

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 December 2019

Public Authority: Bristol City Council
Address: City Hall
PO Box 3399
Bristol
BS3 9FS

Decision (including any steps ordered)

1. The complainant has requested information provided to Cotham School about Stoke Lodge Playing Fields prior to its academy conversion in 2011. Bristol City Council disclosed some information and withheld other information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Bristol City Council has correctly withheld the requested information
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 4 April 2019, the complainant wrote to Bristol City Council (the "council") and requested information in the following terms:

"The purpose of the request is to identify information provided internally and to/by Cotham School about Stoke Lodge Playing Fields prior to its academy conversion in 2011 - specifically the then-current usage of those fields by the school, other groups and members of the public, and the terms of the proposed lease to be granted on academy conversion. This includes both internal emails within BCC Property/Estates Information/Legal Services etc and/or correspondence between members of those teams and Cotham School or their solicitors.

A useful starting point would be the email dated 2 June 2011 timed at 16:42 addressed to 'PROPERTY, Estates Information Team' - subject: Cotham - Proposed Academy Conversion - Stoke Lodge Playing Fields. Please disclose this email and attachment (labelled Cotham Off-Site Playing Fields).

This email was in response to an email dated 1 June 2011 timed at 16:23, which itself refers to another email dated 23 May 2011.

Please disclose the whole of this email thread, together with any attachments, both before and after the 2 June 2011 email identified above; and any correspondence on the same general theme."

5. The council responded on 30 April 2019. It disclosed some information and withheld other information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
6. Following an internal review the council wrote to the complainant on 6 June 2019. It stated that it was maintaining its position.

Scope of the case

7. On 26 June 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied the exception in regulation 12(5)(b) to withhold some of the requested information.

Reasons for decision

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

9. The council has withheld a series of emails from June 2011 providing legal advice on the terms of the lease of Stoke Lodge playing fields to be granted to Cotham School when it was due to convert to an academy in September 2011.
10. Under this exception a public authority can refuse to disclose information on the basis that "...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".
11. The Commissioner's guidance explains that '*an inquiry of a criminal or disciplinary nature*' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law¹. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that '*an inquiry of a criminal or disciplinary nature*' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
12. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".

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

Is the exception engaged?

13. By way of background, the council explained that the shared use of Stoke Lodge playing fields in Bristol by Cotham School and local residents has been a contentious matter for some years. It confirmed that the matter has resulted in a recent judicial review² in relation to a successful town or village green (TVG) application by a group of local residents.
14. The council confirmed that the disputed information comprises a series of emails from June 2011 providing legal advice on the terms of the lease of Stoke Lodge playing fields to be granted to Cotham School when it was due to convert to an academy in September 2011. The council stated that the advice was provided by a council lawyer to the council (their client) and that it is, therefore, subject to LPP.
15. Once a public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures.
16. Waiver is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. In this context 'cherry picking', or only revealing part of the advice given, isn't permitted.
17. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under the EIR. This is because the EIR is concerned with disclosures to the world at large rather than disclosures to a limited audience. In an EIR context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.
18. The council confirmed that it is satisfied that the confidentiality attached to the withheld information has not previously been lost. It confirmed that the advice remains relevant to consideration of any similar legal issues by the council and therefore remains confidential.

² https://cornerstonebarristers.com/cmsAdmin/uploads/cotham-judgment_.pdf

19. The complainant has argued that extracts of the legal advice have previously been disclosed by Cotham School (not in response to a request for information) and that the information was subsequently published on Twitter.
20. The council has argued that it considers privilege is maintained because it did not consent to waive LPP and only part of the information was published. It has also confirmed that the Tweet in question is no longer available. The council further confirmed that Cotham School has confirmed that the advice emails have since been kept confidential and not disclosed further.
21. Having considered the council's arguments and referred to the withheld information and publically available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
22. The Commissioner is of the view that disclosure of information of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice. She 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.
23. 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

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.

Public interest in disclosing the information

25. The council has acknowledged the general principle in favour of disclosure under the EIR. It has also recognised the importance of transparency and accepted disclosure of the requested information will ensure that it remains accountable to the public in respect of its operations and decision making.

26. The council has further recognised that disclosing information would contribute to the development of public debate and allow the public to understand the rationale behind the council's decisions. The Commissioner is mindful that the matters to which the request refer are a matter of local concern and accepts that disclosure of the information would serve the public interest in promoting understanding of the council's decision-making and in providing reassurance that appropriate legal advice has been sought.

Public interest in maintaining the exception

27. The Commissioner considers that there is a strong public interest in public authorities 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 which, in turn, would have a negative impact upon the quality of decisions made by the council which would not be in the public interest.

28. The council has further argued that there is a strong public interest in maintaining the confidentiality of legal advice to allow public authorities to fully understand their rights and obligations without fear of interference so that their concerns and requirements can be honestly and fully addressed.

29. The council has submitted that releasing the information would compromise its ability to defend itself in the event that it is subject to any future legal proceedings in relation to the Stoke Lodge TVG. It confirmed that a release under EIR is effectively a release to the public at large and, should the information be disclosed, the advice could be analysed for weaknesses which could then be exploited in the future. The council maintains that it is in the public interest that it is able to defend its position without having to reveal it in advance.

30. The Commissioner is mindful that the public interest in maintaining the integrity of LPP is stronger when legal advice is recent or still live. In this case the council has confirmed that a further TVG application has been made in relation to this matter. The council has clarified that it has two distinct roles in relation to this: it is the landowner and is opposing the application in that capacity; and, it is the Commons Registration Authority and makes the decision in relation to the application in that capacity. The council has confirmed that the legal advice relates to the council's role as landowner and the TVG application process is dependent on many factors and can take a year or more to be resolved.

Balance of the public interest

31. 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.
32. 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”.
33. The Commissioner recognises that the complainant and the wider community have genuine concerns about the substantive matter (the use of Stoke Lodge playing fields) and legitimate reasons for having sight of the council’s legal advice.
34. The Commissioner notes that the legal advice is still current. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council’s strategy in such scenarios. She acknowledges that this would result in adverse effect to the course of justice by revealing the council’s legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner’s view, this weighs heavily in the balance of the public interest test in this case.
35. Whilst the Commissioner recognises there is a public interest weighting in favour of disclosure she must consider the broader public interest in allowing the council to consider and carry out its legal obligations without these being undermined. She considers that, given that the advice is relevant to current or future TVG applications, disclosure would have tangible adverse effects on the council’s ability to carry out its legal and planning functions. Whilst she is sympathetic to the complainant’s concerns she considers that other legal remedies for challenging any decisions made by the council in this regard are more appropriate than disclosure under the EIR.
36. Whilst the Commissioner accepts the complainant’s interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
37. The Commissioner does not consider that the arguments in favour of disclosure in this case carry over-ridingly significant, specific weight.

She has determined 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).

38. 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.

Right of appeal

39. 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@justice.gov.uk

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

40. 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.
41. 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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