

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 September 2024

Public Authority: Somerset County Council
Address: County Hall
Taunton
Somerset
TA1 4DY

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application. Somerset County Council (the council) disclosed some of the information to the complainant but withheld the remainder of the information citing regulations 12(5)(b) (the course of justice and inquiries) and 12(3) (personal information) of the EIR as its basis for doing so.
2. The Commissioner's decision is that the council was correct to rely on regulations 12(5)(b) of the EIR.
3. The Commissioner also considers that the council has failed to comply with its obligations under regulation 5(2) of the EIR as it did not issue a response to the complainant's request within 20 working days.
4. The Commissioner does not require further steps.

Request and response

5. On 19 November 2023, the complainant wrote to the council and requested information in the following terms:
"Please provide me with copies of all:
1) correspondence (both internal and external)

- 2) Emails
- 3) Documents
- 4) Discussions
- 5) meetings including agendas, agreed actions and minutes along with attendance.
- 6) logged phone calls including transcripts and those involved.
- 7) Surveys including reasons, expected outcomes and results relating to planning application reference 22/03560/OUT.

In all cases please also provide who was involved and in what capacity. The period of the request is to cover anything prior to the application being made on Wed 21 Dec 2022 up until today's date 19/11/2023. For the avoidance of doubt, you can discount from the search anything that has already (and still is) publicly available on the Somerset Council Planning Portal."

6. The council responded on 30 January 2024 and provided some of the information falling within the scope of the request. However, it withheld legal advice it received from a named individual by virtue of regulation 12(5)(b) and also withheld personal information in the disclosed information under regulation 12(3) of EIR.
7. Following an internal review the council wrote to the complainant on 25 April 2024. The council partially upheld the complaint and admitted that substantial information in scope of the request, was not disclosed in its original response. It also provided links to other information related to the planning application together with document logs explaining the redactions applied.
8. In response to the complainant's concern that they have not been provided logged phone calls including transcripts, the council explained that calls are not routinely logged or transcribed. It explained that although reference may be made to telephone conversations and other documents, it does not hold a record of the conversations.
9. In relation to the surveys, the council stated that all the information that it holds is either part of the online planning application or included in the original and supplemental response to the complainant.
10. The council maintained its position to withhold information under regulations 12(5)(b) and 12(3) of the EIR.
11. The Commissioner has also noted that the complainant is not challenging the redaction of personal information contained in the

information disclosed to them. In their internal review request they stated that "I understand and accept the redactions to remove PII (personally identifiable information) as the various regulations allow for". Therefore, the Commissioner will not consider the council's application of regulation 12(3) of the EIR in this decision.

Scope of the case

12. The complainant contacted the Commissioner on 16 January 2024 to complain about the way their request for information had been handled. They complained that the council had not responded to their request.
13. The Commissioner wrote to the council on 27 January 2024 and required the council to issue a response to the complainant's request within 10 working days of receipt of his correspondence. On 28 March 2024 the complainant contacted the Commissioner again to complain about the council's delayed response to their internal review request.
14. The Commissioner originally accepted their complaint for investigation without an internal review response, however the council issued its internal review response on 25 April 2024, prior to commencement of the Commissioner's investigations.
15. The Commissioner considers the scope of his investigation is to determine whether the council was correct to rely on regulations 12(5)(b) of the EIR.

Reasons for decision

Is the requested information environmental?

16. The Commissioner agrees that the requested information is environmental information falling within the scope of regulation 2(1)(a) of the EIR as it relates to measures (including administrative measures), and activities affecting or likely to affect the elements and factors referred to in regulation 2(1)(a) ...as well as measures or activities designed to protect those elements. Therefore, the council was right to consider this under the EIR access regime.

Regulation 12(5)(b)-material in the course of completion

17. Regulation 12(5)(b) of the EIR states that a public authority may 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'.

18. 'Adversely affect' means there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect.
19. 'Would' means that it is more probable than not, i.e. a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

Legal professional privilege (LPP)

20. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance the application of the exception, encompasses, amongst other types of information, material covered by LPP. This approach was supported by the Tribunal's decision in *Kirkaldie v Information Commissioner & Thanet District Council* (EA/2006/0001, 4 July 2006)¹ where they stated:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts, and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this, it covers LPP, particularly where a public authority is or is likely to be involved in litigation."

21. The principle of LPP is based on the need to ensure that communications between a client and their legal adviser will be treated in confidence and not revealed without the client's consent. It is fundamental to the English legal system that a client can speak freely and frankly with their legal adviser to obtain legal advice based on full knowledge of all the relevant circumstances of the case. In the absence of such a concept, those with legal knowledge would have an unfair advantage over those who did not when matters come to court.
22. The course of justice element covers a wide range of information which includes material covered by LPP. Therefore, disclosing LPP information could undermine the general principles of LPP, and this would have an

¹ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i94/Kirkaldie.pdf>

adverse effect on the course of justice relating to a person's right to receive a fair trial.

23. A public authority can take into account the general effect on the course of justice in terms of undermining LPP. However, contrary to the FOIA where section 42 is class-based, it is not enough to merely show that the information is covered by advice privilege and comprises communications between the public authority and its legal representative to engage the exception. There is more a public authority must do to engage regulation 12(5)(b). This was recognised in the case of Department for Communities & Local Government (DCLG) v Information Commissioner & William Robinson [2012] UKUT 103 (AAC) (28 March 2012), the Upper Tribunal said:

"...it would be possible to conclude that the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (e.g. that the legal advice is very stale), such that there would be no undermining of public confidence in the efficacy of LPP generally" and "whether regulation 12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis."

24. Therefore, the onus is on the public authority to demonstrate that the exception applies to the information it wishes to withhold.
25. For regulation 12(5)(b) to be engaged, a public authority must also demonstrate that disclosure of the requested information would adversely affect the course of justice and the balance of the public interest favours maintaining the exception.

Complainant's position

26. The complainant argued that the council did not provide all the documentation regarding the planning application it approved as they know that the council did not follow planning guidelines and there is suspicion of significant fraud. They believe that the planning team is preventing their attempts to get all the documents relating to the planning case and it will be too late to stop the application if work starts.

The council's position

27. The council has explained that the information in question is Counsel advice on the legal implications of a planning appeal decision related to the absence of a five-year supply of housing land pursuant to planning application 22/03560/OUT.
28. It states that the relevant category of privilege is legal advice privilege which constitutes advice provided by a legal adviser with the sole purpose of providing legal advice in relation to rights or obligations. It

says that the advice was given in confidence, and it is neither in the public domain nor has it waived privilege in respect of it.

29. The council maintained that the disclosure of the withheld information would adversely affect the course of justice. When arguing the adverse effect disclosure would have, the council referred to the DCLG case (para 23) and argued that the adverse effect on LPP such as confidence in the efficacy of LPP and the administration of justice generally ought to be considered and not simply the effect on this particular case.
30. It argued that the adverse effect on the course of justice can result from the undermining of the general principles of LPP and that it is inevitable that disclosure of privileged information would adversely affect the course of justice. It reiterated the Tribunal's suggestion that there would need to be special or unusual factors in play for this not to be the case. In the council's view disclosure would not only undermine confidence in the efficacy of LPP but also, it would inhibit it from seeking and obtaining legal advice.
31. The council argued that to release the information at this time would adversely affect the course of justice as it relates to current planning which is proceeding through the planning system and would therefore involve public access to information subject to LPP whilst the planning application is still live. It argued that its determination of the application may well be subject to legal challenge.
32. It says that this would have a general effect of directly undermining its ability to confidentially consider legal risks and the formulation of options in relation to the handling of a live and ongoing planning application.

The Commissioner's view

33. The Commissioner has seen the withheld information and is satisfied that it constitutes a confidential communication made between a client and professional legal adviser for the dominant purpose of seeking and giving legal advice and is therefore covered by LPP on the basis of advice privilege.
34. In addition, and turning to the requirement to show that there would be an adverse effect on the course of justice from disclosure of the information, 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.
35. Having had regard for the council's arguments, the Commissioner agrees that it is inevitable that disclosure of privileged information would adversely affect the course of justice. He has not identified any special or unusual factors at play for this not to be the case.

36. In light of 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 Commissioner will now go on to consider the public interest test.

Public interest test

37. 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.

Arguments in favour of disclosure

38. The council has recognised that disclosure would promote transparency in the actions and decisions taken by the public authority. It added that it would increase the public's understanding of the reasons and basis on which decisions are made.

Arguments in favour of maintaining the exception

39. The council argued that as the information constitutes legal advice, the general principle of LPP applies in respect of client/ counsel legal advice. It stated that disclosure would directly undermine its ability to confidentially consider legal risks and the formulation of options in relation to the handling of ongoing planning application which it says would not be in the wider public interest.
40. It says that the legal advice applies to live planning application which may be subject to appeal or judicial review. Therefore, disclosure could have the effect of prejudicing its position on other future planning applications due to the ongoing issues with a five-year housing land supply in the South of Somerset.
41. When considering where the balance of public interest lies, the council argued the fundamental importance within the English legal system of a client's privilege to communicate freely and frankly with their legal advisor based on the full knowledge of all the relevant circumstances of the case. It referred to the DCLG case that there are no special or unusual factors in play for there to be an overriding justification to deviate from the principle in this case. It says that the public interest arguments in favour of disclosure do not outweigh the public interest in maintaining the confidentiality of legal advice through LPP or the ability

to engage in full and frank discussion/ correspondence with its legal advisors in order to obtain legal advice. The council added that the planning process has a high degree of transparency already. It also considers that the existence of the legal advice has been made clear in planning committees when discussing this application, ensuring appropriate transparency in the decision-making process. On this basis the council argued that the public interest in maintaining the exception outweigh the public interest in disclosure and that regulation 12(5)(b) should be maintained.

The Commissioner's decision

42. 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.
43. 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 Bellamy² 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..."
44. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
45. The Commissioner has made his decision in this case based on the contents of the information, and on the evidence, he has regarding the council's decision-making process and conduct in the relevant matter.
46. The Commissioner is satisfied that the factors described in paragraph 43 above are not present such as would lend the required weight to

overturn the strong public interest in maintaining the exception. He therefore considers that the balance of the public interests favours the exception being maintained.

47. 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 in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*³, "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).
48. 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.

Other matters

49. Regulation 11 of the EIR states that:

"(3) The public authority shall on receipt of the representations and free of charge—11

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."

3

https://assets.publishing.service.gov.uk/media/5d9dc592e5274a595bf5dabf/SGIA_44_2019i.pdf

50. In this case, the complainant requested an internal review on 31 January 2024 and the council did not provide the outcome of its internal review until 25 April 2024. The Commissioner therefore finds that the council has breached regulation 11 of the EIR by failing to carry out an internal review within the statutory time limit of 40 working days.

Right of appeal

51. 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

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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