

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 28 October 2015

Public Authority: Barrow-in-Furness Borough Council

Address: Town Hall
Duke Street
Barrow-In-Furness
Cumbria
LA14 2LD

Decision (including any steps ordered)

1. The complainant has requested information relating to a complaint about parking enforcement. Barrow-in-Furness Borough Council disclosed some information and withheld other information under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that Barrow-in-Furness Borough Council:
 - failed to provide information within the statutory time limit and breached regulation 5(1) and regulation 5(2) of the EIR;
 - failed to issue a proper refusal notice and breached regulations 14(1), 14(2) and 14(3) of the EIR;
 - 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 22 April 2015, the complainant wrote to Barrow-in-Furness Borough Council (the "council") and requested information in the following terms:

"...all internal and external correspondence between yourself and any other officers/Councillors/third parties within and outside of the Council relating to your investigation of my complaint. You may wish to withhold the legal advice your earlier letter refers to (but I would hope that transparency rules the day). However, your request for the advice will clearly not be an exempt item."
5. The council responded on 13 May 2015 and stated that it was withholding the requested information under the exception for internal communications (regulation 12(4)(e) of the EIR).
6. The complainant did not ask the council to review its handling of the request.
7. On 11 June 2015 the council issued a further response which confirmed that the complainant's associated planning complaint had now been concluded and asked whether they were still interested in accessing the requested information.
8. The complainant confirmed on 11 June 2015 that they still wanted the information and on 16 June 2015 the council disclosed some information but withheld other information because it considered it to be subject to Legal Professional Privilege.
9. On 17 June 2015 the complainant wrote to the council to complain about its response and, effectively, requested an internal review under regulation 11 of the EIR. The council's response of 18 June 2015, maintained its position in relation to the withheld information.
10. On 30 June 2015 the council issued a further response which confirmed it was relying on regulation 12(4)(e) and regulation 12(5)(b) to withhold some of the requested information.

Scope of the case

11. On 18 August 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The Commissioner has considered whether the council complied with the procedural requirements of the EIR and whether it has correctly withheld information under regulation 12(5)(b).

Reasons for decision

Regulation 5 – duty to provide information

13. Under regulation 5(1) of the EIR public authorities have a duty to make environmental information available upon request.
14. Under regulation 5(2), authorities should comply with the duty under regulation 5(1) within 20 working days of the date of receipt of the request.
15. In this instance, the original request was submitted on 22 April 2015 and the council disclosed some of the requested information on 16 June. The Commissioner has, therefore, concluded that the council failed to comply with regulation 5(1) and regulation 5(2) of the EIR.

Regulation 14 – Refusal to Disclose Information

16. Under regulation 14(1), where a request for information is refused under one or more of the exceptions in the EIR, a public authority must issue a refusal notice stating this. Under regulation 14(2) an authority should do this within 20 working days.
17. Under regulation 14(3), the refusal notice should specify the reasons not to disclose the requested information and clarify the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b).
18. In this case the request was originally submitted on 22 April 2015 and the council issued a refusal notice stating that it was relying on regulation 12(4)(e) to withhold the information. However, this notice did not specify why the exception was applicable nor did it identify any of the matters the council considered in relation to the public interest test.
19. The council issued a further refusal notice stating that it was relying on regulation 12(5)(b) to withhold some of the information on 30 June 2015. Again, this refusal notice failed to specify the matters the council considered in reaching its decision with respect to the public interest.
20. In light of the above the Commissioner has concluded that the council breached regulations 14(1), 14(2) and 14(3) in its handling of the request.

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

21. During the course of this investigation the council provided the Commissioner with further submissions in relation to its application of regulation 12(5)(b) in this case.
22. The complainant has stated that they consider that, as the council failed to issue a proper refusal notice within the statutory time limit, it follows that the withheld information should be disclosed. However, it is the case that public authorities have the right to claim any exemption (including s12 or s14) or exception for the first time before the Commissioner or the Tribunal. The relevant case law in this matter is presented in the binding decision of the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).
23. 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."
24. 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".

25. 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.
26. In this instance, the withheld information constitutes legal advice provided to the council by an external solicitor. The legal advice relates to a parking enforcement / planning matter which was the subject of a complaint to the council (made by the complainant).
27. The council confirmed that the instructions which gave rise to the advice were submitted to the solicitor in question in verbal form; the instructions themselves are not held as recorded information.

28. Having viewed the withheld information the Commissioner is satisfied that it constitutes confidential communications between a client and a lawyer made for the dominant purpose of giving legal. He is, therefore, satisfied that the information is subject to LPP and falls within the scope of the exception.
29. The council explained that that the legal advice was provided to its Acting Principal Legal Officer and that it was shared with an Assistant Director. It confirmed that the advice was shared on a restricted basis and there has been no unrestricted disclosure of the advice. The confidence attached to the advice, therefore, has not been lost.
30. 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.
31. 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. Furthermore, the council has argued that it has reason to believe that its legal position in this matter could be subject to legal challenge through the courts. It considers that the withheld advice, therefore, also attracts litigation privilege.
32. 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.
33. 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

34. 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 in favour of disclosing the information

35. The council has acknowledged the general presumption in disclosure provided by regulation 12(2) and also recognised that there is a public interest in transparency, openness and accountability in public life.
36. The council has stated that disclosing the information would assist the public in understanding the basis of its decision making processes. The council also acknowledged that there is a public interest in disclosing information which would help the public determine whether it has acted with propriety.
37. 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.
38. *Public interest in maintaining the exception*
39. 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.
40. 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.
41. 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.
42. 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.

43. The council has further argued that planning law is a complex area, often contentious and open to interpretation and that it often has to rely on technical arguments and legal advice in such matters. The council maintains that its ability to seek legal advice in confidence is critical to ensuring the propriety and integrity of the decision making process.
44. The council has also highlighted that the planning/parking enforcement matter to which the legal advice relates remains 'live' and that it relates to a substantive complaint which was submitted by the complainant in this case. The council considers that the live nature of the advice heightens its sensitivity and makes it substantially more likely that its disclosure would have a damaging impact on the course of justice.

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. 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.
48. 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".
49. The interest of the complaint and other individuals affected by 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.

50. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. He also notes that the complainant has concerns that the council might have behaved improperly in its handling of this planning/parking enforcement matter. However, the Commissioner considers that there are other more appropriate remedies for such concerns to be addressed, either via planning law, complaints to the relevant ombudsman or via judicial review.
51. 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.
52. 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).
53. 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).
54. 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.

Other Matters

55. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
56. The Code of Practice issued under regulation 16 of the EIR (the "Code") provides guidance to public authorities as to the practice that would be desirable for them to follow in connection with discharging their functions under the EIR.

57. Paragraph 1 of the Code states:

*"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided."*¹

58. In view of the handling of the request which is the subject of this decision notice the Commissioner has concerns that council staff might not have been provided with adequate training.

59. The Commissioner raised these concerns with the council and has been advised that the following steps have been taken to prevent a recurrence of the failings identified in this notice:

- EIR and FOIA request handling training has been commissioned for twenty council officers who are responsible for dealing with requests,
- specific training focusing on the application of exceptions and FOIA exemptions has been scheduled and,
- the council has updated its procedures to clarify its approach to dealing with FOIA and EIR requests. In future, if a request is being refused the reasons for refusal will be reviewed by its Acting Principal Legal Officer who will decide whether refusal is the correct approach.

60. The Commissioner is encouraged by the steps taken by the council to address these areas of concern and he will monitor its performance in this regard via complaints made to this office.

¹ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Right of appeal

61. 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

62. 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.
63. 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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