

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

Date: 25 October 2022

Public Authority: St Albans City and District Council
Address: District Council Offices
St Peter's Street
St Albans
AL1 3JE

Decision (including any steps ordered)

1. The complainant requested information relating to a certificate of lawfulness application.
2. St Albans City and District Council (the Council) refused to provide some of the requested information on the basis that regulation 12(5)(b) (course of justice) of the EIR applied.
3. The Commissioner's decision is that the Council was entitled to apply regulation 12(5)(b) to withhold that information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 3 August 2021, the complainant wrote to the Council and requested information in the following terms:

"I would like to request all information held by all the St Albans council departments on [address redacted] Application [reference redacted] under the freedom of information act 2000. This is to include all but not limited to all recorded information which includes information held on computers, in emails by all parties and officers and in printed or handwritten documents as well as images, video and audit recordings".

6. The Council responded on 26 August 2021 confirming that it holds relevant information. It provided some of that information, but refused to provide the remainder, citing the following exemptions of FOIA as its basis for doing so:
 - section 21 (Information reasonably accessible to the applicant by other means)
 - section 40(2) (personal information)
 - section 42 (Legal professional privilege)
7. The Council described the information withheld by virtue of section 42 as 'two emails in the file between our legal department and a planning officer'.
8. Following an internal review the Council wrote to the complainant on 27 September 2021, revising its position. It released further information, namely emails and photographs. It also released redacted versions of the emails previously withheld in full by virtue of section 42.

Scope of the case

9. The complainant contacted the Commissioner on 7 November 2021 to complain about the way his request for information had been handled. He considered that the public interest favoured disclosure of the information withheld under section 42.
10. In its submission to the Commissioner, the Council revised its position, advising him that it is relying on the equivalent exception in the EIR – namely regulation 12(5)(b) (the course of justice and inquiries) - to withhold the information previously withheld under section 42 of FOIA.
11. In the circumstances, having told the complainant that he would consider the Council's application of section 42 of FOIA, the Commissioner considers that the scope of this case is to consider whether the Council is entitled to rely on regulation 12(5)(b) to withhold the disputed information.

Reasons for decision

12. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that its 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.

13. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance¹ on regulation 12(5)(b), encompasses, amongst other types of information, material covered by legal professional privilege (LPP). This approach was supported by the Upper Tribunal in *DCLG v the Information Commissioner & WR* [2012] UKUT 103 (AAC) in which the Tribunal, as set out in the Commissioner's guidance, stated that, in the absence of special or unusual factors, an adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege.
14. The Council's position is that the withheld information relates to discussions with a solicitor for the purpose of providing advice on how to proceed with the Certificate of Lawfulness application. It considers that the information is subject to LPP and therefore, that the exception is applicable.
15. The Commissioner recognises that LPP exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice.
16. 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 the withheld information relates to the obtaining and receiving of legal advice. He is also satisfied that disclosure of that information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

The balance of the public interest

17. Regulation 12(5)(b) is a qualified exception, and the Commissioner has therefore considered the balance of the public interest to determine

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

whether it favours the disclosure of the information, or favours the exception being maintained.

Public interest in disclosure

18. The Council acknowledged that openness and transparency is a fundamental part of the planning process. In support of its view that there is always a public interest in a public authority conducting its business in a transparent manner, it confirmed that access had been provided to much of the planning material, and, in particular, the relevant Committee report in this case.

Public interest in maintaining the exception

19. The Council has stressed the public interest in the preservation of confidence in the general principle of LPP. It argues that there is a need to maintain the confidentiality of the legal advice on which it bases its actions, in order to defend decisions which may be challenged at various stages of the planning process.

20. It considers that the district as a whole benefits from its ability to seek, obtain, and rely upon legal advice on planning matters.

The Commissioner's decision

21. The Commissioner's role in this case is to determine whether the Council was correct to refuse to provide the requested information for the reasons it has stated.

22. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest.

23. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case² when it stated that: "...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest. It is important that public authorities be allowed to conduct a

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

free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”.

24. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial number of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
25. While the Commissioner acknowledges the complainant’s argument about the number of concerned local residents, he does not consider that the number of people affected is decisive in this case. Nor has he seen any evidence that any of the other factors are present to the extent that they would provide the required weight to tip the balance against the strong public interest in maintaining the exception.
26. The Commissioner therefore finds that the balance of the public interests favours the exception being maintained.
27. It follows that the Commissioner considers that the exception provided by regulation 12(5)(b) was applied correctly.

Right of appeal

28. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

29. 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.
30. 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

Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF