

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 May 2019

Public Authority: Harrogate Borough Council

Address: Civic Centre
St Lukes Avenue
Harrogate
HG1 2AE

Decision (including any steps ordered)

1. The complainant has requested information about an outline planning application. Harrogate Borough Council refused the request, citing the exceptions for internal communications (regulation 12(4)(e)), the course of justice (regulation 12(5)(b)) and the confidentiality of proceedings (regulation 12(5)(d)).
2. The Commissioner's decision is that Harrogate Borough Council has correctly withheld the requested information under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 28 September 2018, the complainant wrote to Harrogate Borough Council (the "council") and requested information in the following terms:

"In respect of the Harrogate Planning Committee held on 25 September 2018 under item 5 (01) - Outline application for the erection of up to 210 dwellings and associated infrastructure, with access to (but not within) the site considered. (Site Area 13.17Ha) – I would like access to the exempt briefing note considered and containing further information on the three proposed reasons for refusal as set out in the minutes of the Planning Committee held on 14 August 2018."
5. The council responded on 26 October 2018. It stated that it was withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and confidentiality of proceedings (regulation 12(5)(d)).
6. Following an internal review the council wrote to the complainant on 12 December 2018. It stated that it was maintaining its position and confirmed that it was also relying on the exception for the course of justice (regulation 12(5)(b)) to withhold the information.

Scope of the case

7. On 21 December 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether they council had correctly withheld the requested information.

Reasons for decision

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

9. The council confirmed that it was applying regulation 12(5)(b) to withhold the entirety of the requested information.
10. Regulation 12(5)(b) EIR provides an exception from the duty to disclose information where the 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'. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.

11. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' is 'more probable than not'.
12. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Tribunal described legal professional privilege as 'a fundamental condition on which the administration of justice as a whole rests'. The Commissioner accepts that disclosure of legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
13. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

Is the exception engaged?

14. The council has explained that the information was generated for the purposes of properly advising members of the Planning Committee. This took the form of a memo which was presented to members of the Planning Committee. The council has confirmed that the advice was given by the council's Principal Planning Lawyer to their client, these being the 12 members of the Planning Committee. The council confirmed that the advice was made for the sole purpose of obtaining, and giving, of legal advice from the Council's Legal Service. The advice was made by the Principal Planning Lawyer in their capacity as legal advisor to the Planning Committee.

15. Having considered the above, the Commissioner recognises that disclosure of the information would undermine the principle of legal professional privilege, and that the disclosure would also affect the council's ability to defend itself in related legal challenges. The Council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.
16. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged. She has, therefore, gone on to consider the public interest test.

The public interest test

17. 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. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public Interest In Disclosure

18. The Commissioner considers that some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
19. The council has acknowledged that there is a clear public interest in transparency and scrutiny of local government decision making. It has also accepted that the withheld information relates to a decision associated with a significant housing development and that there is a public interest in understanding the reasoning which unpins any Planning Committee decision.
20. The council has also identified the public interest in allowing the public to scrutinise the quality of advice given to the Planning Committee and the Committee's actions in relation to that advice; in essence to consider whether the advice was followed.
21. The complainant has suggested that the legal advice is void as it was based on the lack of a 5-year land supply within the borough (which they assert is no longer the case). The council has disputed the complainant's thesis, and stated that the status of the council's Five

Year Land Supply was a peripheral issue in the legal officer's advice. The main thrust of the legal advice given to Committee Members was that, if they wanted to overturn officer's recommendation and refuse this application then they needed to do so for sound, well founded planning reasons on a solid evidential base. If they failed to produce sound reasons for refusal then this would expose the council to the possibility of a costs application

22. The council has further argued that, irrespective of the present figure of housing land supply, the provisions of Paragraph 11 of the National Planning Policy Framework (NPPF) continue to apply to any decision taken by the council's Planning Committee. It has confirmed that the local plan and policies relating to housing supply are out of date and that, in these circumstances the NPPF states that the 'tilted balance' applies and that:

"11d) where there are no relevant development plan policies, or the policies which are the most important for determining the application are out-of-date, granting permission unless:

- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed or*
- ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."*

Public interest in maintaining the exception

23. The council has argued that there is a strong public interest in upholding the principle of LPP and particularly in maintaining the unhindered ability of legal advisors to provide legal advice to their clients without the prospect of such advice being disclosed into the public domain. The council considers that it would negatively affect the public's confidence in the legal process if this principle was removed, therefore having a negative effect on all cases put to Planning Committee where the input of legal expertise is necessary.
24. The council has further argued that disclosure may also set an unwanted precedent where the public's expectation is that legal advice is routinely disclosed, which would clearly have a negative impact on the ability of legal advisors to give free and frank advice and therefore have an adverse effect on the processes within the council. It considers that such adverse effect on the way advice is given within those processes would not be in the public interest, as the council's internal processes in relation to legal advice must be able to operate effectively.

25. The council has further submitted that significant weight has been attached in previous decisions by the Commissioner to the importance of LPP in its wider context. The council has noted that LPP is an established and fundamental principle of the justice system which allows parties to take advice, and discuss legal interpretation or matters of litigation freely and frankly in the knowledge that such information will remain confidential. The council considers that this was reinforced in the Upper Tribunal appeal in *DCLG v Information Commissioner & WR* [2012] UKUT (AAC) (28th March 2012) where the Tribunal considered the significance of LPP under the EIR, allowing the appeal by the DCLG and re-making the decision of the First Tier Tribunal. In this case, the council has stated, The Upper Tribunal stated that an adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice.
26. The council has further submitted that, since the advice was made further developments have taken place in relation to the status of this particular planning application which was subject to the determination of the Planning Committee on the 25 September 2018. The council has explained that the application for planning permission is now with the Secretary of State to determine whether this application should be subject to his call in powers under The Town and Country Planning Act 1990. The council has clarified that it may be that this particular application could be determined by a Planning Inspector¹.

Balance of the public interest

27. 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.
28. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege

¹ Since its initial submissions to the Commissioner, the council has confirmed that it was made aware on 3 May 2019 by the Ministry of Housing, Communities & Local Government that the Secretary of State has made the decision not to call in this application.

itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.

29. The Commissioner notes that the legal advice relates to matters that are still live, with a final decision in relation to the planning application still pending. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's strategy in such scenarios. She acknowledges that this 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.
30. The Commissioner acknowledges that the complainant has a genuine interest in accessing the information. She also notes that the complainant has concerns that the council has mishandled the application. However, the Commissioner has not been presented with any compelling evidence that this is the case, nor does she consider that it falls within her remit to determine whether this is the case. She also considers that the planning process and other dispute procedures provide mechanisms for such issues to be addressed and other concerns about the council's handling of the matter can be progressed in other arenas than under the EIR.
31. In addition, whilst the Commissioner accepts the complainant's interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
32. Furthermore, the Commissioner considers that the public interest in the context of the EIR refers to the broader public good and, in weighing the interests identified by the complainant against those of the council and its ability to undertake planning matters on behalf of the wider public, the Commissioner does not consider that the interests identified by the complainant tip the balance in this case.
33. The Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. She has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
34. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

35. As this exception covers all the withheld information and the Commissioner finds that it has been correctly applied, she has not gone on to consider the other exceptions invoked by the council.

Right of appeal

36. 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

37. 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.
38. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF