparency.
29. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has taken into account the circumstances surrounding the request, both the Council's and the complainant's arguments, the timing of the request and the nature of the withheld information. The Commissioner is satisfied that, in this case, the inherent public interest in protecting the established convention of legal

⁴ Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

professional privilege is not countered by at least equally strong arguments in favour of disclosure. The Commissioner's decision is, therefore, that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

30. 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.

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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