

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 29 September 2020

Public Authority: Chelmsford City Council
Address: Civic Centre
Duke Street
Chelmsford
Essex
CM1 1JE

Decision (including any steps ordered)

1. The complainant requested from Chelmsford City Council (the Council) information consisting of planning documentation associated with the approved class for a specific property. The Council stated that all relevant documents requested were accessible in its planning portal, except legal advice that the Council sought and received in relation to this property. The Council cited the exemption provided under section 42(1) of the FOIA (legal professional privilege) as its basis for refusing to disclose this document. During the course of the Commissioner's investigation the Council acknowledged that the request should have been considered under the EIR instead of the FOIA. However, the Council maintained that the withheld information was exempt under regulation 12(5)(b) (the course of justice) of the EIR.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) to the withheld information.
3. The Commissioner requires no further steps to be taken as a result of this decision notice.

Background information

4. In 2018, a leisure and sports centre in Great Baddow, Chelmsford was put up for sale.
5. A local charity called Chelmsford Muslim Society purchased the leisure and sports centre. A number of local residents organised a campaign to express their concerns that the new owner was changing the use of the leisure and sports centre, and to oppose these changes¹. Their concerns became the subject of a number of local media reports².
6. The Council's planning department sought legal advice on the plans for the building.

Request and response

7. On 18 January 2020 the complainant wrote to the Council and requested information of the following description:

"All planning documentation associated to the APPROVED USE CLASS for this property.

Included within this information we would request the following information:

1) The existing approved Use Class (As defined under the Town and Country Planning (Use Classes) Order 1987

2) Details of any previous approved use class and any amendments made since the original building was built under planning reference 08/1872/FUL

3) Any conditions set within the existing approved Use Class.

4) Copies of any documentation associated to the initial application for Use Class and associated response

¹ <https://www.savethehamptons.co.uk/>

² <https://www.essexlive.news/news/essex-news/chelmsford-leisure-centre-could-become-3734250>

5) Details of any current submitted applications for change of use from the current approved Use Class."

8. On 21 March 2019 the Council responded. It stated that all relevant information regarding this property's planning history was available online on its planning portal, and provided the complainant with a web-link to the portal. The Council also added that *"It is the Council's informal view that current use does not fall within any one particular use class."* and *"...that there are no current planning applications for change of use for this site."*
9. Remaining dissatisfied with the response received, on 4 February 2020 the complainant wrote to the Council and expressed his dissatisfaction with the response. The complainant asked the Council to conduct an internal review.
10. The Council conducted the internal review and sent its outcome to the complainant on 3 March 2020. The Council added that it recently sought and received legal advice in relation to this property. However, the Council decided to withhold this information citing the exemption provided under section 42(1) of the FOIA (legal professional privilege) as its basis for doing so. It maintained that the remainder of the information it held within the scope of the complainant's information request was available on its planning portal.

Scope of the case

11. The complainant contacted the Commissioner on 5 March 2020 to complain about the way his request for information had been handled. He expressed his disagreement with the Council's decision to withhold some information because it considered it to attract legal professional privilege (LPP). The complainant stated that the purpose of his complaint to the Commissioner was to object to the Council's decision to withhold this information and asked her to review this case. The complainant did not raise any concerns relating to the information the Council stated was available on its planning portal.
12. During the course of the investigation, the Council was asked to reconsider the access regime applied in its handling of the complainant's request. The Commissioner gave a view that the EIR was the appropriate legislation as opposed to the FOIA. The Council agreed with the Commissioner that the request should have been handled under the EIR, and stated that it considered that the withheld information was exempt from disclosure under regulation 12(5)(b) – adversely affect the course of justice – as it still believed it to be covered by LPP.

13. The following analysis covers whether the Council was correct to handle the request under the EIR. The Commissioner has also considered whether it was entitled to rely on regulation 12(5)(b) of the EIR in relation to the request and whether the balance of the public interest favoured maintaining the exception in respect of the withheld information.

Reasons for decision

Regulation 2(1) – is the information environmental?

14. The Council, in different phases, referenced both section 42 of the FOIA and regulation 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 on:

“(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;”

15. The Commissioner has examined the withheld information. She notes that it consists of a communication between the Council's planning department and its legal department with the purpose of seeking legal advice on a number of points raised by the planning department, which were responded to in the form of legal advice by the legal department. The points raised were related to a specific planning permission and the lawful use of the building concerned.
16. The Commissioner considers that this information is on activities affecting or likely to affect the elements and factors of the environment as defined at regulations 2(1)(a) and 2(1)(b). She is therefore satisfied that the information falls within the definition of environmental information at regulation 2(1)(c) of the EIR.

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

17. Under regulation 12(5)(b) a public authority can refuse to disclose information to the extent 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.
18. The Commissioner has issued guidance on the application of regulation 12(5)(b)³. This regulation will be likely to be engaged if the information in question is protected by legal professional privilege (LPP), due to the adverse effect on the course of justice that may result through the disclosure of information otherwise confidential under LPP. Consideration of the specific circumstances is, however, required when addressing the public interest test. In addition, 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.
19. The Council considers the information it holds falling within the scope of the request is subject to LPP. Regulation 12(5)(b) does not make direct reference to LPP, but that information may be subject to LPP can be relevant when considering whether its disclosure would result in an adverse effect to the course of justice.
20. LPP protects the confidentiality of communications between a lawyer and a client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)*⁴ 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. "

³ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

⁴

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

21. 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 a professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

Is the exception engaged?

22. The Council has identified the withheld information as being subject to legal advice privilege.
23. In order to attract LPP, the information must be communicated confidentially in a professional capacity between a client and a professional legal adviser. However, not all communications from a professional legal adviser will attract advice privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
24. The Council confirmed that the withheld information in question consists of a document which contains a number of questions which were raised by its planning department in the capacity of client and the responses to the questions raised provided by the Council's legal department in the form of legal advice. The questions raised were in relation to the legal use of a specific building - the subject matter of the planning permission referred to in the complainant's information request. The Council's principal lawyer, in this case, provided legal advice in the capacity of the legal adviser.
25. The Council explained that the sole purpose of this communication between its planning and legal departments was to obtain legal advice on whether the change of use would be required for the building in question.
26. The Council maintains that no part of the advice has been disclosed and that the privilege attached to the communication is, therefore, intact.
27. In the course of her investigation, the Commissioner has examined the withheld information. She notes that it is evident that the information represents confidential communications between a client and legal adviser acting in their professional capacity, and made for the sole purpose of obtaining legal advice.

28. In order to engage the exception under regulation 12(5)(b) it must be established that disclosure of the information in question would adversely affect the course of justice. As the subject matter of the legal advice is in relation to ongoing issues that, in the future, may become subject to a legal dispute between the parties involved, the Commissioner's view is that disclosing this information to the world at large would adversely affect the course of justice.
29. The Commissioner considers that a public disclosure of the legal advice that the Council obtained in relation to this specific property would inhibit the Council's ability to defend its position in a potential legal dispute..
30. The Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of this information and has therefore gone on to consider the public interest test.

Public interest test

31. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, the 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 arguments in favour of disclosing the requested information

32. The Council acknowledges that there is a public interest in disclosing the legal advice obtained because it would give additional understanding to the public about the operation of the Council and its decision making process.
33. The complainant did not present any specific arguments in favour of disclosing the information withheld, but he expressed his firm belief that, as a member of the public concerned, he is entitled to have access to information which has an impact on the area where he lives.

Public interest arguments in favour of maintaining the exception

34. The Council's view is that disclosing legal advice would break the confidentiality of communications between the client and the legal adviser. The Council maintains that this disclosure would inhibit its lawyers from giving advice in the future, because their assumption is that when they provide legal advice it would remain confidential and would not be disclosed to the world at large.

35. In addition the Council stated that the advice provided before a particular situation had materialised. In this respect, the Council claims that the legal advice was preliminary. The Council added that if, in the future, a planning application was to be submitted in relation to the building in question, the Council's legal department would be asked to provide further advice, depending on the circumstances.
36. The Council explained that, following other information requests, it has already disclosed some information on this topic, including the Council's correspondence with the parties involved.
37. The Council expressed its concern that there is some tension in the community about the use of this specific building and disclosing the legal advice, in this situation, would not result in a positive impact on the community.
38. The Council concluded that its view was that the public interest in maintaining the exception outweighed the public interest in disclosing the information.

Balance of the public interest

39. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. She recognises that there may be a need for enhanced transparency and scrutiny of decision making on planning matters, especially when such decisions may have an impact on large numbers of the community or have specific environmental implications.
40. However, the Commissioner reiterates that she 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 communication between client and lawyer, in order to ensure access to full and frank legal advice. The Commissioner believes that this principle is fundamental to the administration of justice.
41. This view has been upheld by the Information Tribunal as well on many occasions. For example, in the above referenced case of *Bellamy v The Information Commissioner and the DTA*, the Tribunal confirmed that there is a strong element of public interest inbuilt into the privilege itself. The Tribunal noted that there should be at least equally strong countervailing considerations to override that inbuilt interest.

42. Furthermore, in its decision of 28 March 2012, in the case of *DCLG v Information Commissioner & WR* [2012] UKUT (103 AAC)⁵, the Tribunal concluded that the risk of disclosure of legally privileged information leading to a weakening of confidence in the general principle of LPP is a public interest factor of very considerable weight in maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
43. Having viewed the withheld information and considered the relevant context, the Commissioner is satisfied that the public interest in the maintenance of the exception outweighs the public interest in disclosure of the information in question.
44. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
45. As set out above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(b) was applied correctly.

⁵ <https://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>

Right of appeal

46. 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

47. 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.
48. 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

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