

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 July 2013

Public Authority: Ashford Borough Council
Address: Civic Centre
Tannery Lane
Ashford
Kent
TN23 1PL

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning enforcement notice issued by Ashford Borough Council (the "council") in relation to a property owned by the complainant. The council provided some of the requested information but withheld some information under the exception for adverse effect to the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the council has correctly applied regulation 12(5)(b) to the requested information and that, in this case, the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 29 January 2013, the complainant wrote to the council and requested information in the following terms:

"1. The evidence referred to in para 4 of the letter of 26 March 2010 from Geoffrey Searle solicitors.

2. The counsel's advice referred to in para 2 of the letter of 26 March 2010 from Geoffrey Searle solicitors.

3. Information relating to PPG18 compliance as requested in the complainant's letter of 6 February 2011."

5. The council responded on 20 February 2013. It disclosed the information requested at part 1 of the request. The council refused part 2 of the request citing the exception for adverse affect to the course of justice and refused part 3 of the request because it considered it to be manifestly unreasonable.
6. Following an internal review the council wrote to the complainant on 25 March 2013. It stated that it was maintaining its original position.

Scope of the case

7. On 31 January 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the council disclosed the information requested in part of the request, overturning its reliance on the exception for manifestly unreasonable requests.
9. On the basis of the complainant's submissions, the Commissioner has concluded that his investigation should consider whether the council has correctly applied the course of justice exception to refuse the information requested in part 2 of the request.

Reasons for decision

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

10. Regulation 12(5)(b) of EIR 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 enquiry of a criminal or disciplinary nature."

Is the exception engaged?

11. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of Kirkaldie

v ICO & Thanet District Council [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

12. The Commissioner has also noted the views of the Tribunal in Rudd v ICO & The Verderers of the New Forest [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

13. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in Bellamy v ICO & DTI [EA/2005/0023] as, "a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation¹".
14. There are two types of privilege – legal advice privilege and litigation privilege.
15. In this case, the council considers the withheld information is subject to legal advice privilege and that release of the withheld information would adversely affect the course of justice. The council has claimed advice privilege in relation to the withheld information, on the basis that the

¹ EA/2005/0023, para 9

withheld information constitutes advice given by a barrister following instructions to advise issued by the council in December 2009.

16. By way of background, the council had received complaints about a property and its annex which was subsequently the subject of an enforcement notice. The council investigated the complaints and it appeared to it that a material change of use had occurred and this change of use was unlawful as the necessary planning permission had not been granted.
17. The council explained that it subsequently issued an enforcement notice requiring the use to cease. The notice was issued to everyone with an interest in the property (including the complainant) on 13 August 2009. Everyone who was served had the right to appeal against the notice to an independent planning inspector by 16 September 2009, however no appeal was lodged.
18. The council has argued that LPP applies because legal advice was sought. The barrister was instructed to advise on, amongst other things, assertions made by solicitors acting on behalf of one of the persons served with the notice that there had been no breach of planning control (i.e. that the holiday lets did not require planning permission). Those solicitors were asking for the enforcement notice to be withdrawn as result. The Council had to decide whether the notice had been correctly issued and the advice was required in order to help make that decision.
19. Having viewed the withheld information the Commissioner is satisfied that it constitutes a communication between a lawyer and a client, in this case, the council and that this advice has not lost the quality of confidentiality.
20. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to planning, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
21. He has therefore gone on to consider whether disclosure would have an adverse affect on the course of justice, with particular reference to LPP.

Adverse Affect

22. The council has argued that disclosure would adversely affect the course of justice because:

- The enforcement notice in question is still in force and waiving privilege would be unfair and put the council at a disadvantage in the event of bringing proceedings related to the notice. The requirement to comply with the notice is on-going and applies to all subsequent owners (section 179(1) of the Town and Country Planning Act 1990 refers).
 - Although the council decided a breach of planning control had occurred based on the particular circumstances of that case, the council it considers that this kind of breach is far from site-specific. Being a largely rural district, there are great many dwellings in the borough that could be used as holiday lets. The information is therefore of general application and not limited to the circumstances at the property in question and the council may rely upon it when investigating other similar breaches.
 - As per the Upper Tribunal decision in DCLG v Information Commissioner ([2012] UKUT 103 (AAC)) "it would be unfair to give the requester access to the public authority's legal advice, without the public authority having the corresponding benefit". The council noted that, in the same decision, the Upper Tribunal noted that account must be taken of "the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisers will not be subject to disclosure"
23. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. He considers the likelihood of this happening to be more probable than not. 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.
24. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test

25. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

26. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.
27. The council has acknowledged the general public interest in transparency, openness and understanding the reasons for the council's position. It has also submitted that disclosure may serve to increase public confidence in the robustness of the council's decision-making.
28. The complainant has raised concerns that the council might not have followed due legal process in issuing the enforcement notice and has argued that disclosure would provide reassurance in this regard.

Public interest arguments in favour of maintaining the exception

29. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the weighting of such arguments, as they have been submitted to him by the council.
30. The council has also argued that disclosure would be unfair since parties seeking to challenge its legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position.
31. The council has further argued that the legal advice is still "live", being as it relates to an enforcement notice which is still applicable to the property in question, regardless of its owner. The council also considers that the legal advice is not specific to this property and is transferable to other comparable scenarios where planning enforcement is being considered.

32. The council considers that it has already explained to the complainant why the enforcement notice would not be withdrawn and that, disclosure of the legal advice, would not assist the complainant's understanding of the matter.
33. The council has also submitted that the complainant had an opportunity to appeal against the enforcement notice at the time it was issued but did not do this. Releasing the information now would not serve any purpose and would not justify the damage to the principle of LPP.

Balance of the public interest

34. 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.
35. 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 itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
36. The Commissioner notes that the legal advice is still current. He 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 issuing enforcement notices in such scenarios and this could result in adverse effect to the course of justice via 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.
37. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council 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 being made by the public authority because it would not have the benefit of thorough legal advice.
38. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. He also notes that the complainant has concerns that the enforcement notice issued by the council might not have been properly issued. However, the Commissioner has not been presented with any compelling evidence

that this is the case. He also considers that the planning appeal process provides mechanisms for such issues to be addressed and concerns about maladministration, similarly, can be progressed in other arenas than under the EIR.

39. In addition, whilst the Commissioner accepts the complainant's interest in this matter, he 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.
40. In addition, the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake planning and enforcement matters on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.
41. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, he does not consider that they he 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).
42. 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.

Right of appeal

43. 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

44. 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.
45. 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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