

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 August 2013

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information relating to a decision to decline to carry out an Environmental Impact Assessment (EIA) direction. The Department for Communities and Local Government (DCLG) provided some information within the scope of the request but withheld the remainder of the information relying on regulation 12(5)(b) of the EIR as it considered that the information was subject to a claim of legal professional privilege (LPP).
2. The Commissioner's decision is that DCLG has correctly withheld the remainder of the information under regulation 12(5)(b) of the EIR. The Commissioner does not require any steps to be taken.

Request and response

3. On 2 January 2013, the complainant wrote to DCLG and requested information in the following terms:

"provide all contemporaneous notes, information and correspondence entered into in relation to the decision to decline to carry out an EIA direction."
4. The DCLG responded on 16 January 2013. It provided some information within the scope of the request but withheld the remainder of the information relying on regulation 12(5)(b) of the EIR as its basis for doing so.

5. Following an internal review on the 18 March 2013 the DCLG wrote to the complainant. It stated that it was maintaining its original position to withhold the remaining information.

Scope of the case

6. The complainant contacted the Commissioner on 27 March 2013 to complain that the information requested had been refused by the DCLG.
7. During the course of the Commissioner's investigation the DCLG considered that regulation 12(4)(e) and 13 of the EIR were also engaged to parts of the withheld information.
8. The Commissioner will first consider if regulation 12(5)(b) is engaged to all of the information that has been withheld, and will only go on to consider regulations 12(4)(e) and 13 if any part of the withheld information is not covered by regulation 12(5)(b).

Reasons for decision

Regulation 12(5)(b) – Course of Justice

9. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information if 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.
10. The DCLG argued that the exception was relevant because the withheld information was subject to LPP. The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason the Commissioner has found in previous cases that regulation 12(5)(b) will be relevant to information which attracts LPP.
11. In order to reach a view as to whether or not the exception is engaged, the Commissioner must first consider whether the withheld information is subject to LPP. He must then decide whether the disclosure of that information into the public domain would have an adverse effect on the course of justice as claimed by the council.
12. The Commissioner has inspected the withheld information in this case and is satisfied that it constitutes communications between a client (i.e. the DCLG) and its legal adviser (a solicitor in the department's legal

directorate) providing advice in a professional legal capacity. It therefore attracts LPP. The Commissioner is also satisfied that there is no evidence to indicate that the legal advice had been shared with a third party for it to have lost its confidential character.

Would disclosure have an adverse effect on the course of justice?

13. The DCLG argues that disclosure would have an adverse effect on the course of justice because it would undermine the general principles of legal professional privilege and the administration of justice. It also states that there are no special factors in this case sufficient to think that disclosure of the information would not undermine the general principle of lawyer/ client confidentiality.
14. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information 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 the 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.
15. In consideration 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 is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information

The public interest test

16. 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 his 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 arguments in favour of disclosure

17. The DCLG recognises there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability.
18. The DCLG also recognises that, in this case, disclosure of the information requested would enable the public to see the legal advice that was sought and received. This in turn would serve the public

interest in knowing that decisions being made on the basis of that advice, are sound.

Public interest arguments in favour of maintaining the exemption

19. As already discussed, the Commissioner and Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice would have an adverse effect on the course of justice through weakening of the general principle behind LPP.
20. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on LPP The course of justice and inquiries exception (12(5)(b))¹ states the following:

"In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice."

21. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
22. In light of the above, there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* 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

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.ashx

those advising them without fear of intrusion, save in the most clear case..."

23. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.
24. To add some background and context to this case, the complainant is an environmental law firm acting on behalf of a client. The law firm submitted a request to the Secretary of State for an EIA Screening Direction, to determine whether or not two planning applications to redevelop a stadium complex were EIA development (would they be likely, or not, to have significant effects on the environment) in accordance with EIA Regulations 2011. The dispute was between the law firm and a named council. The law firm believed the planning applications were EIA development whereas the council did not. The screening request from the law firm was for the Secretary of State to determine the matter. The Secretary of State declined to issue a screening direction.
25. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. He also accepts that there is a strong public interest where those decisions concern activities that could have significant impacts on the environment, such as in this case whether or not an EIA screening direction should be carried out. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the DCLG's right to obtain legal advice in confidence.
26. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the DCLG and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions made by the DCLG because it would not have the benefit of thorough legal advice.
27. The Commissioner is therefore satisfied; in this case, the inherent public interest in protecting the established convention of LPP is not countered by at least equally strong arguments on favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure. As a result of this the Commissioner has not gone on to consider either regulation 12(4)(e) or regulation 13 of the EIR.

Right of appeal

28. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. 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