Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **12 March 2018**

Public Authority: **Suffolk Coastal District Council**
Address: **Melton Hill**
Woodbridge
Suffolk
IP12 1AU

Decision (including any steps ordered)

1. The complainant has requested information generated by litigation involving himself, a Planning Inspector and Suffolk Coastal District Council.

2. The Commissioner's decision is that Suffolk Coastal District Council correctly relied on Regulation 12(5)(b) of the EIR to withhold the requested information.

Background

3. The complainant submitted a planning application to Suffolk Coastal District Council ("the Council") for the conversion of a garage into a house, the application was refused. On 16 January 2015, a Planning Inspector, on behalf of the Secretary of State for Communities and Local Government, allowed the complainant's appeal against the Council's decision.

4. The Council challenged the Planning Inspector's decision of 16 January 2015 by bringing an action in the Planning Court of the Administrative Court under section 288 of the Town and Country Planning Act 1990, (Claim No CO/929/2015-Suffolk Coastal District Council).

5. The Council advanced three grounds of appeal. In the event, the Secretary of State of Communities and Local Government was prepared

to concede to judgment. Therefore, the matter was disposed of by consent, rather than a court hearing, and by an order sealed on 9 June 2015 the decision letter of 16 January 2015 was quashed.

Request and Response

6. On 22 June 2015,the complainant wrote to the Council and requested information in the following terms:

> "… all information the Council (including both Suffolk Coastal and Waverney councils) has on the following subject. This is to include but not be limited to all paper and electronic copies of files, reports, emails, memos, minutes, notes and letters, including information, communications etc. between and involving the solicitors, barristers and other legal entities involved in the legal case the Council brought against the Planning Inspectorate, my wife and myself (and any alternative cases considered).:
>
> Information regarding the planning application, appeal and high court action regarding the conversion of the garage … to a house".

7. The Council responded on 15 July 2015. It stated that it refused to provide the requested information citing the following exception:

- Regulation 12(5)(b) of the EIR (disclosure would adversely affect— the course of justice)

8. Following an internal review the Council wrote to the complainant on 10 August 2015. It stated that it upheld its decision.

9. The complainant next submitted the same request on 23 January 2016. The Council in reply (24 February 2016) referred the complainant back to its previous replies (as outlined above) and advised the complainant to complain to the Commissioner if he remained dissatisfied.

Scope of the case

10. The complainant contacted the Commissioner 11 January 2017 to complain about the way his request for information had been handled.

11. During the course of the Commissioner's investigation the Council provide her with what it said was all the withheld information. However after discussions with the complainant this completeness was called into question. The Commissioner therefore wrote to the Council and said ,inter alia,

"…the complainant is adamant that you have not provided me with minutes of the meeting where the court case against the planning inspectorate had been discussed in private"[1].

12. The Council replied saying "I attach with this email;-

    (a) the exempt report about this matter-not previously sent to the Commissioner , or the complainant

    (b) the open minutes of the meeting of the Planning Committee held on 23.3.15. These have not previously been sent to the complainant, but are accessible via the Council's website. Please see items 6 and 7 of the open minutes, which relate to the exempt item, that is, the report relating to the complainant's case and

    (c) the exempt minute about this matter, also not previously supplied to you or (the complainant) "[2].

13. The Council said further that the closed report and minute had not been shared with the complainant, as they are exempt by virtue of regulation 12(5)(b).

Reasons for decision

14. Regulation 12(5)(b) of the EIR provides that a public authority can refuse to disclose information 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 enquiry of a criminal or disciplinary nature.

15. 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

[1] Commissioner to Council, 12 July 2017

[2] Council to Commissioner, 21 July 2017

this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

16. The Council confirmed to the Commissioner that the exemption in Regulation 12(5)(b) is relied upon vis-à-vis the 'interest of justice' limb based upon legal professional privilege (LPP) , and it is litigation privilege rather than legal advice privilege.

17. This is (the Council says) because, all of the information in question came into existence as a result of the Council's planning officers seeking legal advice about the Planning Inspector's decision and then deciding to engage in litigation (successfully) by challenging the inspector's decision in the High Court under Section 288 of the Town and Country Planning Act 1990. At all relevant times, litigation was either occurring, or, in the early stages, there was a real prospect of it, rather than just a possibility. The Council was very concerned about the Inspector's decision and wanted to challenge it if it was at all possible to do so.

18. The Council provided a copy of the contents of a legal case file. The said contents included instructions to counsel, counsel's opinion, counsel drafted draft orders, case correspondence with the Treasury Solicitors and correspondence with the Council's solicitor agents. The Commissioner has no difficulty in identifying these as documents containing legally privileged information. The Commissioner also notes that the document latterly supplied to her by the Council (paragraph 13 above) were a minute and a report where legal advice, which had been supplied to the Council, was discussed or noted. To reveal this information would be to reveal legally privileged advice and accordingly regulation 12(5)(b) is similarly engaged.

19. The said legal case file also contained information which was not necessarily as apparent to be legally privileged information as the aforesaid information. This less apparent information being a document to the planning Committee the document titled "Report by Head of Planning and Coastal Management and Head of Legal Services.

20. The Commissioner therefore asked the Council to justify its assertion that the "Report by Head of Planning and Coastal Management and Head of Legal Services" did indeed attract LPP in its entirety.

21. The Council replied arguing that the whole report attracts LPP since;-

"… Whilst the report might be in joint names, I can confirm that (*name withheld)* the solicitor dealing with this matter, actually wrote the report, based on discussions which he had had with the Council's London agents, Sharpe Pritchard, Solicitors. That is why …*the solicitor*… is named as the contact person in the report, and not the Head of Planning. The only reason that the Head of Planning is named, along

with the Solicitor, is because of professional courtesy. As the proposed court proceedings related to a planning matter, of course, the Head of Planning would be present at the Planning Committee, to advise members on planning policy, if required. The Head of Planning instructed the in-house legal team to obtain advice about the legal implications of taking court action. Those legal implications are set out in the report, the content of which is almost all about legal issues.

…The report has been written by (*the solicitor)* so that he could advise his client, the Head of Planning, and the Planning Committee, about the legal implications of issuing court proceedings. Therefore, the exempt report and minute are documents which are intended to transfer information between a lawyer and his client. In this case, (*the solicitor*) has provided advice to his client officer and to the Planning Committee.

If the Head of Planning's name were removed from the top of the report, it would still meet the test of being a confidential communication, provided by a lawyer, to his clients, with the intention of giving legal advice.

It would be wrong, unfair, and erode the principle of LPP if, simply because the Head of Planning's name is there for professional courtesy, LPP were lost. Therefore, I cannot agree with your suggestion. The report is primarily a report about a legal issue, and the implications of issuing court proceedings. If you assess the contents of the report, you will see that it is primarily about legal matters, legal advice, legal proceedings and court costs."

22. As stated above, the Commissioner recognised that the said report contained legal advice but was concerned about the possible authorship of the advice. However the Commissioner accepts the explanation of the Council that the said advice was provided by one of its lawyers and not by its Head of Planning as explained above. Accordingly the Commissioner finds the said report also to attract legal professional privilege.

23. She is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information. She has therefore gone on to consider the public interest test.

24. 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 her 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.

25. The Council's considerations and submissions regarding its application of the public interest test are laid out in paragraphs 26 and 27 below.

26. "We refer specifically to DCLG v Information Commissioner & WR [2012] UKUT 103 (ACC), an important decision of the Upper Tribunal (UT) which is frequently used as a reference point by decision makers in cases where this issue arises. This decision makes it clear that wherever disclosure of legally privileged information is sought, the decision maker should consider the general harm to the public interest which is likely to occur every time that this principle is not upheld, even if it may be arguable that there is no or little harm in the instant case. The weakening of public confidence in the general principle of LPP is a public interest factor of very considerable weight in favour of maintaining the exception. There need to be special or unusual features in a particular case to justify not giving it this weight. The UT Judges went on the say (Para 33) that this does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

27. Applying these principles to this case, the Council acknowledges the presumption in favour of disclosure required by the regulations, and also the public interest in the openness and transparency of decision making relating to planning. However, as previously stated in our correspondence we believe that there is no unusual factor strengthening the case for disclosure- quite the reverse, in that the Secretary of State conceded fairly rapidly that its inspector's decision was legally flawed. This is therefore not a case where there is any reasonable suspicion of misfeasance or error".

28. The Commissioner is not minded to accept that there is a wider public interest in the disclosure of information on this issue except to those few individuals directly impacted by the pertaining litigation. She does not therefore consider there are any special factors in this case that would warrant overriding the significant public interest in maintaining LPP and protecting the confidence that public authorities have in the operation of LPP.

29. The Commissioner is therefore satisfied that, in this case, the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. She has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Right of appeal

30. 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

31. 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.

32. 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 .....

Pamela Clements
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