

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 December 2021

Public Authority: Wealden District Council
Address: Council Offices
Vicarage Lane
Hailsham
East Sussex BN27 2AX

Decision (including any steps ordered)

1. The complainant requested information from Wealden District Council ("the Council") about its decision-making in relation to a planning application. The Council provided some information relating to an alleged breach of the Code of Conduct, but withheld some information relating to legal advice under regulation 12(5)(b) of the EIR – adversely affect the course of justice (legal professional privilege).
2. The Commissioner's decision is that the Council does not hold any further information within the scope of the relevant part of the request. He is also satisfied that it is entitled to withhold the information relating to legal advice under regulation 12(5)(b) of the EIR, and the balance of the public interest favours the exception being maintained.
3. The Commissioner does not require the Council to take any steps.

Background to the requests

4. The requests under consideration in this notice relate to a planning application for the construction of up to 119 new houses at Crowborough in East Sussex. After the matter was deferred at the initial planning hearing, in February 2020, because the committee required more information, the application was reconsidered in March 2020, and refused. However, a decision was not issued at this stage because

concerns were raised by the planning applicant. Subsequently, the application was referred back to the committee to be re-heard, and was approved on 10 July 2020.

5. The complainant was informed that the planning applicant had alleged that a councillor, who attended the February meeting, had breached the Code of Conduct. The complainant understood that the Council had taken legal advice, and he wished to scrutinise the decision-making behind the processes that were followed.

Requests and response

6. On 23 June 2020, the complainant made the following requests for information (numbers added for ease of reference):
 - 1) *"Details of the alleged breach of Code of Conduct, by the applicant;*
 - 2) *Brief submitted to Counsel and the subsequent Opinion;*
 - 3) *... when was the letter received from the applicant's solicitor outlining the alleged breach of the code of conduct... When was the Councillor told they had allegedly breach[ed] the code and when did the appropriate committee meet to confirm or otherwise? Did the councillor receive or request advice prior to the meeting?"*
7. On 17 August 2020, the Council responded. It refused parts 1) and 3) of the request under section 40(5) of the Freedom of Information Act 2000 (FOIA) – neither confirm nor deny, on grounds of personal data – and refused part 2) under regulation 12(5)(b) of the EIR – adversely affect the course of justice, on grounds of legal professional privilege.
8. The complainant requested an internal review on 19 August 2020.
9. The Council sent him the outcome of its internal review on 2 November 2020. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 17 October 2020 to complain about the way his request for information had been handled.

11. During the course of the Commissioner's investigation, the Council re-visited the request and disclosed some information to the complainant, as explained below.
12. With regard to requests 1) and 3) (information about an alleged breach of the Code of Conduct), the Council withdrew its reliance on section 40(5) of the FOIA (neither confirm nor deny). It confirmed that some information was held.
13. It provided some correspondence to the complainant. It also informed him as to when the relevant councillor had been told of the alleged breach, confirmed that the councillor had both requested and received some advice, and added that referral to the standards committee had not been necessary since a formal complaint had not been received.
14. With regard to request 2) (brief to Counsel and Counsel's Opinion), the Council provided a description of the brief that had been provided to Counsel, as follows:

"We can confirm counsel was briefed verbally at the Council's offices and was provided with a number of papers from a variety of sources. The brief consisted of [bullet points added for clarity]:

- *Officer's Report and Minutes of the meeting of Planning Committee North held on 6th February 2020;*
 - *letters dated 9 March 2020 and 12 March 2020 from Pinsent Masons;*
 - *Part 5 of Wealden's Constitution 'Members' Code of Conduct';*
 - *Officer's Report and draft minutes of Planning Committee North held on 5 March 2020; and*
 - *some email communications."*
15. The Council advised the complainant that some of the above information; specifically, the officer's reports, the minutes and the Code of Conduct, were in the public domain, and provided links.
 16. It also provided him with the letters from Pinsent Masons (the applicant's solicitors), with some personal details redacted.
 17. However, the Council stated that the emails, and Counsel's Opinion itself, were being withheld under some or all of the following exceptions of the EIR:
 - Regulation 12(4)(e) of the EIR – internal communications;

- Regulation 12(5)(b) of the EIR – the course of justice, etc; and/or
 - Regulation 12(5)(d) of the EIR – confidentiality of proceedings.
18. The complainant advised the Commissioner that he remained dissatisfied with the handling of parts 1) and 2) of the request.
 19. With regard to part 1), the complainant considered he had not been provided with everything within the scope of his request for "*details of the alleged breach of Code of Conduct by the applicant*".
 20. With regard to part 2), the complainant considered that the withheld information should be disclosed.
 21. This decision notice covers whether the Council holds any further information falling within the scope of the request for "*details of the alleged breach of Code of Conduct, by the applicant*". It also covers whether some of the requested information relating to Counsel's Opinion was correctly withheld under the exceptions of the EIR detailed at paragraph 17 above.

Reasons for decision

Request 1)

22. The complainant requested: "*Details of the alleged breach of the Code of Conduct, by the applicant*".
23. As previously explained, the Council handled this request under the FOIA. After initially applying section 40(5) to the request (neither confirm nor deny, on grounds of personal data), it reconsidered the request, and provided the complainant with some email correspondence.
24. The complainant considered that he had not been provided with everything falling within the scope of his request.

Is the requested information environmental?

25. Requests for environmental information should be considered under the EIR. The Commissioner notes that the Council originally considered Request 1) under the FOIA, and has considered whether the matter of whether any more information is held, should be considered under the FOIA or the EIR.
26. He notes that the Council located some information falling within the scope of Request 1) and that the alleged breach of the Code of Conduct,

to which the request referred, was in relation to a councillor's attendance at a meeting of the planning committee.

27. The Commissioner is satisfied that further information, if held, would relate to the progress of a planning application, and that this process is a measure and/or an activity which is likely to affect the elements and factors of the environment as defined in regulation 2(1) of the EIR. He considers that the requested information would fall within the definition of environmental information at regulation 2(1)(c) of the EIR: information on measures and activities affecting, or likely to affect, the environment.
28. He has, therefore, considered the issue of what is held, under the EIR.

Regulation 12(4)(a): information not held

29. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
30. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past.
31. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

The complainant's view

32. The complainant explained that he was dissatisfied at the amount of information he had received which provided details of the alleged breach of the Code of Conduct.

The Council's view

33. The Council considers that it is clear from the wording of the request: "*Details of the alleged breach of the Code of Conduct, by the applicant*" that the complainant was seeking the information provided to the Council by the planning applicant, about the breach it alleged had occurred.

34. After the Council withdrew its reliance on section 40(5) to refuse this request, it carried out searches for relevant information. It located two letters (the letters from Pinsent Masons, referred to above, which also formed part of the supporting information provided to Counsel) and disclosed these to the complainant. The letters were dated 9 March 2020 and 12 March 2020 respectively.
35. The Council's position is that these two letters from the applicant's solicitors are the only recorded information they hold relevant to this request. The letters set out, in full, the planning applicant's concerns about the conduct of the planning process to date, including the alleged breach.
36. Whilst the letter of 12 March 2020 refers to a letter dated 6 March, the Council has advised that this is a typographical error and in fact was intended to refer back to the earlier letter, dated 9 March 2020. The Commissioner agrees that it is clear from the wording of both letters that this is the case.
37. The Council has explained that it located only these two letters. Whilst the Commissioner is aware that the Council has stated that the applicant's solicitors initially contacted it by telephone, its position is that no written record of this conversation exists.

The Commissioner's decision

38. The Commissioner's remit is to establish whether, on the balance of probabilities, information falling within the scope of the request is held.
39. He understands that, on receiving the request, the Council searched through its relevant planning files and correspondence to ascertain when and how it had been informed by the applicant of the alleged breach.
40. On this occasion, it transpired that it was the applicant's solicitors who had written to the Council, on behalf of the applicant, with the allegations. The two letters which set out the details of this, have already been disclosed. The Commissioner is satisfied that the letters relate to and explain the relevant matters.
41. He is also satisfied that the searches carried out on receipt of the request were adequate, and appropriately targeted.
42. His decision is that, on the balance of probabilities, the Council is correct to state that it does not hold any further recorded information falling within the scope of Request 1), and he does not require the Council to take any steps.

Request 2)

43. In relation to the alleged breach of the Code of Conduct, the complainant requested: *"Brief submitted to Counsel and the subsequent Opinion"*.
44. The Council considered that this was a request for "environmental" information and handled this part of the request under the EIR.
45. The Commissioner is satisfied that the withheld information relates to the progress of a planning application, and that this process is a measure and/or an activity which is likely to affect the elements and factors of the environment as defined in regulation 2(1) of the EIR. He considers that the withheld information falls within the definition of environmental information at regulation 2(1)(c) of the EIR: information on measures and activities affecting, or likely to affect, the environment.
46. He is, therefore, satisfied that this part of the request was correctly considered by the Council under the EIR.
47. The Council disclosed some information, but withheld some email correspondence, and Counsel's Opinion. These were withheld under some or all of the following exceptions of the EIR:
 - Regulation 12(4)(e) of the EIR – internal communications;
 - Regulation 12(5)(b) of the EIR – the course of justice, etc; and/or
 - Regulation 12(5)(d) of the EIR – confidentiality of proceedings.
48. The Commissioner has first considered whether the information is exempt from disclosure under regulation 12(5)(b).

Regulation 12(5)(b) EIR: adversely affect the course of justice, etc

49. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that 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.
50. In this case, the information withheld under this exception relates to the process followed by the Council when considering a specific planning application. It relates to certain issues which gave rise to a cause for concern about the conduct of the matter, and the legal advice received by the Council in respect of this.
51. The withheld information comprises emails – specifically, an exchange between a councillor and the head of legal services at the Council, and a

subsequent exchange between the councillor and a Council officer – and the written legal advice provided to the Council by an external legal adviser (“the Opinion”). The Commissioner is satisfied that the information all relates to the course of justice.

52. The requirement which is necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), when the Information Tribunal highlighted that there must be an “adverse effect” resulting from disclosure of the information, as indicated by the wording of the exception.
53. The Commissioner’s guidance also notes that, in accordance with the Tribunal decision in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word “would” (in “would adversely affect”) is “*more probable than not*”.
54. The Council has provided explanations of how it concluded that an adverse effect to the course of justice would arise from the disclosure of the withheld information in this case.
55. It asserted that all of the withheld information attracts legal professional privilege (LPP), since it comprises confidential communications between lawyer and client. It explained that, in its view, it would attract both legal advice privilege and litigation privilege, since it was clear from the applicant’s solicitors’ letters (which it disclosed) that litigation was being contemplated.
56. It also confirmed that the privilege has not been lost, since the information has not been disclosed previously.
57. The Council considers that an adverse effect on the course of justice would arise from the disclosure of the information “*because it would undermine and weaken the doctrine of LPP.*”
58. It considered that:

“Disclosure would affect the ability of the Council and/or its councillors to seek and receive full and frank advice and would in particular discourage both from seeking legal advice in the context of contentious matters such as those relating to planning. If either is discouraged from obtaining full and thorough legal advice, this in turn will have a negative impact upon the quality of decisions made by the Council and its public function as local planning authority.”
59. With regard to the Opinion, the Council stated that it had sought advice “*in response to a legitimate threat of legal proceedings*”. It stated that it

then relied on the Opinion at the time, and continues to rely on it, because it comprised "*part of an ongoing live issue which is not stale or out of date; it is current.*" The Council alerted the Commissioner to the fact that it was continuing to deal with the "reserved matters" stage of the planning application, and had already seen certain objections which referred to the Council's previous handling of the application.

60. The Council stated that it was aware of cases where planning decisions had successfully been challenged well outside the normal period for judicial review to be granted, which it was mindful could happen in this case. It considered that withholding Counsel's Opinion was important so as not to place it "*at a considerable disadvantage in defending itself from any possible future actions and its ability to act in the best interests of the Council, its decision makers and its fiduciary duties.*"
61. The Council considers that its reasoning, above, demonstrates that an adverse effect would occur to the course of justice, both by illustrating the importance of LPP as a fundamental principle in the English legal system, and by highlighting the adverse effect to the planning process in this case, which would occur from disclosure.
62. In addition, with regard to the withheld emails, the Council asserted that: "*it is critical for those seeking advice to have the ability to obtain full and frank legal advice in confidence, which in turn safeguards openness in legal communications.*" It considers that there would be an adverse effect on the course of justice if councillors were not able, freely and frankly, to seek and obtain legal advice.
63. The Commissioner notes that the second email exchange is not, in fact, between lawyer and client, and therefore does not attract LPP. With regard to the remainder of the information, he agrees that it is privileged and that the privilege has not been lost.
64. Notwithstanding the nature of the second email exchange, he agrees that disclosing the withheld information under the EIR would have an adverse effect on the course of justice, in the ways envisaged by the Council. He is, therefore, satisfied that the exception is engaged in respect of all of the withheld information. As is required by the EIR, he has considered whether the balance of the public interests favours the exception being maintained.

The public interest test

The complainant's view

65. The complainant has provided a great deal of supporting evidence to the Commissioner as to why he considers the balance of the public interests

lies in the withheld information being disclosed, and the Commissioner has considered it in detail.

66. Broadly, he considers that confusion exists around the reasons for, and the legality of, the processes followed in considering this planning application, the matter having been deferred in February 2020, heard (and refused) in March 2020 and then re-heard (and approved) in July 2020.
67. Although he has now been able to scrutinise the letters to the Council from the applicant's solicitors, he considers that serious concerns remain over the explanations provided by the Council, and what it stated publicly about the various matters.
68. He considers that the Council over-stated the importance of a particular councillor having an "interest" in the proposed development, and over-stated the concerns over the nature of that interest, in order to explain why the application had to be re-heard. He notes that no breach of the code of conduct was found. He also notes that the councillor had declared a "prejudicial" interest upfront, at the February 2020 meeting, and that this matter was therefore known about in March 2020 and could have been dealt with at the time.
69. He also considers that there is a wider interest in ascertaining what amounts to a disclosable pecuniary interest (DPI) as opposed to a "prejudicial" interest, and how these interests should be handled. He considers it is a matter of widespread public concern if councillors are prevented from taking part in public affairs, without justification.
70. He further considers that confusion exists around whether the planning application should in fact have been re-heard in its entirety at the March 2020 meeting, and whether this was one of the issues that then led to the Council not issuing its decision at the time; instead, reconsidering the application again in July 2020.
71. Finally, the complainant has highlighted local concerns over a large development having been approved in an Area of Outstanding Natural Beauty, and considers that all information shedding light on the Council's decision-making processes should be publicly available.

The Council's view

72. The Council considers that the balance of the public interests lies in the exception being maintained.
73. Its position is that it, and its councillors, should be able to obtain free and frank legal advice without fear of the advice being disclosed, particularly in relation to contentious matters such as planning.

74. It has stated that: *"the Opinion and Emails relate to a live, ongoing and contentious matter for which the Council could seek further advice in the near future"*.
75. The Council therefore considers that, in relation to this planning application, it is important to maintain the confidentiality of the withheld information, because it would not be in the public interest for the Council to be disadvantaged while the matter remains "live".
76. More widely, the Council also considers it would not be in the public interest for it: *"to be prevented from making informed, well thought out and balanced decisions on the basis that it feels unable to seek legal advice in confidence, which can sometimes be subject matter specific (the chilling effect). This will only serve to have a negative impact on the quality of the Council's decisions"*.
77. Regarding LPP, whilst acknowledging that it can be in the public interest for it to be overturned in certain circumstances, it stated:
- "The Council does not consider that there are special or unusual factors in the circumstances which would not warrant the general principle of LPP to apply to the Opinion or Emails. There is also no compelling evidence to suggest that the Council should not be relying on the legal advice, or that it is acting contrary to its public duties by having done so."*
78. The Council considers that the public already has *"routes to scrutinise and challenge the Council's decision making in relation to the planning applications, for example by virtue of statutory appeals, public consultations and judicial review"* and therefore withholding the information in this case, does not prevent public participation and engagement.
79. In summary, the Council's view is that, after considering both the specific circumstances of the case and the wider importance of the principle, there is no compelling case for overturning LPP, and the balance of the public interests lies in the exception being maintained; that is, in the information being withheld.

The balance of the public interests: the Commissioner's decision

80. The Commissioner has considered the factors on both sides, in light of the circumstances of the case and the contents of the withheld information.
81. He is aware of the inherent public interest in being able to scrutinise how a public authority conducts its business, particularly in respect of environmental information. He is also aware of local concerns over the

proposed development, and the manner in which planning permission was granted.

82. In considering the balance of the public interests in the disclosure of information which has been withheld under an "adverse effect" exception, however, the Commissioner must be mindful of those matters which the exception is designed to protect: in this case, allowing the course of justice to run smoothly, including the importance of the principle of LPP.
83. It would not, generally, be in the public interest to allow the smooth running of the course of justice to be adversely affected; in particular, in relation to damaging the confidential nature of the relationship between client and lawyer. However, all circumstances, and particularly the contents of the withheld information, must be taken into account.
84. The Commissioner has considered the contents of the withheld information. There is, undeniably, local interest in the Council's actions in this case, and some wider interests in councillors' disclosable interests, and councils' accountability for their decisions. However, he does not find the contents of the withheld information itself to be controversial, or to have been misrepresented.
85. He notes that the matter in question was still "live" at the date of the request (which pre-dated the July 2020 decision); the Council, and the councillor, relied on advice to inform their course of action at that date. He notes that the Council continues to rely on the Opinion.
86. The Commissioner considers there to be a weighty public interest in protecting communications between a professional legal adviser and their client, particularly while a dispute is ongoing. He also considers there is significant public interest in allowing a "safe space" in which councillors can seek advice and discuss relevant matters, freely, with officers at the council on which they serve.
87. In this case, he does not consider the withheld information to be of sufficient wider public interest such that it outweighs the very significant public interest in the principle of legal professional privilege, and the need for a safe space for discussion.
88. The Commissioner has determined that the balance of the public interests is weighted in favour of maintaining the exception; that is, in the information being withheld, in this case.
89. It is noted that 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... 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).

90. In this case, however, as covered above, 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.
91. Since all of the withheld information was withheld correctly under regulation 12(5)(b), it has not been necessary for the Commissioner to consider whether any or all of the information is covered by regulation 12(4)(e): internal communications; nor regulation 12(5)(d): confidentiality of proceedings.

Right of appeal

92. 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

93. 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.
94. 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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