

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 December 2017

Public Authority: City of York Council
Address: Customer and Corporate Services
West Offices
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested from the City of York Council (the Council) information concerning legal advice in regards to a particular building on Fulford Road, York.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) (course of justice) of the EIR to the withheld information. Therefore, the Commissioner does not require any steps to be taken.

Request and response

3. On 13 April 2017, the complainant wrote to the Council and requested information in the following terms:

"Since the legal advice you have received concerns a matter of Council policy and is therefore in the public interest, please accept this letter as a Freedom of Information request to reveal the letter instructing the advice and the advice itself. I'm happy for any confidential information to be redacted."

4. The Council responded on 11 May 2017. It informed the complainant that his request had been dealt with under the Environmental Information Regulations 2004 (EIR) rather than the Freedom of Information Act (FOIA). The Council withheld the information under regulation 12(5)(b) of the EIR.
5. On the same day the complainant asked for an internal review.

6. Following an internal review the Council wrote to the complainant on 5 September 2017 and maintained its position to rely on regulation 12(5)(b).

Scope of the case

7. The complainant contacted the Commissioner on 8 September 2017 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the case is to determine whether the Council was entitled to rely on regulation 12(5)(b) to withhold the requested information.

Reasons for decision

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

9. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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”. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege (LPP).
10. In this case, the matter concerns the necessity of a second application to demolish a building when, according to the complainant, permission had already been granted. The complainant is of the view that this additional procedural step is a waste of the Council’s time and of his. The Council stated it had received legal advice regarding the status of the prior approval application and it had decided that a further application was required. However, the complainant argued against this and said that there was no change in description since the site and the buildings to be demolished remained the same. Therefore, the complainant believes that there is not a need for a duplicate application and a fee.
11. The complainant considers that he is entitled to see the reasoning behind this decision “backed by legal advice” and that he is also entitled to see the instruction letter requesting this advice. The complainant said he would be satisfied with the information with correctly applied redactions undertaken, if that advice contains information which is privileged.

12. The complainant is of the view that the Council is being overly obstructive in this case and he disputes the Council's argument that this would have an adverse effect on the course of justice. He believes it is in the public interest that the information is disclosed.

Is the information covered by legal professional privilege?

13. The Council stated in its response to the complainant that it does not share its solicitor's legal advice. It considered that the information provided to him was sufficient to enable understanding of the local planning authority's view regarding the status of the demolition notice.
14. The Commissioner recognises that there are two branches of LPP, litigation privilege, and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege is generally considered where no litigation is in progress or contemplated. It is therefore not necessary for litigation to be in progress in order for a claim of legal professional privilege to be maintained. As such, ongoing litigation is not a requirement for the application of regulation 12(5)(b).
15. In this case the withheld information comprises a summary of the advice provided by external counsel. The Council considers this attracts legal advice privilege. It said that the legal advice retains legal privilege and has not been shared with any third party or been made public. The Council stated that the advice is also regarded as relevant as it is still a 'live' issue and the redevelopment of the site is still under negotiation. It added that in this respect, the privilege is not considered to have been waived.
16. The Commissioner viewed the withheld information and she is satisfied that this information constitutes advice on a specific matter and that it has been provided by a qualified legal professional.

Adverse effect on the course of justice

17. The Council is of the view that disclosure of the information into the public domain would have an adverse effect on the course of justice. The Council believes that disclosure would undermine the general principles of LPP and the administration of justice.
18. It said that there are no special or unusual factors with regard to the commissioning of the legal advice and as the legal advice concerns a 'live' and ongoing matter, disclosure would have an adverse effect on the Council's current and future negotiations. It also said that it would undermine the public's confidence in the efficacy of LPP generally and this common law principle on which the administration of justice rests.

19. The Commissioner is satisfied that there is a potential risk that disclosing the information at this time would have an adverse effect on the course of justice. Having considered the Council's arguments, the Commissioner finds that the Council has correctly engaged the exception at regulation 12(5)(b).
20. 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.

Public interest test

21. 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 her 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 in disclosure

22. The Council considered the public interest arguments to disclose the information for the purposes of promoting transparency and accountability. This is in order to show how decisions relating to 'Prior Application' of this redevelopment have been arrived at and in particular, what decisions were based on.
23. The Council also considered the public interest argument in promoting further awareness. Also, the need to give the public as much opportunity as possible to scrutinise the quality of the legal advice the Council received and its actions in light of this advice. Essentially, whether the Council followed the legal advice given and whether the Council's actions were deemed lawful.
24. The Council said that it had taken into account the overarching public interest requirements and responsibilities of public authorities to disclose information they hold that directly or indirectly impacts the environment.

Public interest in maintaining the exception.

25. The Council is of the view that these arguments are outweighed by the public interest arguments in maintaining the exception. It believes there is an inherent public interest in upholding the principle of LPP and the administration of justice. It would weaken the public's confidence in the legal process if this principle was weakened in this case.

26. In regards to maintaining openness in all communications between the Council and lawyers to ensure the Council has access to full and frank legal advice, it considers there to be a strong public interest here. The Council added that this would be undermined through disclosure which would impact not only the ability of its decision-making in order to be fully informed in respect of Prior Application, but in all cases where the input of legal expertise is necessary.
27. The Council stated that if this legal advice is made public, it would put it in a weaker position in the current negotiations over the redevelopment of the site. It said that it would also put the Council in an unfair position to defend itself should legal challenges arise in respect of the redevelopment. In both of these instances, the Council believe it would impact on the public purse. It also said that it may set a precedent where legal advice is routinely disclosed which would impact the Council's effectiveness in protecting the public purse in negotiations, disputes and in defending legal positions that may arise from legal actions in the future.

Balance of the public interest

28. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to its actions. She recognises that there is a public interest in the specific information - in this case it relates to redevelopment plans which have some significance for the local community.
29. Those affected by public authority actions may feel they have understood the process better if they know how a public authority reached its decisions and its legal justification for pursuing a particular path in relation to a particular development.
30. The Commissioner accepts that there may be a need for enhanced transparency and scrutiny of decision making in planning cases. This is particularly the case where information relates to matters that affect large numbers of people or have specific environmental implications. In this instance, the Council had taken legal advice on the status of the prior approval application for a building due to be demolished. It was subsequently deemed that a further prior approval application would be required for the building in question due to the change in description.
31. It is clear that the Council is in the process of negotiations and the legal advice is ongoing as the matter is still live. In view of these factors, the Commissioner recognises that the public could benefit from being reassured that the Council has received and acted on sound advice.
32. Following previous decisions of the Information Tribunal however, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it

which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is in turn, fundamental to the administration of, and course of, justice.

33. In weighing the balance of the public interest arguments in this case, the Commissioner has given due consideration to the specific interests of the complainant as well as any wider public interest. She considers that there is a broader public interest in the smooth course of justice and the protection of such processes from unwarranted adverse effects.
34. Having viewed the withheld information and considered the relevant context, the Commissioner is satisfied that the public interest favours maintaining the exception and that the Council has correctly applied regulation 12(5)(b) to withhold the requested information.

Right of appeal

35. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.

37. 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

Alun Johnson
Team Manager
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Wycliffe House
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