

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 July 2021

Public Authority: Leeds City Council
Address: Civic Hall
Leeds LS1 1UR

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed expansion of Leeds Bradford Airport. Leeds City Council withheld the information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Leeds City Council correctly withheld the requested information under regulation 12(5)(b)
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant has explained that the owners of Leeds Bradford Airport (LBA) made an application for planning permission to build a new passenger terminal and to extend the hours during which aircraft movements are permitted.
5. The Local Planning Authority responsible for determining the application is Leeds City Council. At the time the request was made a decision regarding the planning application had not been made.
6. The complainant acts on behalf of Group for Action on Leeds Bradford Airport (GALBA), which was formed to oppose the planning application. The complainant has stated that, at a public meeting, a member of the council announced it had sought and received legal advice relating to the application. It is within this context that the request was made.

Request and response

7. On 21 October 2020, the complainant wrote to Leeds City Council (the "council") and requested the following information:

"1 We request disclosure of any and all legal advice tendered to Leeds City Council or its employees in relation to the planning application referred to above, whether such advice be tendered in writing or orally.

2 We request disclosure of the legal advice tendered to the City Plans Panel held on 16th October 2020."

8. The council responded on 2 December 2020. It stated that it was withholding the information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
9. Following an internal review the council wrote to the complainant on 7 January 2021. It stated that it was maintaining its position.

Scope of the case

10. On 25 January 2021, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.

11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(b).

Reasons for decision

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

12. Regulation 12(5)(b) provides an exception from any disclosure of environmental information which would adversely affect the course of justice, the ability of a person to receive a fair trial and the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
13. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to Legal Professional Privilege (LPP) and information about investigations or proceedings carried out by authorities.

The withheld information

14. The withheld information consists of advice provided to the council in respect of the planning application which is the subject of the request and supplementary emails discussing the content of the advice.

Is the exception engaged?

15. LPP exists to ensure complete fairness in legal proceedings and protects advice given by a lawyer to a client and confidential communications between them about that advice.
16. The council has confirmed that the information consists of legal advice provided by a QC. It has stated that the communications are made between a professional legal adviser and their client for the sole purpose of obtaining legal advice and that the information is being communicated in a professional capacity. The council confirmed that it considers that the information consists of legal advice and that it is subject to LPP.
17. The council has confirmed that the advice has not been disclosed externally, or otherwise treated in any way that has waived the privilege. It maintains that the confidentiality attached to the withheld information has not previously been lost.
18. Having considered the council's submissions and referred to the withheld information, the Commissioner considers that disclosure of the withheld information would more likely than not adversely affect the course of

justice. This is because it would involve public access to privileged information when the matters to which the information relate are still 'live'.

19. The Commissioner considers that disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.
20. The Commissioner has also referred to the decision of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011¹, which confirmed that in considering whether information subject to LPP engaged the exception, it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case.
21. In relation to the withheld supplementary emails which consider the advice the Commissioner has referred to the Information Tribunal's decision in *Salford City Council v Information Commissioner & Redwater Developments Ltd* (EA/2015/0276, 3 February 2017). In this case, the Tribunal considered whether information not subject to LPP but which refers in general terms to legal issues that the public authority had considered engaged the exception. The Tribunal accepted that the disclosure of a general reference to legal issues that the authority had considered would adversely affect the legal position of the council and/or the third party as it would "inhibit the council from seeking general legal advice on the types of issues pertinent to the information pertinent to this case..."².
22. Taking all of the above factors into account, the Commissioner has concluded that, in this case, disclosing the information would result in adverse effects to the course of justice, specifically by disclosing information subject to LPP. She has gone on to consider the public interest.

¹ [DCLG v The Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\) \(bailii.org\)](http://bailii.org/uk/ut/ut12/ut12030301.html)

²

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1949/Salford%20City%20Council%20EA.2015.0276%20\(04.07.17\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1949/Salford%20City%20Council%20EA.2015.0276%20(04.07.17).pdf)

Public interest in disclosure

23. The Commissioner acknowledges regulation 12(2), which provides that a public authority shall apply a presumption in favour of disclosure.
24. The council has accepted that, given the potential impact on the local community and environment, there is a general and specific public interest in transparency in relation to this matter
25. The complainant has argued that the number of people potentially affected by the proposed expansion to which the information relates is very large, both in relation to local noise and traffic congestion and in terms of climate change emissions. They consider that these factors provide some weight in favour of disclosure.
26. The complainant has also argued that the planning process is “quasi-judicial” and that it is impossible for objectors to formulate legal arguments unless they know what advice has been tendered to the council.

Public interest in maintaining the exception

27. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice. Central to this is the importance of the principle enshrined in LPP.
28. The council has acknowledged that the planning application is of significant public interest, however, it has suggested that this public interest exists both in opposition and support of the application.
29. The council has emphasised that the withheld advice concerns an application which is very much a “live” matter. In addition, it has argued that the advice which was sought does not concern general points of law, rather it is specific to the facts of this matter and it concerns matters which are not commonplace to planning applications. It considers that there can, therefore, be no argument in this case that disclosure of the advice would give members of the public a broader understanding of issues relevant to planning matters generally.
30. The council has also suggested that there is also at least a risk of a “chilling effect” in the sense that disclosure may discourage the seeking of legal advice, or may undermine legal advisors’, whether internal or external, confidence to give full and frank advice. The council considers that it would not serve the public interest to prejudice its decision-making processes in that way and, in addition, it has argued that there is also a significant risk that disclosure would lead public debate to be focussed solely on the issues in the advice, to the exclusion of other

material considerations. In short, the council does not consider the public interest will be served by “skewing” the debate in this way should there be future legal proceedings.

31. The council considers that, in its role as a Local Planning Authority, it must ensure that the planning process is carried out appropriately and that the application is determined on its material considerations. In addition, it has argued that there should be a publicly-accessible debate which gives careful consideration to all relevant matters, and which takes due account of representations made by all parties. In the council’s view this is where the public interest ultimately lies, rather than in the public having access to the line-by-line legal advice received by the council.
32. Finally, the council has argued that the public interest in this matter is, ultimately, in members of the public being reassured that the comments that they made on the application were appropriately considered, and that the council considered all relevant matters and applied any relevant legal principles appropriately.

Balance of the public interest

33. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. She recognises that there may be a need for enhanced transparency and scrutiny of decision making in planning cases, particularly where decisions have a significant impact on the local community.
34. However, in line with previous decisions of the Information Tribunal, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is, in turn, fundamental to the course of justice.
35. The Commissioner has noted that, at the time of the request, a decision regarding the planning application in question had not been made. Whilst the application was given conditional approval by the council in February 2021, the Commissioner notes that this decision is currently subject to ‘call in’ by the Secretary of State for Housing, Communities and Local Government.
36. The council has explained that, when a planning application is called in, it will be subject to a public inquiry chaired by an appropriate individual (e.g. a planning inspector or lawyer), who will make a recommendation to the secretary of state who will, ultimately, take the final decision on

this matter. The council has also stated that it is also possible that if the application is called in, the decision by the Secretary of State could be subject to a legal challenge.

37. The council has argued that it would prejudice the usual course of those proceedings and would prevent a "level playing field" if other parties to those proceedings had the opportunity to prepare their arguments in full knowledge of every detail of the advice which the council had received. The council has further argued that there already exist well-established processes as regards disclosure of information and legal arguments between the parties in the course of any of the potential future proceedings and in its view those processes can safely be relied upon to achieve equality and a just outcome between the parties. The council has also suggested that parties should not be permitted to use the public rights to environmental information under the EIR to give themselves an advantage in future proceedings, or to circumvent the usual processes during those proceedings.
38. In relation to the complainant's suggestion that the planning process constitutes a "quasi-judicial one", the council has argued that, as a matter of law, the determination of planning applications by a Local Planning Authority is not a judicial or a quasi-judicial function but is, rather, an administrative one. The council has suggested that, in any event, even in circumstances where the council was exercising a quasi-judicial function (for example determining a licensing application), it would not follow that the council was debarred from treating any legal advice it obtained as being privileged in accordance with the usual rules governing legal advice privilege.
39. The Commissioner recognises there is a specific public interest weighting in favour of disclosure in this case, however, she must weigh this against the broader public interest in allowing the council to consider and carry out its legal obligations and its functions as a planning authority without these being undermined. She considers that, given that the advice is relevant to the specific application, disclosure would have tangible adverse effects on the council's ability to carry out its legal and planning functions.
40. The Commissioner is alive to the complainant's concerns in this matter and recognises that the application in question has potentially broad implications for the local community and environment. However, she is also mindful that there are existing planning and, ultimately, legal processes which provide remedies for these concerns to be addressed.
41. The Commissioner has not been presented with any evidence that there are grounds for circumventing the legal mechanisms and remedies which are already available in relation to this matter.

42. Having considered the facts of this matter, the Commissioner considers that it is highly likely that disclosing the information would damage the council's ability to undertake its planning duties effectively and compromise its legal position. It is clear to the Commissioner that the matters to which the withheld information relate are still live. Disclosure at this time, therefore, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice.
43. Whilst she accepts that the arguments in favour of disclosure in this case carry specific weight she does not consider that they outweigh the arguments in favour of withholding the information.
44. The Commissioner has determined that, in the circumstances of this particular case the council has correctly applied regulation 12(5)(b) and that the arguments in favour of maintaining the exception outweigh those in favour of disclosure.

Right of appeal

45. 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

46. 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.
47. 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

Ben Tomes
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