

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 September 2024

Public Authority: London Borough of Sutton
Address: Civic Offices
St Nicholas Way
Sutton
SM1 1EA

Decision (including any steps ordered)

1. The complainant has requested information relating to the legal advice obtained by the London Borough of Sutton (the council) before it introduced additional costs for processing documents submitted in support of a planning application. The council has refused to provide the information, stating that it is covered by Legal Professional Privilege (LPP). It cited regulation 12(5)(b) (the course of justice and inquiries) of the EIR as its basis for doing so.
2. The Commissioner's decision is that the council correctly withheld the information under the exception at regulation 12(5)(b) of the EIR and that the balance of the public interest favours the exception being maintained.
3. The Commissioner does not require the council to take further steps.

Request and response

4. On 1 December 2023, the complainant wrote to the council and requested information in the following terms:
5. "Further to my email below to your colleague in the Planning Department, please can you provide me with a copy of the legal advice that was sought by the Council in connection with the planning top up fees. Please feel free to email this to me by reply. My correspondence address can also be found below. Should you need anything further from me, please feel free to get in touch".
6. The council responded on 2 January 2024 and refused to provide the requested information citing regulation 12(5)(b) of the EIR as its basis for doing so.
7. Following an internal review the council wrote to the complainant on 22 February 2024 and maintained its original position to withhold the information under regulation 12(5)(b).

Scope of the case

8. The complainant contacted the Commissioner on 2 March 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of his investigation is to determine whether the council was correct to apply regulation 12(5)(b) of the EIR to withhold the requested information.
10. The Commissioner has viewed the withheld information.

Reasons for decision

11. 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 and activities affecting the elements of the environment and therefore the council were right to consider this under the EIR access regime.
12. The Commissioner's position is taken from the case of EIR PR Vesco v IC GLD SGIA 44 2019 in which the Upper Tribunal stated:

"The EIRs exist to enable recovery of environmental information in appropriate cases. Any grounds for refusal to disclose are to be restrictively interpreted and the presumption in favour of disclosure

should inform all decisions made under the EIR including the decision to engage an exception in the first place, taking into account for the particular case, the public interest served by disclosure and refusals to disclose information must be justified under the terms of the EIR.”

Regulation 12(5)(b)- the course of justice and inquiries exception

13. 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’.
14. ‘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. ‘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.
15. Regulation 12(5)(b) is subject to the public interest test under regulation 12(1)(b), and the exception can only be maintained if the public interest test supports this.

Legal professional privilege (LPP)

16. 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.”

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

17. 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.
18. 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 adverse effect on the course of justice relating to a person's right to receive a fair trial.
19. 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)², 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."
20. Therefore, the onus is on the public authority to demonstrate that the exception applies to the information it wishes to withhold.
21. 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.

² <https://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>

The complainant's arguments

22. The complainant has argued that the council's refusal to provide the information falls foul of the tests relating to legal privilege. They believe that the legal advice which the council has withheld suggests that the advice may hold the key to the lawfulness of its decision. They do not believe that there is a legal basis for the charge as planning application fees are set by Central Government and there is no scope for top up fees in planning applications.

The council's arguments

23. The council maintains its position as set out in its original response to the EIR request that the information is exempt information, and its disclosure would adversely affect the course of justice because it attracts LPP.
24. The council says that it relies on 12(5)(b) as the information falls within advice privilege and comprises communications between itself and its legal team. It explained that the communication was exclusively for the purpose of receiving legal advice and the information was communicated by its legal team in their capacity as professional legal advisors to the council. The council stated that disclosure of the withheld information would adversely affect its legal position as it would inhibit it from seeking general legal advice.

The Commissioner's view

25. The Commissioner is satisfied that the correspondence comprises confidential communications between client and professional legal advisors, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
26. He has considered whether the confidence attached to the information has subsequently been lost. Having considered the council's arguments and referred to the withheld information the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
27. In addition, and, turning to the requirement to show that there would be an adverse effect on the course of justice from the disclosure of the information, the Commissioner's established view is that disclosure of information subject to LPP will have an adverse effect on the course of justice.
28. With regard to the specific circumstances of the request, the council considers that disclosure will affect its legal position and inhibit it from seeking legal advice.

29. 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, particularly given that the advice is current. He has not identified any special or unusual factors at play for this not to be the case and therefore finds that the exception at regulation 12(5)(b) is engaged.

The balance of the public interest

30. 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

31. The council stated that disclosing legal advice would maintain public trust and assist residents with determining whether it upholds standards of integrity and ensure justice. It also recognised that disclosure would allow the public to consider the quality of the legal advice obtained and what it based its conclusions on in respect of those additional costs.
32. The council stated that, disclosure would allow the public to consider the reasoning for and the understanding of its decisions and legal obligations, providing a full picture of its position.

Arguments against of disclosure

33. The council stated that the disclosure of legal advice would defeat the authority's ability to consult its lawyers in confidence. It argued that any fear of obtaining legal advice due to disclosure could affect the free and frank nature of legal exchanges. The council added that if legal advice was routinely disclosed, it could lead to less candid discussions and potentially undermine the quality of advice given or decisions made.
34. The council says that while transparency is important, the need to preserve the confidentiality of legal advice retains significant weight. It argued that 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. It stated that maintaining confidentiality of legal communications fosters open and honest communication between clients and their legal advisers. It maintained that this is crucial for sustaining trust and confidence in the legal system and in the processes of public authorities.
35. The council says that it undertook a consultation process with relevant stakeholders about the Planning Fee. The consultation ensured that the

decision-making process was transparent and inclusive. It says that the process involved agents in the council's Agents' Forum group as well as those who had submitted applications within the previous 12 months. It says that the consultation ensured that the decision-making process was transparent and inclusive. The council argued that for the reasons stated, the balance of the public interest lies with maintaining the exception.

The Commissioner's decision

36. 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.
37. 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 Bellamy³ 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...".
38. 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.
39. 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 matters.
40. The Commissioner is satisfied that the factors described in paragraph 39 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.

3

https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

41. 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)*⁴, “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).
42. 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.

4

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

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF