

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

Date: 27 November 2024

Public Authority: Stafford Borough Council
Address: Civic Centre
Riverside
Stafford
ST16 3AQ

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning enforcement complaint she had made. Stafford Borough Council (“the Council”) disclosed some information but withheld other information under section 42 of FOIA (the exemption for legal professional privilege). During the Commissioner’s investigation, the Council reconsidered the request under the EIR and confirmed that some information which comprised legal advice was being withheld under regulation 12(5)(b) (the exception for the course of justice).
2. The Commissioner’s decision is that the Council was entitled to rely on regulation 12(5)(b) of the EIR to withhold the information. However, it failed to provide a response and a refusal notice within the time for compliance, which breached regulation 5(2) and regulation 14(2) of the EIR.
3. The Commissioner does not require steps as a result of this decision.

Request and response

4. On 31 August 2023, as part of a wider request for information, the complainant wrote to the Council and requested information in the following terms:

“Further, under the terms of the Freedom of Information Act we request to see our complaint file in full and unredacted (as we know the owner of the shelter) to include the details of all site inspections, evidence based decisions and communications.”
5. The Council responded on 6 October 2023, disclosing some information.
6. On 9 October 2023, the complainant wrote to the Council, querying the absence of legal advice that she had expected would be disclosed with her complaint file.
7. On 17 November 2023, the Council told the complainant that it was withholding confidential legal advice under section 42 of FOIA (Legal professional privilege).
8. There was a further, protracted exchange of correspondence regarding the request and then, on 9 April 2024, the complainant wrote stating her belief that the legal advice falling within scope of the request should be disclosed, as the public interest test had not been carried out correctly.
9. On 26 April 2024, the Council provided the outcome of a review of its application of section 42 to withhold legal advice. Its decision was that the exemption had been applied correctly.

Scope of the case

10. The complainant contacted the Commissioner on 11 June 2024 to complain about the way her request for information had been handled. She disagreed with the application of section 42 of FOIA to withhold any legal advice falling within the scope of the request.

Is the requested information ‘environmental’?

11. Requests for ‘environmental information’ must be considered under the EIR, rather than under FOIA, as there are differences between the two access regimes.
12. Having viewed the withheld information, which relates to a complaint about land use, the Commissioner considered that it fell within the definition of ‘environmental information’ at regulation 2(1)(c) of the EIR.

13. The Commissioner therefore directed the Council to reconsider the request under the EIR. The Council accepted that the EIR was the applicable access regime. It withdrew reliance on section 42 of FOIA and substituted reliance on regulation 12(5)(b) (The course of justice, etc) of the EIR, to withhold the legal advice.
14. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exception, either before the Commissioner or the First-tier Tribunal, and both must consider any such new claims.
15. The analysis below therefore considers the Council's application of regulation 12(5)(b) to withhold the information.

Reasons for decision

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

16. 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.
17. 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; that is, a more than 50% chance that the adverse effect would occur if the information was disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
18. 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.
19. The Council has explained to the Commissioner its reasons for considering that the requested information remains subject to LPP. It said the withheld information documents legal advice requested by a

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/>

client (the Council's planning department) and provided by a professional legal adviser (the Council's solicitor). The information was drafted with the sole purpose of providing legal advice and was communicated in the legal adviser's professional capacity.

20. Although the complainant has argued that privilege had been lost due to the publishing of a report on the matter, the Council is satisfied that the information remains confidential and that the privilege attached to the withheld information has not been waived. It said the withheld information did not form part of the information contained in the report. It was satisfied that, as the withheld information has not been made available to the public or to a third party without restriction, the LPP that these communications attract has been maintained.
21. Having considered the withheld information, the Commissioner is satisfied that it represents confidential communications between a client and (in-house) professional legal advisors, made for the dominant purpose of seeking, and giving, legal advice. It is therefore covered by LPP on the basis of advice privilege.
22. 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 submissions on this point, the Commissioner is satisfied that the legal advice remains subject to LPP and has not been waived.
23. The Commissioner's established view is that the disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
24. The Council has explained that the legal advice relates to a planning matter which is the subject of a complaint made by the complainant and it remains live. The complainant believes the Council should be taking enforcement action regarding the matter and has taken her concerns through its complaints process and also to the Local Government Ombudsman, which the Council says found in its favour. The Council understands that the complainant remains dissatisfied and considers that further legal action may be brought against it. It said:

"We would also like to refer to the Upper Tribunal case of DCLG v ICO [2012] UKUT 103: <https://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>).

In which, the ICO decided that the information need not be disclosed, for the reasons including that Regulation 12(5)(b) was engaged because disclosure of the information would adversely affect the course of justice in that if ... legal advice were to be disclosed then that would adversely affect the department's ability to protect its position in any relevant proceedings. So long as the possibility existed of challenging

the ... planning permission in the Courts, it would have been unfair and have put the department at a disadvantage in preparing for any proceedings there might have been to have to disclose in advance confidential advice that was legally professionally privileged. Even once the likelihood of legal proceedings had been diminished the information might still be relevant to future proceedings. We believe the reasoning and circumstances behind that case are very similar to ours."

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

Public interest test

26. Regulation 12(5)(b) is a qualified exception and the Commissioner has 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

27. 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, which adds weight in favour of environmental information being disclosed in response to an EIR request.

28. The complainant considers that disclosure is in the public interest, saying:

"I assert that the legal advice underpinning the Council's refusal to enforce the move of a mobile field shelter is of wider public interest because of the important precedent set by this specific case. Without access to that legal advice the public cannot know or understand the legal or other basis for SBC [the Council] choosing to take NO action to have this particular shelter moved and therefore for setting an important planning/legal precedent."

29. She explained:

"...I seek only to fully understand the entire situation concerning handling of the field shelter in the context of other similar cases locally and elsewhere, in order that I (and the general public) can experience 'full transparency', 'see the full picture' to promote 'public understanding' and enable myself and the general public to 'hold the Authority (SBC) properly to account' for its actions as a matter of public record".

30. The Council acknowledged that disclosure of the information may assist the complainant to fully understand its handling of her planning complaint. Its advice and decision processes would also be more transparent.

Public interest arguments in maintaining the exception

31. The Council said that the withheld information relates to a specific planning dispute between the complainant and another party. The legal advice was provided to the planning officer in respect of that specific situation and is not legal advice relating to a problem affecting the wider public. It saw no wider public interest in disclosure, as the advice relates solely to that planning dispute. It did not consider that disclosure of the legal advice would benefit the general public in their understanding of how the Council makes wider decisions or in promoting accountability.
32. The Council maintained that there is a strong public interest in protecting legal communications between lawyer and client, which are requested and provided in confidence. To remove the right to LPP in individual-interest cases would compromise its ability to consult lawyers in confidence and to have free and frank discussions when making decisions. Releasing such exchanges would allow requesters to take individual arguments out of context, leading to further invalid arguments and disruption to public services. It added that, if confidential legal advice is to be routinely disclosed, this 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.
33. It said the outcome of the discussions between the Planning and Legal departments have already been made clear to the complainant via the Council's complaints process, and a large number of communications and documents have been disclosed to her. The release of the confidential communications requested would add no further value.

The balance of the public interest

34. The Commissioner considers that openness and transparency by public authorities is, in itself, to be regarded as something which is in the public interest. The disclosure of official information can assist the public's understanding of how public authorities make their decisions and carry out their functions, and this, in turn, fosters accountability and public trust in them. The question to be considered here is whether the public interest is better served by permitting such public scrutiny, or by protecting confidential communications between a legal professional and their client.
35. The Commissioner acknowledges the complainant's view that there is a public interest in disclosing information on decisions relating to land use and planning enforcement, particularly as she is affected by what she

considers to be the unauthorised placement of a field shelter in a neighbouring field. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.

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 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.

38. 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 the decision-making it supports. 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.

39. In this case, the Commissioner is mindful of the complainant's concerns and acknowledges that she feels that she is personally affected by the siting of the field shelter. However, the complainant has already had her concerns thoroughly considered by the Council's complaints process. They have also been subject to external consideration, by the Local Government Ombudsman, which found in favour of the Council. The Council has also disclosed a report and correspondence, detailing its decision, amounting to around 2000 pages. She has therefore been informed of the Council's decision and the reasons that underpin it. The fact is that the complainant continues to disagree with the decision.

40. The complainant has argued that there is a wider public interest in disclosure, in terms of the precedent the decision not to take

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

enforcement action sets for the unauthorised siting of other field shelters. However, the withheld information is concerned with the particular factors present in **this** case. Any question of the placement of other field shelters would, similarly, be considered on a case-by-case basis, according to their own particular circumstances, which might differ in any number of respects. The Commissioner therefore does not agree that the disclosure of the legal advice would reveal information on a wider "precedence" being set and he considers that any general public interest in the disclosure of the information is therefore very limited. Any benefit that would flow from disclosure would accrue mainly to the complainant, to serve her private interests.

41. Having considered the withheld information, the complainant's arguments and the evidence he has received from the Council, the Commissioner's decision is that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the withheld information.
42. 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

43. The Council breached regulation 5(2) of the EIR by failing to respond to the request within the 20 working day time for compliance.
44. The Council breached regulation 14(2) of the EIR by failing to issue a refusal notice specifying the appropriate reasons for not disclosing the information within 20 working days.
45. The Commissioner has made a note of these breaches for monitoring purposes.

Right of appeal

46. 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

47. 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.
48. 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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