

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 February 2021

Public Authority: Mid Suffolk District Council
Address: Endeavour House
8 Russell Road
Ipswich IP1 2BX

Decision (including any steps ordered)

1. The complainant has requested information relating to a specific planning application. Mid Suffolk District Council withheld the requested information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that Mid Suffolk District Council has correctly applied regulation 12(5)(b) to all the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 11 February 2020, the complainant wrote to Mid Suffolk District Council (the "council") and requested information in the following terms:

"I request to see a copy of an email from [Redacted] in relation to advice in respect of paragraph 64 of the NPPF and planning application DC/19/05114."

5. The council responded on 26 February 2020. It stated that it was withholding the information under the exception for the course of justice – regulation 12(5)(b).
6. Following an internal review, the council wrote to the complainant on 15 April 2020. It stated that it was maintaining its reliance on regulation 12(5)(b). The council confirmed that it was additionally relying on the exception for internal communications (regulation 12(4)(e)) to withhold the information.

Scope of the case

7. On 16 September 2020 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 withheld the requested information.

Reasons for decision

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

9. 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."

10. The Commissioner has issued guidance on the application of regulation 12(5)(b)¹. The guidance confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would result through the disclosure of, otherwise confidential, information covered by LPP.
11. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* (Bellamy) 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."*²
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 professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

Is the exception engaged?

13. The council has stated that the withheld information constitutes legal advice given by an in-house solicitor in a professional capacity in response to a request for legal advice from colleagues carrying out the day-to-day work of the council which, in accordance with their professional rules, the solicitor is required to regard as their client as well as employer. The council confirmed that the advice has not been

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

² https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_informa_t

disclosed externally nor indeed wider within the council, or otherwise treated in any way that has the effect of waiving the privilege.

14. Having viewed the withheld information and referred to the council's submissions the Commissioner is satisfied that the information is subject to LPP and that it therefore falls within the scope of the exception.
15. In relation to adverse effects to the course of justice, following the decision of the Upper Tribunal in the case of *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), the Commissioner considers that adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. Whilst the Commissioner accepts it is not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; she considers that there would need to be special or unusual factors in play for this not to be the case.
16. The council has explained that the legal advice concerns the interplay between its council's policies on affordable housing and central government policy on self-build housing. The council confirmed that this issue, and associated issues concerning self-build housing arise frequently and are not straightforward. It explained that the ability of planning officers and councillors to take legal advice in a full and frank manner would be compromised by disclosure of advice like this.
17. Having considered the available evidence, the Commissioner has concluded that the information is subject to LPP and she 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. She has gone on to consider the public interest test.

Public interest test

18. 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 in disclosure

19. The council has acknowledged that there is always some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness of and understanding of

planning/environmental issues, the free exchange of views and public participation in such matters.

20. The Commissioner also considers that there is a public interest in ensuring that public authorities have reached decisions on the basis of sound advice.
21. The complainant has not provided any arguments in relation to the public interest in disclosure.

Public Interest In Maintaining The Exception

22. The Commissioner acknowledges 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 counsel to ensure access to full and frank legal advice. She accepts that the maintenance of LPP is fundamental to the course of justice.
23. The council directed the Commissioner to the Upper Tribunal (UT) case of DCLG-v- IC and WR 2012 UKUT 103 ACC. 28.03.2012 and provided the following submission:

"The UT affirmed the principle that LPP is a very important part of our legal system in the broad sense and thus always has an innate strength and force as an exemption regardless of the precise circumstances of each case. Every disclosure of privileged information weakens public confidence in the principle of LPP itself and in doing so harms a concept which exists to benefit the public as a whole. The UT accepted that this is a factor in favour of maintaining the exemption of very considerable weight. It added that there would have to be 'special or unusual factors' in a particular case to justify not giving it weight - in that reported case there were none and we suggest that in this, our case, there are none."

24. The council has argued that the complainant and anyone else who disputes the approach of the council's actions and decisions as a local planning authority in respect of the planning application in question has the benefit of a process with numerous checks and balances. The council has argued that the complainant may take their own professional advice, argue their points with the council and ultimately appeal to the Planning Inspectorate.
25. The council has further argued that the matter to which the advice relates may become contentious if a planning appeal takes place or used in many applications across the district to undermine the council or even the national position to supply affordable homes. The council has submitted that its interpretation of national policy in terms of affordable housing and self-build is also a key feature of its Local Plan preparation

and there is a risk that this legal advice may be used further in representations in that process.

Balance of the public interest

26. 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.
27. 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 course of justice.
28. However, the Commissioner is mindful that the withheld advice is still live and relevant to future applications which relate to the site in question. Whilst the complainant or others might disagree with the council's position, there are existing legal channels available for those wishing to challenge planning decisions. In order to justify circumventing these channels and interfering with the course of justice, sufficiently weighty public interest factors will need to be present.
29. The Commissioner considers that the public interest in the context of the EIR refers to the broader public good. Where decisions made by authorities have a significant effect on the local community the balance in favour of disclosure might carry enough weight to challenge the weight in favour of maintaining the confidence attached to LPP. However, the Commissioner has no evidence that these effects are present in this case.
30. The Commissioner considers that it is highly likely that disclosing the information would damage the council's ability to undertake its planning duties effectively and compromise its legal position. This, in turn, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice. The Commissioner has not been presented with any evidence that there are grounds for circumventing the legal mechanisms and remedies which are already available in relation to this matter.
31. The Commissioner considers that there is a strong public interest in allowing local authorities to carry out their duties in respect of planning as effectively as possible, particularly in situations where decisions made might be subject to legal challenge. The Commissioner considers that

providing the complainant with the information via the EIR would undermine the council's ability to defend its decision with no reciprocal disclosure being made by the other party. The Commissioner considers that the public interest in benefitting the interests of an individual do not carry significant weight when balanced against the public interest in protecting the course of justice from adverse effects and the public interest in allowing the council to carry out its functions as a planning authority, including the seeking of legal advice to facilitate this function.

32. In view of the above, the Commissioner does not consider that the arguments in favour of disclosure in this case carry 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).
33. 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.
34. As she has concluded that all the withheld information is subject to the exception in regulation 12(5)(b) she has not gone on to consider the application of regulation 12(4)(e).

Right of appeal

35. 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

36. 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.
37. 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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