

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

Decision notice

Date: 11 November 2020

Public Authority: Derry City and Strabane District Council ("the Council")

Address: foi@derrystrabane.com

Decision (including any steps ordered)

1. The complainant has requested information from the Council in relation to a specified planning application. The Council disclosed some information to the complainant, however it refused to disclose the remainder, citing regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) of the EIR to the withheld information.
3. Therefore the Commissioner requires no steps to be taken.

Request and response

4. On 24 April 2020, the complainant wrote to the Council and requested information in the following terms:

"RE: Planning application A/2014/0035/RM - New housing at Drumahoe, Derry.

This application was on the Planning Committee schedule for approval in December 2019. However, as I understand, it was removed from the schedule at the last minute after instruction from the Chief Planner's Office in Belfast.

I would be grateful if you would advise what are the CPO's reasons and/or concerns with Derry/Strabane Council's recommendation to approve this development?

Under Freedom of Information / Environmental Information Regulations, can you provide me with:

1. any correspondence and records of meetings and telephone conversations that have taken place between the CPO and the Council since the December 2019 planning committee.
2. any correspondence and records of meetings and telephone conversations that have taken place between the Council and the applicant / agents for the development since the December 2019 planning committee."
5. The Council responded on 9 June 2020. It disclosed some information to the complainant, however it stated that the remaining information ("the withheld information") could not be disclosed, citing regulation 12(5)(b) of the EIR as a basis for non-disclosure.
6. Following an internal review the Council wrote to the complainant on 7 August 2020. It stated that it was upholding its original response.

Scope of the case

7. The complainant contacted the Commissioner on 26 August 2020 to complain about the way her request for information had been handled.
8. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of regulation 12(5)(b) to the withheld information.

Reasons for decision

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

9. 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.

10. The Commissioner has issued guidance on the application of regulation 12(5)(b).¹ 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.
11. The Council considers that the withheld information is subject to LPP. Regulation 12(5)(b) does not make direct reference to LPP, but the fact that information may be subject to LPP can be relevant when considering whether its disclosure would result in an adverse effect on the course of justice.
12. 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)* 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."
12. 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.

¹ https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

Is the exception engaged?

13. The Council has identified the withheld information as being subject to legal advice privilege.
14. 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.
15. The Council confirmed that the withheld information in question consists of legal advice regarding the legality of the environmental impact assessment process which was carried out regarding the residential development which is the subject of the specified planning application which is the crux of the complainant's request. The advice was provided to the Council by external legal counsel, i.e. a QC.
16. The Council explained that the sole purpose of this communication between it and its legal adviser was to obtain legal advice on the environmental impact assessment process.
17. The complainant states that LPP has been lost because the legal advice in its entirety was disclosed to the Department for Infrastructure (DfI) and also part of the legal advice was disclosed in correspondence between the Council and Gravis Planning.
18. Where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected by LPP. If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its LPP protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.

19. The Council has stated that, as the Commissioner is aware, the DfI has oversight of the planning function and therefore a shared common purpose with the Council in this endeavour. The advice was shared with the DfI upon the understanding that LPP was not being lost, which was subsequently communicated in telephone conversations regarding the matter. As the DfI has not shared the advice elsewhere, it is the Commissioner's view that this amounts to a restricted disclosure and therefore LPP has not been lost.
20. In relation to the correspondence, the Council accepts that part of the legal advice was disclosed in correspondence, and has provided that correspondence to the complainant in response to her request for information. However, the Council has stated to the Commissioner that the part of the advice which was disclosed does not reveal any part of the detail or substance of the remaining advice, so privilege has not been lost in respect of the remaining advice.
21. Having found that the withheld information has the necessary characteristics for advice privilege and that the privilege has not been lost, the Commissioner accepts that this information is subject to LPP. Having examined the withheld information and in view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

Public interest test

22. 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 arguments in favour of disclosing the withheld information

23. The Council acknowledged that there is a public interest in transparency and accountability and in ensuring that the public fully understands the Council's position.

24. There is also a public interest in knowing that the Council's decisions are reached on the basis of sound legal advice.

Public interest arguments in favour of maintaining the exception

25. The Council's view is that the balance of the public interest lies in the exception being maintained in this case.

26. In its response to the complainant's request, the Council stated that: -

The arguments which were taken into account in favour of maintaining the exception were:

- The specific circumstances of the case and the content of the information requested in relation to those circumstances;
 - The timing of the request;
 - The amount of information already in the public domain;
 - The impact of disclosure upon individuals and the wider public; and
 - The risk of inhibiting debate.
 - The likelihood and severity of harm that disclosure might cause.
 - The significance and sensitivity of the information.
27. The Council did not go into detail regarding these arguments in either its initial response or internal review response. When invited by the Commissioner to add further detail to these arguments, the Council simply stated that the legal advice constitutes confidential communications between a legal adviser and his client and that full and frank legal advice assists public authorities with their obligations.

Balance of the public interest

28. As the Council has not provided detailed arguments in respect of either maintaining the exception or disclosing the information, nor has it provided evidence of having carried out a balancing exercise, the Commissioner has assessed the balance of public interest in this case using what information is available to her.

29. 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 in planning cases. This is particularly the case where information relates to matters that affect large numbers of people or have specific environmental implications.

30. However, following previous decisions of the Information Tribunal, 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 smooth running of the course of justice.
31. In the Commissioner's view, in this instance, weight must be placed on the Council's ability to carry out certain aspects of the planning process. She accepts that confidentiality may be needed at certain stages of the process, to ensure that proceedings are conducted as effectively as possible. In the current case, she considers that disclosing the specific information requested would adversely affect this confidentiality.
32. The Commissioner is also satisfied, as she has been in previous decisions that, during the formal planning process, the public has the opportunity to engage openly with the Council.
33. Whilst the Commissioner considers that the arguments in favour of disclosure carry some 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).
34. 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).
35. 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.

Right of appeal

36. 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

37. 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.
38. 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

Deirdre Collins
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