

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 November 2018

Public Authority: Bath and North East Somerset Council

Address: Lewis House
Manvers Street
Bath
BA1 1JQ

Decision (including any steps ordered)

1. The complainant has requested information about the legal advice sought and received on a planning application to modify a waste storage site at the University of Bath. The Council refused to provide the information on the basis it attracted legal professional privilege (LPP) and made reference to section 42 of the FOIA and regulation 12(5)(b) of the EIR. The complainant then amended his request to ask only for the question posed by the Council when seeking the legal advice, rather than the advice itself. The Council maintained its position on the amended request, and considered that the public interest in preserving the confidentiality of LPP outweighed the public interest in disclosing the information.
2. The Commissioner's decision is that Bath and North East Somerset Council has correctly applied regulation 12(5)(b) to the information request, and that the public interest in maintaining the exception outweighs the public interest in disclosure.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 21 August 2017 the complainant wrote to Bath and North East Somerset (BANES) Council and requested information in the following terms:

'The University of Bath applied for full planning permission to "Modify an existing Waste Storage Area" at the Claverton Down Campus (17/02607/FUL) Some Local residents considered that the planning application should have been considered a "Major" development rather than a "minor" development, Chris Gomm with the planning department sought legal advice on the matter which I understand was "inconclusive" I would like a copy of the advice please' (sic)

5. The Council responded on 19 September 2017. It stated that it considered the information requested attracted legal professional privilege (LPP) and therefore section 42 of the FOIA and regulation 12(5)(b) were engaged.
6. On 6 December 2017 the complainant then modified his request to include only the wording of the question(s) posed by the Council's planning department to its legal advisers, rather than the advice received:

'You kindly supplied information to me on the 19th Sep 2017 reference No. 1406/17. I understand from that the legal advice BANES received is confidential. What was the wording of the question(s) the Council (or planning department) asked advice on? I have attached a copy of your supplied information for your convenience'

7. The Council responded on 8 January 2018 and maintained its position regarding LPP and section 42 of the FOIA / regulation 12(5)(b) of the EIR.
8. The complainant requested an internal review on 22 January 2018. He did not consider, as part of a local residents' group, that the planning application had been dealt with correctly. The Council responded on 19 February 2018, maintaining its reliance on section 42 of the FOIA and 12(5)(b) of the EIR. Although it aimed to be transparent and accountable to the public, it considered that the principle behind LPP of ensuring full and frank access to legal advice as fundamental to the justice system was paramount.

Scope of the case

9. The complainant contacted the Commissioner on 12 April 2018 to complain about the way his request for information had been handled. He did not consider that the question(s) asked by the Council's planners could be deemed to attract LPP. He went on to explain what he considered to be significant in the way the question was asked on the handling of the planning application. In summary, if the application was determined 'major', this would necessitate more public consultation and detailed plans / information, which would potentially be suppressed if the development were to be determined as 'minor'.
10. The Commissioner considers the scope of the case to be whether the question(s) asked by the Council's planning department of its in-house legal advisers engaged regulation 12(5)(b) of the EIR, and whether the public interest in withholding the information outweighs the public interest in disclosure.

Reasons for decision

Environmental Information

11. The Council referenced both section 42 of the FOIA and exception 12(5)(b) of the EIR in its refusal notice and review of the complainant's request. Regulation 2(1) of the EIR defines environmental information as:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
12. As the request relates to a planning application made in connection with changes to waste management facilities, it is clear that the request should have been dealt with solely under the EIR. The Commissioner

directed the Council to consider its responses during the course of her investigation under this regime.

Regulation 12(5)(b)

13. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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.'

14. The Commissioner has issued guidance on the application of regulation 12(5)(b) – The course of justice and inquiries exception¹. The exception is permissive and subject to the public interest test. A public authority must apply a presumption in favour of disclosure when considering firstly if the exception is engaged, and then whether it is in the public interest to withhold or disclose the information.
15. The Council considers the information it holds falling within the scope of the request as attracting LPP. The exception does not make direct reference to LPP but the 'course of justice' element under the EIR is broad and can legitimately be applied to information with this classification.
16. LPP protects the confidentiality of communications between a lawyer and client, and is a cornerstone of the justice system. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) (Bellamy)² as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

² http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

17. There are two categories of LPP – litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies when no litigation is in progress or contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
18. The Council has identified the withheld information as holding advice privilege. However it also argued that, as with any planning application, once a decision has been determined a legal challenge can always be mounted, and it may therefore also attract litigation privilege. The Commissioner gives little weight to this position as the planning permission was granted on 20 October 2017 and any appeal (only allowable to the applicant) would now be well out of any time limits. Additionally, application for a judicial review of the decision by any other party should be made within 6 weeks of the application being granted, and is therefore also now well out of time.
19. The focus of this investigation is on the questions asked of the Council's in-house legal advisers, and this was provided to the Commissioner. The complainant is of the belief that the planning officer would have considered questions to ask before actually seeking any advice and therefore this information could not be considered as legally privileged.
20. The complainant's request is for '*the wording of the question(s) the Council (or planning department) asked advice on*'. The Commissioner takes this to be a clear and specific request for the question(s) actually posed. He has not asked for information held that resulted in the questions being posed. In any event, the email sent from the planning officer to the in-house legal advisers requesting advice indicates this was done in the normal course of business and there is no suggestion of any (need for) prior consideration of the questions asked. The Commissioner therefore considers that the information provided by the Council to her covers all the information falling within the scope of the complainant's request.
21. Having viewed the withheld information, the Commissioner is satisfied that it constitutes communications between a client and their lawyer and that it clearly relates to legal matters. The fact that it is the questions asked and not the advice received is immaterial; the questions are a confidential communication between a client and lawyer, made purely for the purpose of seeking legal advice. Having considered the withheld

information and her guidance specifically on LPP³, the Commissioner is satisfied that it attracts advice privilege under LPP.

22. Given that the withheld information attracts LPP, and therefore falls under the 'course of justice' within exception 12(5)(b), the next issue for the Commissioner to consider is whether disclosure would adversely affect the course of justice.
23. Adversely affect means that there must be an identifiable harm to, or negative impact on, the interests of the exception i.e. the course of justice. The threshold for establishing this is high: 'would' means that it must be more probable than not.
24. The Council has argued that the information concerns a contentious planning application, and that consequently disclosure of the information could be advantageous to any aggrieved party wishing to challenge the Council's position. However, as previously noted, the Commissioner understands that it is too late for any challenge of the planning decision and so gives no weight to this argument.
25. The Council has also taken into account the wider importance of the principles behind LPP, which it considers allows for *'safeguarding openness in all communications between client and lawyer to ensure full and frank access to legal advice'* and that *'disclosure would undermine the general principles of legal professional privilege and the administration of justice'*.
26. The Commissioner attaches significant weight to the importance of LPP in its wider context. The Commissioner notes that LPP is an established and fundamental principle of the justice system which allows parties to take advice, and discuss legal interpretation or matters of litigation freely and frankly in the knowledge that such information will remain confidential. This was re-enforced in the Upper Tribunal appeal in *DCLG v Information Commissioner & WR [2012] UKUT 103 (AAC) (28 March 2012)*⁴, where the Tribunal considered the significance of LPP under the EIR, allowing the appeal by DCLG and re-making the decision of the First Tier Tribunal. The Upper Tribunal stated that an adverse effect

³https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

⁴<http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j3477/GIA%202545%202011-00.doc>

upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. The Upper Tribunal also accepted that it was not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; but suggested that there would need to be special or unusual factors in play for this not to be the case.

27. The Commissioner therefore accepts that disclosure of information which is subject to LPP would have an adverse effect on the general course of justice as over time there will be a weakening of confidence in LPP if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' will have reduced faith that discussions will remain private and therefore communications would become inhibited. She therefore concludes that exception 12(5)(b) is engaged.
28. However the Commissioner does not accept that disclosure of the specific information falling under this request would (i.e. more likely than not) have an adverse effect on the course of justice for the purposes of litigation. The Council has stated that 'we consider disclosure to be advantageous to any aggrieved party wishing to challenge the Council's final decision on the planning application', but this is not a valid argument since opportunities for legal challenges have now passed.

The Public Interest Test

29. Once it has been established that exception 12(5)(b) is engaged, under regulation 12(1)(b) a public authority must then apply the public interest test. This means that a public authority must consider, in all the circumstances of the case, whether the public interest in maintaining the exception outweighs the public interest in disclosure. When assessing this, the public authority must apply a presumption in favour of disclosure.
30. The EIR implements the EU Directive 2003/4/EC on public access to environmental information. The public interest in disclosure is emphasised in the preamble to the directive:

"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."
31. The Directive derives from the 'Convention on Access to Information, Public Participation' in Decision-Making and Access to Justice in

Environmental Matters', known more commonly as the Aarhus Convention. The Objective of the Convention is that:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information ... in accordance with the provisions of this Convention."

32. It is therefore clear that there is a strong, general interest in the disclosure of environmental information to promote public participation in decision-making and facilitate better living environments. There are also other aspects of public interest in transparency, accountability, integrity and value for money that are promoted through the disclosure of information by public authorities. However this must be considered in the context of what the exception is protecting, in this case LPP.

The Complainant's Position

33. The complainant's concern relates to the designation of the planning application as a 'minor' development rather than 'major'. This is because the consultation process, related timescales and required documentation is different depending on the designation. He wishes to know what questions were asked of the in-house legal team by the Council's planning officer to understand why the application was deemed 'minor' when all waste applications should be categorised as 'major'. This is of particular significance as the development impacts on environmental health issues affecting the local community such as noise pollution, potential fire risk and vermin.
34. The complainant links his concern about the granting of the application, and potentially others from the University of Bath, to the conduct of local councillors and their declaration or otherwise of interests in, or benefits/hospitality from, the University. He is pursuing a number of complaints against the Council in connection with this, but they have not yet been resolved.

The Council's Position

35. The Council has argued two main points in the public interest for maintaining the exception. Firstly, it considers that disclosure of LPP can lead to a weakening of confidence in the general principle behind LPP – that being safeguarding the openness between client and lawyer in order to obtain full and frank legal advice thereby supporting the administration of justice.
36. Secondly, the Council has argued that disclosure of the information would expose the Council to challenge *'whilst highlighting the strengths*

and weaknesses of the advice and unbalancing the level playing field under which adversarial proceedings are to be carried out.'

The Commissioner's Position

37. The Commissioner gives weight to the complainant's view that there is a public interest in understanding how the planning application was deemed a minor development when it would appear that, as a waste management application, it should perhaps have been considered a 'major' development. The Commissioner notes 'The Town and Country Planning (Development Management Procedure) (England) Order 2015' which states:

"major development" means development involving any one or more of the following—

(b) waste development;"

38. It is not the Commissioner's remit to interpret planning regulations, and therefore make a decision on whether the Council was correct in its determination of the application as a 'minor' development. However, she raises this point as it forms the crux of the complainant's concern that the application was not handled correctly, and on the face of the above regulations, she understands this concern. As the EIR are designed to promote public participation in environmental matters, and designating the application as major or minor would have a direct impact on the scope of public participation, there is a strong public interest in the release of information that would shed light on whether the Council's determination was correct.
39. The second issue that the complainant raises is the conduct of Councillors and appropriate declaration of interests or benefits in connection with University of Bath. The Commissioner has not taken this into account when considering the public interest as the request was for the questions asked by the planning officer of the in-house legal team in connection with the application. This is not related to the conduct of Councillors. Any concerns regarding Councillor conduct and the actual granting of the planning application is not specifically related to the complainant's request. In any event, the complaints made by the complainant to the Council in this respect have yet to be concluded.
40. The Commissioner has explained, under her arguments regarding the engagement of LPP, that she gives little weight to the Council's view that the withheld information attracts litigation privilege as there is no possibility of appeal at this stage. Consequently, the Council's public interest argument that disclosure of the withheld information would disrupt the level playing field in the event of any legal proceedings is simply not relevant.

41. However, the Commissioner does attach significant weight to the overarching principle of LPP as a cornerstone of the English legal system and essential in ensuring a free and frank exchange of views and advice between a client and their lawyer for the administration of justice. As supported by the Upper Tribunal's decision in the DCLG case referenced earlier, the Commissioner considers that the undermining of LPP through the release of information under FOIA and EIR requests would harm the course of justice. Although the Commissioner accepts that there is meaningful public interest in understanding how the Council arrived at its position in determining the planning application as minor, particularly given the planning regulations referred to earlier, she does not consider that in this case release of the withheld information is of sufficient public interest to override the principle of LPP, and therefore accepts that the public interest rests in maintaining the exception under 12(5)(b).

Right of appeal

42. 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

43. 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.
44. 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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