

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

Date: 13 November 2024

Public Authority: Epsom & Ewell Borough Council
Address: Town Hall
The Parade
Epsom
Surrey
KT18 5BY

Decision (including any steps ordered)

1. The complainant requested legal advice relating to decisions about the Green Belt. Epsom & Ewell Borough Council (the "Council") disclosed some information and withheld other information under the exemption for legal professional privilege (section 42 of the FOIA). During the Commissioner's investigation the Council reconsidered the request under the EIR, confirming that some information was not held and that some information was being withheld under the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the Council correctly withheld the requested legal advice under regulation 12(5)(b) but failed to provide a response and a refusal notice in time and breached regulation 5(2) and regulation 14(2).
3. The Commissioner does not require further steps.

Request and response

4. On 6 March 2024 the complainant asked for the following information:

"I understand that the Council has procured legal advice with respect to the impact, on the possibility of building on the Green Belt and/or redrawing Green Belt boundaries, of changes made to the NPPF in December 2023.

Please can you provide a copy of:-
 - a) The contract for this legal advice
 - b) The legal advice itself
 - c) The cost incurred in procuring the legal advice
 - d) On whose authority this advice was procured."
5. The Council responded on 24 May 2024 and disclosed the information in parts c and d of the request. It withheld the outstanding information under the exemption for legal professional privilege (section 42 of the FOIA).
6. On 3 June 2024 the complainant asked the Council to carry out an internal review. On 15 July 2024 the Council provided its internal review response which upheld its original decision.

Scope of the case

7. On 18 July 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. Given the nature of the request, which relates to potential decisions in respects of Green Belt land, it occurred to the Commissioner that the information was environmental in nature and that the request fell to be considered under the EIR rather than the FOIA. He, therefore, directed the Council to reconsider the request under the EIR.
9. The Council provided the Commissioner with a new response under the EIR. This confirmed that, in relation to the request for legal advice in part b of the request, it was withholding this information under the exception for the course of justice (regulation 12(5)(b)). The Council also explained that, in relation to the information in request part a, which was initially withheld under section 42 of the FOIA, its position had changed, confirming that the information was not held.

10. The Commissioner has considered whether the Council correctly handled the request.

Reasons for decision

Is the requested information environmental?

11. 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);
12. The requested information relates to potential decisions in respect of Green Belt land. The Commissioner is, therefore, satisfied that the information is likely to constitute information on a measure as defined in regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

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

13. Regulation 12(5)(b) provides 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. The threshold for establishing an 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; that is, 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. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance on regulation 12(5)(b), encompasses, amongst other types of information, material covered by legal professional privilege (LPP)¹.
16. The Council confirmed that the information is legal advice provided by a barrister, who supplied the advice at the request of the Council. The information was drafted with the sole purpose of providing the Council with legal advice and was communicated to the Council in the barrister's professional capacity. The Council has confirmed that it is satisfied that the privilege attached to the withheld information has not been waived; it has stated that the communication has not been made available to the public or to a third party without restriction, the LPP that this communication attracts has been maintained.
17. In summary, the Council has confirmed that the requested information is subject to LPP. Referencing the Commissioner's guidance, the Council stated LPP is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'.
18. Having considered the withheld information the Commissioner is satisfied that it represents confidential communications between a 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.

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/>

19. The Commissioner has also considered whether the confidence attached to the information has subsequently been lost or waived through a disclosure of the advice to the world at large. Having considered the Council's arguments, the Commissioner is satisfied that the legal advice remains subject to LPP.
20. 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.
21. The Council has explained that the legal advice was obtained to support a confidential all Member (Councillor) briefing in relation to the emerging Local Plan in January 2024 following changes to the National Planning Policy Framework (NPPF) in December 2023, specifically in relation to releasing Green Belt land through the Local Plan process.
22. The Council confirmed that the confidential briefing focused on the NPPF updates and spatial strategy of the emerging local plan and its purpose was to obtain a steer from members on what they considered could be an appropriate spatial strategy to be contained within the Pre-Submission Local Plan. It explained that the advice was to support / guide members in making recommendations to officers as to what they considered would be an appropriate spatial strategy having regard to the national policy changes.
23. The Council has confirmed that the advice in question remains live, as it was provided at a point in time to inform decision making on progressing the Proposed Submission Local Plan and this item is still under consideration with a recommendation by committee and decision by full council to be made later this year.
24. Having regard to 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.
25. Regulation 12(5)(b) is a qualified exception, and the Commissioner has, therefore, considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exception being maintained.

Public interest arguments in favour of disclosure

26. Regulation 12(2) of the EIR provides a presumption in favour of disclosure, which adds weight in favour of environmental information being disclosed in response to an EIR request.

27. The Council has acknowledged that disclosing legal advice would maintain public trust and assist residents with determining whether the Council upholds standards of integrity. The Council has also recognised that disclosure would allow the public to consider the quality of the legal advice obtained and what it has based its conclusions on in respect of the details in the local plan regarding Green Belt land.
28. The Council also acknowledges that disclosure would allow the public to consider the reasoning for and the understanding of its decisions relating to the use of Green Belt land.
29. The complainant has argued that the advice was obtained at the public expense for the express purposes of informing decisions about whether or not Green Belt land must be offered up for development under the Local Plan. The complainant considers that there is, therefore, a public interest in disclosing the result of this consultation in order to ensure public funds have been used effectively.

The public interest in maintaining the exception

30. The Council has argued that disclosure of legal advice would defeat its ability to consult lawyers in confidence moving forward. Furthermore, if legal advice was routinely disclosed, it could lead to less candid discussions between the Council and its legal advisors, and potentially undermine the quality of advice given or decisions made in the future.
31. The Council has argued that maintaining the confidentiality of legal communications fosters open and honest communication between clients and their legal advisers. The Council considers that this is crucial for sustaining trust and confidence in the legal system and in the processes of public authorities.
32. The Council has also argued that the public interest in transparency, accountability and in facilitating public engagement in decisions relating to the Green Belt and the Local Plan has been served via other means.
33. In addition to documenting the public consultation process already undertaken, the Council confirmed that it is working on the evidence base that is needed to produce the next iteration of the Local Plan, known as the Draft Pre-Submission.
34. The Council confirmed that, once the evidence base is gathered and complete, a recommendation will come to the Licensing and Planning Policy Committee (LPPC) on a proposed Pre-Submission Local Plan. The Council explained that LPPC will then make a recommendation to Full Council who will then decide how it wishes to proceed with the Local Plan. The Council confirmed that it is only at this stage that a Full Council decision on the Local Plan will be made, explaining that, if it is

agreed, then it will go forward to another six-week public consultation, when the community will again be able to engage with decisions about the potential use of this land. The Council explained that these consultations, reports and public meetings aim to ensure that the decision-making process is transparent, accountable and inclusive.

The balance of the public interest

35. The Commissioner recognises there is a public interest in a Council being transparent about its actions so it is accountable for them.
36. The Commissioner also acknowledges the complainant's view that there is a public interest in matters that relate to considerations regarding the use of Green Belt land. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
37. 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.
38. 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...”²
39. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
40. In this case the Commissioner is mindful of the complainant's concerns and acknowledges that they are likely to be widely shared in the local

² Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023).

community. However, he also notes that the decision-making process outlined by the Council provides opportunities for public engagement and scrutiny of decisions and he does not consider there are specific factors which warrant interference in the due course of this process. Specifically, he acknowledges that legal advice can play an important role in assisting public authorities in carrying out their statutory roles effectively. Disclosing information subject to LPP damages both the common law concept and the effectiveness of decision-making it supports.

41. The Commissioner's decision is that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
42. The Commissioner has made his decision in this case based on the contents of the information, the complainant's arguments and on the evidence he has received from the Council. He has also considered previous decision notices he has issued in cases where similar conditions apply and he considers the conclusions reached are transposable here³.
43. 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

Procedural matters

Regulation 5(2) – duty to provide environmental information

44. Regulation 5(1) of the EIR states:

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.”

³ See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022745/ic-153574-l0m9.pdf>

45. Regulation 5(2) of the EIR states:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

46. In this case the complainant submitted their request on 6 March 2024 and the Council responded on 24 May 2024.

47. The Commissioner has, therefore, concluded that the Council failed to respond in time and breached regulation 5(2).

Regulation 14 – refusal of request

48. The relevant parts of regulation 14 state:

"(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including—

(a) any exception relied on under regulations 12(4), 12(5) or 13...."

49. In this case the Council's initial response and internal review applied the exemption in section 42 of the FOIA to withhold the contract in part 'a' of the request.

50. During the Commissioner's investigation the Council revised its position, confirming that the information was not actually held. The relevant exception under the EIR in cases where requested information is not held by a public authority is contained within regulation 12(4)(a).

51. The Commissioner has concluded that, in this case, the Council breached regulation 14(2) by failing to issue a refusal notice specifying the appropriate reasons for not providing the information within 20 working days.

Right of appeal

52. 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

53. 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.
54. 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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