

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 March 2015

Public Authority: Horsham District Council
Address: Park North, North Street,
Horsham,
West Sussex,
RH12 1RL

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application for a proposed skate park. Horsham District Council disclosed a summary of some legal advice and withheld other information under the exception for adverse effect to the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that Horsham District Council:
 - disclosed all the (non-excepted) information it holds but in providing some information late it breached regulation 5(2);
 - failed to conduct an internal review within 20 working days and breached regulation 11(4).
 - correctly applied regulation 12(5)(b) to withhold legal advice.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 30 August 2014, the complainant wrote to Horsham District Council (the "council") and requested information in the following terms:

We wish to make a request for information under the FoI Act and/or the EIR re planning application DC/12/0940 (Skatepark at Memorial Playing Field, Steyning). HDC is the planning authority. Steyning Parish Council (SPC) is the planning applicant.

According to a press release issued by SPC:-

'In August 2014 HDC requested a meeting with the Parish Council where we were advised that HDC could not now approve the planning application due to the Village Green status placed in the MPF site by WSCC in February 2012, following an application by a member of a local protest group'.

We are the "local protest group" referred to in this press release.

This August 2014 meeting was between two public bodies and concerned the planning process in respect of an application which has been ongoing for well over two years. This planning application has been suddenly abandoned after tens of thousands of pounds of public money has been spent.

There is a clear public interest in knowing what has been going on to cause the abandonment of the application.

There must be file notes relating to this meeting held by the planning officer(s) who attended and by any other officers in attendance. We think there is likely to be correspondence, too.

Please may we have copies of all documents relating to this meeting and its outcome?"

5. The council responded on 29 September 2014. It confirmed that the requested information was being withheld under the exception for adverse effect to the course of justice (regulation 12(5)(b) of the EIR).
6. On 29 September 2014 the complainant asked the council to conduct an internal review. The council issued its internal review response on 28 January 2015. The review upheld the original decision but disclosed a copy of a summary of the withheld legal advice.

Scope of the case

7. On 29 October 2014 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 his investigation would consider whether the council had disclosed all relevant information and, in relation to the withheld legal advice, whether it had correctly applied regulation 12(5)(b).

Reasons for decision

Regulation 5 – duty to provide environmental information

9. Regulation 5 of the EIR requires public authorities to provide environmental information, usually within 20 working days of receipt of a request.
10. In this case the complainant considers that the council has not provided all the relevant information it holds which falls within the scope of the request.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
12. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
13. To assist with this determination the Commissioner approached the council with a number of standard questions which, along with the council's responses, are summarised below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

14. The council confirmed that it spoke with the officers who attended the meeting which was the subject of the request to ask if any notes were taken at the meeting. They confirmed that none were taken.

If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including lap top computers) and on networked resources and emails

15. The council confirmed that those present at the meeting advised that no notes were taken therefore no notes were stored on any computers.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

16. The council confirmed that no information (notes taken at the meeting) was ever held.

Is there a business purpose for which the requested information should be held? If so what is this purpose?

17. The council stated that the meeting was held at the request of the Parish Council so there was no business purpose for it to hold the information.

Are there any statutory requirements upon the Council to retain the requested information?

18. The council stated that there were no statutory requirements for it to generate or retain information in this context.

19. The Commissioner notes that the complainant considers that the council should hold further information to that which has been disclosed. However, he has not been provided with any evidence which contradicts the council's position. Having considered the searches conducted by the council and its explicit confirmation that no further information is held the Commissioner has concluded that, on the balance of probabilities, it is likely that the council has provided all the information relevant to the request that it holds.

20. The Commissioner has, therefore, concluded that the council has complied with its obligations under regulation 5(1) of the EIR, however, in disclosing some information after 20 working days had passed, the council breached regulation 5(2) of the EIR.

Regulation 11 – internal review

21. Regulation 11 of the EIR sets out a public authority's duty in relation to the handling of complaints about requests for information. These are commonly referred to as "internal reviews".
22. Under regulation 11(4) of the EIR, a public authority must respond to a request for internal review within 40 working days.

23. In this case the complainant submitted their internal review request on 29 September 2014. The council issued its review response on 28 January 2015, after being directed to do so by the Commissioner.
24. The Commissioner has concluded that, in failing to conduct an internal review within 40 working days, the council breached regulation 11(4) of the EIR.

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

25. Regulation 12(5)(b) provides that the disclosure of information can be refused 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 inquiry of a criminal or disciplinary nature.”
26. In the Information Tribunal hearing of Kirkaldie, the Tribunal stated that the purpose of this exception was reasonably clear and that:

“...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”.

In this hearing the Tribunal decided that legal professional privilege (LPP) is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

27. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test of “would adversely affect” for this exception would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.
28. In this instance, the withheld information constitutes legal advice provided to the council. The Commissioner is satisfied that it constitutes confidential communications between a client and a lawyer made for the dominant purpose of giving legal advice in relation to the matter of the memorial playing fields stake park planning application. He is, therefore, satisfied that the information is subject to LPP and falls within the scope of the exception.
29. The Commissioner is mindful that the council has disclosed a summary of the withheld legal advice. The complainant has argued that, as a result of this disclosure, the legal advice has lost its confidential status and can no longer be considered to be subject to privilege.

30. The council has argued that the summary does not disclose the substance of the advice it sought, namely, legal advice sought in its capacity as a planning authority. It considers that the core of the advice maintains its confidentiality and this confidentiality is to be upheld in order to retain the integrity of its decision making in relation to planning determinations.
31. Having considered the points raised by both parties and referred to both the summary and the withheld advice, the Commissioner has concluded that the focus of the legal advice retains its confidential status and remains subject to LPP.
32. 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.
33. In this specific case 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.
34. 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.
35. 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

36. 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

37. The council has argued that disclosing the information could promote accountability and transparency and allow the public to better understand the basis of the council's decision and its legal justification for a particular course of action.
38. The council has also argued that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately.
39. 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.
40. The complainant has argued that the withheld advice does not relate to a "live" issue as the planning application in question has been withdrawn.

Public interest in maintaining the exception

41. 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.
42. The council has argued that, if disclosed, the advice could be analysed for weaknesses which could then be exploited in future. It has stated that privilege must not be waived where disclosure might prejudice the council's rights to obtain access to justice
43. The council has further argued that public authorities should be able to consult with lawyers in confidence to obtain legal advice and that disclosure would inhibit the free and frank nature of free and frank legal exchanges.
44. The Commissioner notes that disclosure would be unfair since parties seeking to challenge the council's 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.

Balance of the public interest

45. 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.
46. 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. The legal advice in this case relates to the council's role as a planning authority and disclosure would have a similar impact on the integrity of its statutory role in this regard.
47. The Commissioner notes that, at the time of the request, the planning application had been withdrawn. As argued by the complainant, therefore, the legal advice did not relate to a "live" issue. Whilst this is a relevant factor and carries some weight the Commissioner does not consider that it, in isolation, is sufficient to outweigh the broader public interest in maintaining the confidentiality of legal advice.
48. Similarly, whilst the Commissioner accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice this general principle does not in itself overturn the public interest in preventing adverse effects to the course of justice. The Commissioner also considers that the disclosure of the summary has, in this case, gone some way to serve the public interest in this matter.
49. 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".
50. The interest of the local community in the council's decision in this matter is genuine; however the Commissioner does not consider this in itself to be decisive. For this counterbalancing to take place, there would need to be specific arguments or evidence demonstrating that an equivalent or greater public interest would be served by disclosure.

Whilst the complainant has argued that public money has been spent on pursuing the application, this in itself is not direct evidence of impropriety or the misuse of public funds.

51. In the Commissioner's view, the general need to protect LPP would of itself outweigh the public interest in disclosure of the privileged information here, with due account taken of the presumption provided by regulation 12(2).
52. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, he does not consider 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).
53. 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

54. 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

55. 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.
56. 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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