

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2016

Public Authority: Warwick District Council

Address: Riverside House
Milverton Hill
Royal Leamington Spa
CV32 5HZ

Decision (including any steps ordered)

1. The complainant made a number of requests relating to the enforcement of particular planning conditions. The Council dealt with the requests in a single response. The Council provided some information but withheld other information under the exceptions provided by regulation 12(3) – third party personal data and regulation 12(5)(b) - adverse affect on the course of justice. During the course of the Commissioner's investigation the Council identified some additional information relating to the legal advice it had received, but argued that it did not hold this information for the purposes of the EIR. It went on to argue that if the Commissioner deemed this information was held, some of it was exempt under regulation 12(5)(b) and some of it under regulation 12(4)(e) – internal communications. It also applied regulation 12(4)(e) to one of the pieces of information it had originally withheld under 12(5)(b).
2. In respect of information on certain tests which the complainant was particularly interested in, the Council claimed that some of that information was covered by the exception provided by regulation 12(5)(b) whilst other information on the tests was not held. The complainant did not challenge the application of the regulation 12(3) – personal data.
3. The Commissioner's decision is that the Council does hold the information identified during her investigation for the purposes of the EIR. The Council is entitled to withhold the information to which it has applied regulation 12(5)(b). This includes the information it had originally located and that which it discovered during the investigation. It is also entitled to withhold some of the information to which it has applied regulation 12(4)(e). However 12(4)(e) is not engaged in respect of one piece of information, the notes of a meeting. In respect of the

information on the tests, the Commissioner is satisfied that some of that information is not held and that the remaining information is exempt under regulation 12(5)(b).

4. The Commissioner finds that the Council's responses to the request were well outside the statutory time limits which constitute breaches of both regulations 5(2) and 14(2).
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information contained in the meeting note. It may redact any personal data that it is necessary to.
6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

7. On 17 August 2015 the complainant wrote to the Council regarding planning application W/05/0101 – Premises 9/10 Ramsey Road and requested information of the following description:

“Information required, on following points of interest.

Monitoring

How long this lasted

The dates and times

The evidence that was collected that was usable

Tests Applied

The definition used in the Public Interest test applied to the case

The definition used in the proportionality test

How this case failed to meet the threshold of those tests, provide details on the specific areas it failed on.

Non Enforcement

All internal conversations regarding the stated vacation date and the actual vacation date and how this was applied in the decision not to enforce”

8. The Council acknowledged receipt of the request the following day, ie 18 August 2015.
9. On 7 September 2015 the complainant wrote to the Council to clarify the information he was seeking in the following terms:

“Further to my original request, I would like to clarify some detail, the information should include

Unabridged and full copies of

[Named council officer] case notes to include dates and times and evidence collected

[Second named council officer] case notes to include dates and times and evidence collected

Requested advice made by planning enforcement to legal to include

The request dates/meeting dates

Advice sought

Evidence presented at the time of each request/meeting

Response from legal department and date of these responses or minutes documented after each meeting”

10. On the same day, ie 7 September 2015, he submitted a subject access request for his own personal data under the provisions of the Data Protection Act 1998 (DPA). The Council’s handling of that request is not a matter that can be addressed in this notice. On 18 November 2015 the complainant made a further request to the Council. This time he asked:

“Please supply all correspondence regarding the above in particular

- The letter from the freeholder confirming determination date
- The recorded vacation date on planning enforcement files
- Correspondence between enforcement and freeholder/lessee regarding lease determination and vacation dates in light of known proven breaches
- Internal correspondence explaining grounds of non-enforcement of known proven breaches.
- Correspondence sharing information of lease determination with legal

- Advise from legal."

11. Then on 30 November 2015 he made another request:

"Confirmation of the date when structural breaches were recognised

The correspondence with the lessee to enquire about lease period and vacation date

Correspondence including file notes and formal letter of reply following confirmation letter from the lessee regarding lease determination date."

12. On 8 April 2016 the Council provided a response which was intended to address all three of the requests, ie those of 17 August 2015 (as amended by the email of 7 September 2015), together with the later requests of 18 and 30 November 2015.

13. The Council disclosed some information but withheld other information because it was the personal data of third parties and its disclosure would breach the provisions of the DPA and was therefore exempt under regulation 12(3) of the regulations. The Council also withheld information under regulation 12(5)(b) - adverse effect on the course of justice - on the basis that the information in question attracted legal professional privilege. The Council advised the complainant that it had contemplated applying the exception provided by regulation 12(5)(e) - commercially confidential information. However in the end the Council decided not to rely on this exception.

14. The complainant requested an internal review on 6 May 2016. When doing so he identified the following outstanding issues:

- "Correspondence from enforcement officers **to** solicitors including the times and dates
- Correspondence **to** the lessee/freeholder in particular requests surrounding the vacation date and the correspondence sent by enforcement officers following replies from the lessee/freeholder on such matters; to include times and dates.
- Internal correspondence between officers, including file notes regarding the vacation date."

15. He also referred to outstanding issues in respect of:

"... details on the public interest and proportionality tests applied and on what points in each test this case failed"

This was a reference to the information sought in the original request of 17 August 2015.

16. The Council provided the outcome of its internal review on 1 July 2016. It provided one additional letter to the lessee/freeholder in response to the second bullet point of paragraph 14 above. However in respect of the other information it had identified as falling within the scope of the request, the Council maintained its reliance on the exceptions it had originally cited. In respect of the complainant's references to the 'public interest' and the 'proportionality tests' the Council did not appreciate these related to part of the original request. Instead it appears the Council took these comments to be about the public interest test applied when considering whether to rely on the exception provided by regulation 12(5)(b).
17. The majority of the withheld information is contained in an enforcement file. During the course of her investigation the Commissioner informed the Council that she did not accept its application of 12(5)(b) to three entries in that file. This was on the basis that the information did not attract legal professional privilege. On reflection, the Council agreed with the Commissioner. However, having reviewed the matter the Council now said that one of the entries was exempt under regulation 12(4)(e) on the basis that it constituted internal communications.
18. In respect of the other two entries, the Council argued that, on reflection, it did consider the information was captured by the request. Having studied the complainant's request the Commissioner is satisfied that the particular entries in question do not contain any of the information that was actually requested. Therefore she will not consider the complainant's right of access to them any further.
19. During the course of the Commissioner's investigation the Council also identified some additional information relating to the advice that had been provided by its legal advisers. As will be discussed in more detail later, the Council has argued that it does not technically hold this information. However in the event that the Commissioner disagreed with this position, the Council also extended its application of regulation 12(5)(b) to some of that information on the basis that it too was covered by legal privilege. In respect of the remaining information, the notes of a meeting, the Council applied regulation 12(4)(e) – internal communications.

Scope of the case

20. The complainant contacted the Commissioner on 30 March 2016 to complain about the way his request for information had been handled. Following an exchange of correspondence between the complainant and the Commissioner, the complainant clarified that his concerns related to the Council's application of regulation 12(5)(b) and its failure to provide information on the public interest and proportionality tests used when

considering what, if any, enforcement measures were appropriate in the planning issue which is the subject of these requests.

21. There are a number of matters to be decided, firstly whether any of the information discovered during the investigation is held by the Council. The next issue is whether the Council is entitled to rely on regulation 12(5)(b) to withhold any of the requested information, including the application of this exception to any of the newly discovered information it is deemed to hold.
22. The Commissioner will also consider the Council's application of regulation 12(4)(e). This has been applied to some of the newly discovered information and the one entry from the enforcement file which was originally withheld under 12(5)(b).
23. In respect of the public interest and proportionality tests the Commissioner will consider whether the Council holds this information and, if so, whether the Council has any grounds for withholding it.
24. The complainant has also raised concerns over the Council's failure to comply with the time limits set out in regulations 5(2) and 14(2) when responding to his request and carrying out the subsequent internal review.

Reasons for decision

Is the newly discovered information held by the Council

25. The Council initially provided the Commissioner with a copy of the relevant enforcement file. This documented the Council's investigation and consideration of a planning matter in respect of the property identified in the request. The file contained summaries of legal advice received by the Council's enforcement officers. References in the file suggested this advice had been requested and obtained verbally. However during the Commissioner's investigation the Council advised the Commissioner that its legal adviser who provided the advice had kept rough notes of the issues raised in case they should need to refer to them in the future.
26. The Council argued that this information was held by the solicitors for their own purposes and therefore was not held by the Council.
27. The Commissioner rejects this argument.
28. The Commissioner initially understood that the legal advisers in question were the Council's own internal solicitors. If this was the case, regardless of the fact that it may never have been the intention for the

solicitors to share these notes with enforcement officers, the information was still being held by them as officers of the Council and so is deemed to be held by the Council.

29. However in one of the Council's submissions there is reference to legal advice being received from external lawyers. However it transpires that the lawyers work for both the district and county councils. Even if it had been the case that the solicitors were external advisers, the Commissioner considers the information would be held by these solicitors on behalf of their client, ie the District Council.
30. In either eventuality the Commissioner is satisfied that the information is held by the Council for the purposes of the EIR.
31. The Commissioner will now go onto consider whether of the newly discovered information, together with any of the information from the enforcement file is protected by regulation 12(5)(b).

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

32. So far as is relevant, 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.
33. The Commissioner has issued guidance on the application of this exception, 'The course of justice and inquiries exception (regulation 12(5)(b))', which is available from his website at www.ico.org.uk. That guidance sets out the Commissioner's view that the exception is wide enough to be applied to information protected by legal professional privilege.
34. In broad terms legal professional privilege protects the confidentiality of communications between a client and their legal adviser. The privilege belongs to the client and allows them to explain the issues they require advice on as fully as possible and the legal adviser to then provide full and frank advice on those issues. A client's ability to speak freely and frankly with his legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. It helps to ensure fairness in legal proceedings. Therefore disclosing such communication would adversely affect the course of justice.
35. There are two types of legal professional privilege. Litigation privilege will apply where litigation or other adversarial proceedings are in prospect, or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the Council is relying on advice privilege.
36. As well as protecting communications directly between someone seeking advice and their legal adviser, legal professional privilege may also

protect communications relaying the substance of that advice. For example if one officer within an organisation such as a council was tasked with obtaining legal advice, that officer would then need to share the advice they had received with their colleagues. Such communications would also be protected by legal professional privilege as it is the Council, or at least those within it with a business need to have access to the advice, which is deemed to be the client in these scenarios. Similarly, a file note recording the legal advice could also attract legal professional privilege, as could a note made by a solicitor recording the facts of the matter on which advice is being sought and the advice provided.

37. In order for information to attract legal professional privilege it has to satisfy a number of conditions. The first is that the communications are between a solicitor, acting in their professional capacity, and their client.
38. The Council has applied the exception to some of the entries contained in the enforcement file and to the majority of the newly discovered information comprising of notes made by the Council's solicitors during meetings with enforcement officers at which legal advice was provided verbally. Having viewed the withheld information the Commissioner is satisfied that all the information, apart from one note from the enforcement file, record the gist of the advice that was obtained. This information therefore satisfies the first condition.
39. The one remaining entry from the enforcement file sets out a matter on which legal advice was needed and makes it clear that it was the officer's intention to seek legal advice on that matter. As discussed earlier, legal professional privilege protects communications that seek legal advice as well as those which contain the advice provided. The entry in the enforcement file is a note of the matters on which advice was to be sought and can sensibly be considered part of the communications with the lawyer as it would have served to inform the officer's discussion with his legal adviser when seeking advice.
40. Having established that the information being withheld under regulation 12(5)(b) can all be considered communications between a client and their lawyer, the second condition is that these communications were made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created, as opposed to the sole purpose. The Commissioner considers these communications were very clearly made to facilitate the seeking of advice, to inform the legal advice that was provided, or to convey the legal advice that had been provided.
41. The final condition is that the information contained in the communications must remain confidential. It is obvious that the notes produced by the solicitors at the time they provided legal advice have

not been shared with a wider audience and remain confidential. In respect of the legal advice contained in the enforcement file the Council has assured the Commissioner that these too remain confidential. In light of these assurances and in the absence of any evidence to the contrary the Commissioner is satisfied that the communications remain confidential.

42. As the information being withheld under regulation 12(5)(b) consist of communications between a solicitor and their client for the dominant purpose of either seeking or obtaining legal advice, and as these communications remain confidential, the Commissioner finds that they are protected by legal professional privilege. Their disclosure would have an adverse affect on the course of justice and the exception provided by regulation 12(5)(b) is engaged. However before deciding whether the Council may rely on this exception to withhold the information, it is necessary to consider the public interest test.

Public interest test

43. The public interest test, which is set out in regulation 12(1)(b), means. that even though information is covered by an exception, a public authority may only refuse to provide it if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
44. The Council has recognised that there is always a value in disclosing information that would increase transparency and accountability of public authorities.
45. Having viewed the enforcement file the Commissioner is aware of the issues relating to that property which can be summed up as being concerns that the industrial/commercial use of the property is in breach of planning conditions. She recognises that, if the alleged breaches had occurred, these concerns would affect the neighbouring properties. There is therefore a particular value for those affected in understanding the Council's approach to dealing with the matters raised. However there does not appear to be any wide spread concern over the matters raised, or controversy over how the Council dealt with them.
46. If the withheld information showed that the Council had failed to follow the legal advice it received there would be an increased value in disclosing it. However having studied the withheld information the Commissioner is satisfied this is not a relevant factor.
47. In respect of the arguments in favour of maintaining the exception, there is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. It is important that the client can lay out all the issues relevant to the legal issue they require advice on and that the lawyer can respond in full to

those issues. This may include explaining any weaknesses in their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice and so defend their legal rights. That is why legal professional privilege is considered to be a cornerstone of the English legal system.

48. The Council has reiterated this point in its submission to the Commissioner. It stressed the importance of safeguarding the relationship between lawyer and client to ensure full and frank advice; stating that,

"It is fundamental this this is preserved for the fair administration of justice; undermining this principle would damage the relationship between the Council and its legal advisers on other cases and therefore have an impact on the wider public interest in bringing matters forward."

49. Even if the issue on which the legal advice was obtained may now have been concluded, the legal advice is still relatively recent. To disclose such recent advice would have a marked impact on how freely council officers felt able to speak to lawyers when seeking advice. This would be felt more keenly by planning and enforcement officers, particularly when dealing with problems similar to those which are at the heart of this request. The Commissioner considers it likely that such advice would be required on a reasonably regular basis and therefore this chilling effect would be frequently felt. This would increase the harm caused through eroding the principle that communications with a legal adviser should remain confidential.
50. Given the limited value in disclosing the legal advice and the potential harm that could be done to the relationship between a lawyer and their client if the information was disclosed, the Commissioner is satisfied that the public interest in favour of withholding the information outweighs the public interest in favour of disclosure.

12(4)(e) – internal communications

51. Regulation 12(4)(e) provides that a public authority can refuse to disclose information if it consists of internal communications.
52. The Council has applied the exception to two pieces of information. The first is an entry in the enforcement file which the Council originally withheld under regulation 12(5)(b). The second is a note of meeting produced by a solicitor.

53. As explained in the Commissioner's guidance on this exception¹ the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file where others may consult it. Applying this concept to the information in question the Commissioner is satisfied that the entry in the enforcement file is an internal communication. It is clearly a comment which expresses one officer's view on a particular issue and is addressed to other officers. The exception provided by regulation 12(4)(e) is engaged in respect of this information.
54. Turning to the solicitor's note of a meeting, the Commissioner accepts the principle that the notes of a meeting can be an internal communication. This includes notes of meetings between the Council and external parties, as was the case here. Although the discussion that took place could not be considered confidential, the Council's views, comments and interpretation of the discussion still form part of its internal thinking.
55. However the important issue is whether the note of the meeting formed a means of communication, ie whether the solicitor intended to share the note with others within the Council. The note is clearly not a formal note of the meeting, it is hand written and appears to be held in a note book, presumably the solicitor's personal note book. The Council has stated that the note was produced by the solicitor for their own working purposes. This would all suggest that the note was in fact a simple aid memoir held for the solicitor's own purposes. If this was the only reason the note was held the Commissioner would not accept it formed an internal communication.
56. However, the Council has gone on to argue that the note was also intended for internal communication purposes and was held to enable discussion and reflection on the issues raised at the meeting. The Commissioner interprets this to simply mean that the note was held by the solicitor so that he could refresh his memory of the discussion as and when necessary. The Commissioner is not satisfied that this transforms a personal aide-memoir in to a means of communication. The Commissioner finds that the exception is not engaged in respect of this note. The Council is required to disclose the note. It may however redact personal data from that note as necessary. The Commissioner recognises that this is likely to reduce how informative the note is.

Public interest test

57. Although the meeting note does not attract the exception the Commissioner has found that the entry in the enforcement file does. However the exception is subject to the public interest test. As explained

¹ Internal communications (regulation 12(409e) 20130319 Version: 3 – available from the Commissioner's website

previously the public interest test, as set out in regulation 12(1)(b), provides that even where an exception is engaged, information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure.

58. The entry comments on how a particular aspect of the planning issue was handled. It is a frank, but entirely professional comment. The Commissioner considers that officers should feel free to record their views in such a way. The Commissioner considers that disclosing the comment would stifle such full and frank exchanges in the future. Such exchanges can be required when considering the best way to tackle difficult issues. To disclose the information would have a chilling effect on the willingness of officers to address any concerns that they had. This would hamper the effectiveness of those officers and work against the public interest. The Commissioner considers this to be a significant argument in favour of maintaining the exception.
59. There are of course public interest arguments in favour of disclosure. These include the general public interest in increased transparency and accountability of the Council's actions. However the issue addressed by the note is by no means central to the main issue of whether there were grounds for pursuing enforcement action in respect of the named property. Therefore disclosing the note would be of very limited value in informing the public how the Council performed its planning functions.
60. In light of this the Commissioner finds that the public interest in maintaining the exception easily outweighs the public interest in disclosing the entry from the enforcement file.

Information relating to the application of the public interest and proportionality tests

61. In his original request of 17 August 2015 the complainant asked for the definition used in the 'public interest' and 'proportionality' tests that had been applied by the Council when considering the particular planning matter. He also asked:

"How this case failed to meet the threshold of those tests, provide details on the specific areas it failed on."
62. Initially the Council overlooked these elements of the request. Then when raised at the internal review stage the Council misinterpreted the complainant's concerns as being criticism of how it had explained the public interest test under regulation 12(5)(b) when refusing elements of his request.
63. However once the Council recognised the confusion it explained its position to the Commissioner. The Council stated that it did not hold definitions of these tests. The tests were described as being a matter of

law and judgement. From this the Commissioner understands that there are no precise statutory definitions. Practitioners' understanding of the factors that should be considered when applying the tests has evolved over time, partly due to the development of case law, and each case requires individual consideration and judgement in applying those tests. The Council has stated categorically that it does not hold any definitions of the two tests.

64. In light of the above the Commissioner accepts that the Council does not hold information on the definitions. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold information when the applicant's request is received and, technically, the Council should have cited this exception. However the important point is whether the information is in fact held and, as explained, the Commissioner is satisfied that it is not.
65. The Council does accept that the Council holds information on how these tests were applied when considering this particular planning matter. However it has explained that this is recorded as part of the legal advice that was obtained; as such it would form part of the information which attracts legal professional privilege and which has therefore been withheld under regulation 12(5)(b).
66. The Commissioner has reviewed the references to these tests contained in the enforcement file and the solicitor's notes. She is satisfied that the consideration of these test forms part of the records of the legal advice and is therefore part of the information which she has already found to be exempt under regulation 12(5)(b). The Council may withhold this information.

Regulations 5(2) and 14(2) – time for compliance

67. When a public authority receives a request it has twenty working days to respond. Regulation 5(2) provides that a public authority should communicate the requested information within that twenty day period. That is, of course, unless the information is covered by one of the exceptions. Where the public authority intends to withhold some or all of the information under an exception it must tell the applicant within the same twenty working day period. Where the request seeks a lot of information, or raises particularly complex issues, regulation 7 allows the twenty day period for compliance to be extended to forty working days.
68. In this case the last of the three requests was submitted to the Council on the 30 November 2015. The Council did not provide a substantive response until 8 April 2016, at which time it disclosed some of the requested information, but withheld other information under regulation 12(5)(b). This clearly exceeds the time for compliance by some margin.

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The Commissioner therefore finds that the Council breached regulations 5(2) and 14(2).

Right of appeal

69. 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

70. 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.

71. 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

Rob Mehan
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