

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 January 2020

Public Authority: Fylde Council
Address: The Town Hall
St Annes Road West
Lytham St Annes
Lancashire
FY8 1LW

Decision (including any steps ordered)

1. The complainant requested correspondence between the legal officer and the planning department at Fylde Council ("the Council") which related to planning applications at a specific address. The Council withheld the information, stating that it was covered by Legal Professional Privilege (LPP).
2. The Commissioner's decision is that the Council correctly withheld the information under the exception at regulation 12(5)(b) of the EIR – adversely affect the course of justice – and that the balance of the public interest favours the exception being maintained.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 25 July 2019, the complainant wrote to the Council and requested information in the following terms:

"A copy of the Council's Legal Officer advice and correspondence and the date it was provided to the planning department, together with the planners' correspondence to legal, in respect of [redacted address] and

lawful development applications refs: [redacted] from 17 February 2017 to date.

In the event that the correspondence did not specifically relate to the above address I request that a copy of the planners and legal officer's correspondence/advice within the above timeframe relating to the consideration of the weight that ought to be provided to affidavits Vs letters and also the application of the four and ten year rules in respect of an apartment and roof terrace that both form part of a building."

5. On 1 August 2019, the Council responded and stated that it held one email falling within the scope of the request: an email dated 19 September 2017 from its Head of Governance to a named officer, in which the Head of Governance *"gave legal advice in relation to aspects of an application for a certificate of lawful use and development at [redacted address]"*. The Council's position was that this email was exempt from disclosure under section 42 of the FOIA – legal professional privilege.
6. Later that day, the complainant asked whether any earlier email from the named officer, asking for the advice, had been considered for disclosure.
7. On 2 August 2019, the Council stated that it considered an email from the named officer was covered by the same exemption.
8. Following a further query from the complainant, the Council confirmed that the correspondence *"related to the application of the four or ten year rule, and in particular its application to part only of a building... [and] the statutory test that the local planning authority must apply in deciding whether it can grant a certificate of lawful use"*.
9. On 6 August 2019 the complainant queried why the Council had not initially identified the email from the named officer as falling within the scope of the request, and asked whether there was any other relevant information, such as attachments to the email. She then formally requested an internal review into the handling of the request, on 8 August 2019.
10. The Council sent the complainant the outcome of its internal review on 28 August 2019. It confirmed that no further information was held relevant to the request. It upheld its position that the two emails falling within scope were exempt from disclosure under section 42, and that, while it neither confirmed nor denied whether the named officer's email contained attachments, it considered that any such attachments would also be exempt under the same exemption.

Scope of the case

11. The complainant contacted the Commissioner on 12 September 2019 to complain about the way her request for information had been handled.
12. During the course of the investigation, the Council agreed with the Commissioner that the request should have been handled under the EIR, in which case, it considered that the correspondence was exempt from disclosure under regulation 12(5)(b) – adversely affect the course of justice – as it still believed it to be covered by LPP.
13. Also, during the course of the investigation, the Commissioner reviewed the withheld information. Since it became clear that some confusion had arisen over what would normally be described as an attachment to an email, and that this had led to the Council's reliance on 'neither confirm nor deny' with regard to any attachments which may have been sent with the email correspondence, the Council withdrew this reliance. The Council confirmed that all of the information it holds falling within the scope of the request is contained within the body of the two emails, and all of it has been withheld as being legally privileged communication.
14. This decision considers whether the two withheld emails have been correctly been withheld under the exception at regulation 12(5)(b).

Reasons for decision

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

15. This regulation 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.
16. 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.

17. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance¹ on the application of the exception, encompasses, amongst other types of information, material covered by LPP.
18. In this case, the Council has explained that it considers that the information is covered by the type of LPP known as 'advice privilege' since it comprises a request for advice from, and the advice itself provided by, the Council's chief legal advisor, acting in his professional capacity. In summary, its view is that it comprises a confidential communication between a client and its lawyer for the purpose of obtaining legal advice.
19. The Commissioner is satisfied that the correspondence comprises confidential communications between client and lawyer, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
20. She has considered whether the confidence attached to the information has subsequently been lost.
21. Having considered the Council's arguments, and referred to the withheld information and publicly-available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
22. 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, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
23. With regard to the specific circumstances of the request, the Council has explained that in its view, at the date of the request, the information related to a 'live' matter. At that date, it was considering whether to issue a certificate of lawful use and was also dealing with a complaint about its conduct over the planning issues.
24. The Commissioner notes, as the complainant has argued, that the specific planning application being considered in the withheld information cannot be said to have been 'live' at the date of the request,

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

since, by the date of the request, that specific application had been refused.

25. However, it is her understanding that decision-making regarding the building was not resolved by the date of the request, since the Council was then considering, albeit with further supporting evidence from the complainant, a new, broadly similar application, and also dealing with a potential complaint as to its conduct.
26. In any event, the Commissioner considers that there is no requirement for the relevant issue to be 'live' for the disclosure of legally privileged legal advice under the EIR to have (more probably than not) an adverse effect on the course of justice. This was confirmed by the Upper Tribunal in *DCLG v the Information Commissioner & WR* [2012] UKUT 103 (AAC)² in which the Tribunal, as set out in the Commissioner's guidance referenced previously, stated that, in the absence of special or unusual factors, an adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege.
27. 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.

The balance of the public interest

28. 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.

Arguments in favour of disclosure

29. Under regulation 12(2) of the EIR, there is a presumption of disclosure, which adds weight in favour of environmental information being disclosed under the legislation.
30. It is also well established that there is always a public interest in a public authority conducting its business in a transparent manner. Indeed, the Council acknowledged in this case that there is a public interest in "*openness, transparency and accountability in public*

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

administration, and particularly in determinations that affect individuals' rights and interests".

31. The Council also considers that there is, potentially, a public interest in *"providing a person who feels aggrieved by the council's actions with the material that she feels that she needs to fully pursue any available right or remedy"*.
32. The complainant considers that the balance of the public interest lies in the disclosure of the information, and she has provided detailed submissions.
33. She wishes to understand the Council's interpretation and application of specific aspects of the relevant planning legislation, including the 'Four/Ten Year Rule' and how it applies to a building or part of a building, and the definition of a dwelling house. She further considers that the Council's interpretation and application of the legislation may have been contrary to government advice. She considers that these are matters of wider public interest.
34. She believes the Council to have been inconsistent in its rulings relating to applications for the grant of Lawful Development Certificates (LDCs). She argues that its reasons for the apparent inconsistencies may lie in the withheld information, and considers that the LDC decision-making process should be open to public scrutiny.
35. In this case, the Council ruled against the complainant's evidence which was submitted in favour of the LDC being granted. The complainant considers that its reasons, which she considers would be set out in the withheld information, should be disclosed.
36. The complainant suspects that the Council may be withholding the information in an attempt to conceal previous errors relating to other LDC decisions.

Arguments for the exception to be maintained

37. The Council's view is that the balance of the public interest lies in the exception being maintained in this case.
38. It has stressed the public interest in the ability of public bodies to receive advice from professional legal advisers on the same basis as other bodies and individuals.
39. In addition, it states that there is a public interest in ensuring that its decisions are supported by appropriate legal advice, and in having a safe space in which to discuss and consider such advice with its legal advisors.

The Commissioner's decision

40. 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.
41. 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*³ 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..."*.
42. 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.
43. The Commissioner has made her decision in this case based on the contents of the information, and on the evidence she has regarding the Council's decision-making process and conduct in the relevant matters.
44. The Commissioner has no evidence that the Council, in seeking legal advice, was aiming either to justify or to conceal its reasons for decisions about granting LDCs, as has been suggested by the complainant. Neither does she have evidence that the Council disregarded and misrepresented the planning applicant's evidence, which has also been suggested.
45. The Commissioner is not satisfied that any of the factors described in paragraph 42 above are present, such as would lend the required weight required to overturn the strong public interest in maintaining the exception. She therefore considers that the balance of the public interests favours the exception being maintained.

³ *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (ES/2005/0023)

46. 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), *"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).
47. 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.

Right of appeal

48. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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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