

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

Decision notice

Date: 17 November 2014

Public Authority: Bolton Council
Address: Town Hall
Bolton
BL1 1RU

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application for certificate of lawful development. Bolton Council (the "council") directed the complainant to the relevant section of its website, where some of the requested information was published. The council also stated that some information was not held and confirmed that other information was being withheld under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that Bolton Council correctly handled the request under the EIR and correctly applied regulation 12(5)(b) to withhold some of the requested information.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant has explained that their request relates to a planning application which they submitted to Bolton Council (the "council") in January 2014. The application was for a Certificate of Lawful Use (LUC) in relation to the historic use of land at Old Fold Road in Westhoughton, Bolton.
5. Amid perceptions by the complainant that it was being mishandled, the application was withdrawn. It is within this context that the request was made.

Request and response

6. On 17 March 2014, the complainant wrote to the council and requested information in the following terms (edited version of request):

(In relation to planning application for certificate of lawful development, Ref. 91231/13 Old Fold Road, Westhoughton)

"I request a complete list of all documents in the possession of the council relating to the above application..."

....The further documents I require are un-redacted copies of all documents connected with/related to the above application (save as listed later below)....

....The documents of which copies are not required are: the planning application and the included documents and any e-mails between the Council and Bayley Design Associates."

7. The council responded on 14 May 2014 and confirmed, under regulation 6(1)(b) of the EIR, that some of the information was already publically accessible and directed the complainant to the relevant section of its website. The council also stated that some of the information was not held and confirmed that some information was being withheld under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR).
8. Following an internal review the council wrote to the complainant on 19 august 2014. It stated that it was maintaining its position.

Scope of the case

9. On 3 September 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied regulation 12(5)(b) to withhold some of the requested information. The Commissioner has also considered whether the council correctly handled the request under the EIR.

Reasons for decision

Is it Environmental Information?

11. The complainant has disputed the council's decision to handle the request under the EIR and considers that the request should have been dealt with under the FOIA.
12. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form 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) and (b) as well as measures or activities designed to protect those elements...'
13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. The Commissioner notes that the withheld information relates to decisions regarding planning. He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)– (f), and he has concluded that it can for the reasons given below.
15. In this case the subject matter of the withheld information relates to land/landscape and activities which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.

16. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
17. In view of this the Commissioner considers that the council correctly handled the request under the EIR.

Regulation 12(5)(b) – Adverse affect to the course of justice

18. Regulation 12(5)(b) of 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 enquiry of a criminal or disciplinary nature."

Is the exception engaged?

19. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"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 legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

20. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or

whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system”.

21. Legal professional privilege (“LPP”) protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation¹”.
22. There are two types of privilege – legal advice privilege and litigation privilege. In this case, the council considers the withheld information is subject to legal advice privilege and that release of the withheld information would adversely affect the course of justice. In this case, the withheld information constitutes emails between council officers and a planning solicitor and instructions to counsel and the resulting legal advice in relation to the planning application in question.
23. Having considered the withheld information the Commissioner is satisfied that it constitutes legal advice that would be subject to the confidentiality provided by LPP and, more broadly, that the information relates to the course of justice. The council has confirmed that the advice has not been shared with third parties and that it, therefore, retains the quality of confidence.
24. In relation to the adverse affect to the course of justice which disclosure would cause, the council has confirmed that the information relates to a planning application which, whilst currently withdrawn, may be re-submitted at a future date. The council has explained that this matter is the subject of an ongoing complaint by the applicant (the complainant) and to release the information outside the planning and complaint process would adversely ability its ability to conduct these statutory duties.
25. The council has stated that the withheld information would assist in in formulating its position should this become necessary. Disclosure of the information, it has argued, would undermine confidence in the general principles of LPP and would also unfairly disclose the council’s legal

¹ EA/2005/0023, para 9

position, something which a potential litigant would not, at this stage, be obliged to do.

26. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to planning, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
27. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.
28. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the information

29. The complainant has argued that there is a particular need for transparency in this case because there is a "plausible perception of wrongdoing" in relation to the planning application which is the subject of the request.
30. The complainant directed the Commissioner to a Local Government Ombudsman (LGO) report dated 19 April 2012 which, in relation to a different planning application, concluded that the council had displayed "systemic maladministration promoted at a senior level in the planning service".²
31. The complainant has suggested that the senior officers in question alluded to in the LGO report are still in post at the council and that this undermines confidence in the ability of the council to properly conduct

² <http://www.lgo.org.uk/decisions/planning/planning-applications/bolton-metropolitan-borough-council-10-022-952-amp>

either the planning application or the submission via the council's complaints procedure.

32. The complainant has also raised other concerns about the procedures followed by the council in determining the planning application and has affirmed that this, combined with the evidence of the council's historic malpractice, provides a weighting in favour of transparency and disclosure.
33. The complainant has made reference to a previous decision notice in which the Commissioner found that the public interest favoured disclosing information withheld under regulation 12(5)(b)³. In that instance, the Commissioner had concluded that the complainant had advanced legitimate concerns about the council's handling of a planning application and the council had failed to advance adequate counter arguments.
34. The council has acknowledged that there is a public interest in there being a planning process that is fair to all parties and that the process is sufficiently transparent to promote public confidence that this is the case.

Public interest in maintaining the exception

35. The council has argued that, with reference to the decision notice cited by the complainant, in the case of the current request, a complaint regarding the conduct of the planning application is ongoing. It considers that there is, therefore, a process already in motion by which the council's processes can be scrutinised. The council has stated that, as there is an examination of its planning process already underway, the weight of argument in favour of disclosure for the purposes of transparency is weakened.
36. The council has highlighted that a number of decisions issued by the Commissioner and the Information Tribunal have reinforced the position that disclosing information that is subject to LPP would have an adverse affect on the course of justice through weakening the general principle of confidentiality upon which LPP rests. The council stated that, in view of the prospect of a challenge to its position in this case, it is important

³ ICO reference: FER0520852, published on the ICO website here:
http://ico.org.uk/~media/documents/decisionnotices/2014/fer_0520852.ashx

that it is able to defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice.

37. The council has argued that, as there is an ongoing complaint relating to the substantive planning matter, the position in relation to maintaining LPP is reinforced. It considers that, in order for this complaint to continue unhindered, there is a public interest in favour of maintaining the confidentiality of any advice and allowing the information to be used within the boundaries of the complaints process.

Balance of the public interest

38. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
39. The Commissioner notes that the issues to which the legal advice relates were still live at the time of the request. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would result in adverse effect to the course of justice by revealing the council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
40. The Commissioner acknowledges that the complainant has a personal interest in accessing the information and has concerns that the council might not have been following proper procedures in considering the planning application. He also notes that the complainant has concerns that the council's complaints process might also be deficient. However, he is mindful that, in the context of the EIR, the 'public interest' refers to the broader public interest, rather than the interests of individuals, although he accepts that these interests can sometimes intersect.
41. The Commissioner is mindful that historic findings of maladministration by the LGO in relation to planning decisions made by the council will raise broader concerns about the council's practice. The Commissioner notes that there is no direct evidence of malpractice in this specific case. The complainant has raised concerns about the council's handling of their planning application, however, whether these are legitimate concerns are a moot point. It is not the Commissioner's role to determine whether the complainant's concerns about the council's

planning process are warranted: These are matters to be determined via the council's complaints procedure or the planning process.

42. He accepts that there might be the perception of a paradox here, in that the EIR can provide access to information which might constitute evidence of poor practice. However, he considers that this is resolved because suspicions about malpractice or other misconduct must have some specific evidential basis to justify overturning the inherent interest in maintaining LPP. The Commissioner has not been presented with any compelling evidence in this specific case. Furthermore, the circumstances which resulted in the Commissioner's decision in the decision notice cited by the complainant do not apply in this case as the council has provided the Commissioner with cogent submissions.
43. Having inspected the information, the Commissioner can see no obvious sign of unlawful activity, evidence that the council has misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. Whilst he accepts there is a public interest in authorities being held accountable for decisions, in this instance, these do not outweigh the public interest in maintaining the exception and other remedies are available for testing the council's actions in this case.
44. The Commissioner considers that, more generally, the planning appeal process provides mechanisms for concerns to be raised and decisions to be challenged. Similarly, a remedy for complaints about maladministration is available via the Local Government Ombudsman. The Commissioner does not consider that the available evidence in this case warrants side-stepping these remedies nor does he, in any event, consider that disclosing the information would serve the broader public interest to the extent that the disclosure of information subject to LPP would be warranted in this case.
45. The Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception. He has, therefore, concluded that the council has correctly applied the exception to the withheld information.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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.

Signed

Andrew White
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