

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 August 2023

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Decision (including any steps ordered)

1. The complainant requested legal advice on issues relating to planning aspects of the Norwich Western Link Road project. Norfolk County Council (the Council) withheld the information requested under regulation 12(5)(b) of the EIR. The Commissioner's decision is that the Council correctly applied regulation 12(5)(b) to the request. He does not require any steps to be taken.

Request and response

2. On 14 February 2023, the complainant wrote to Council and requested information in the following terms:

"Please produce a copy all **legal opinion** produced by a **barrister** on the instruction of Norfolk County Council, and which contains legal advice on issues pertaining to the planning aspects of the Norwich Western Link Road project, and which came into existence during the period 1/1/22 and 1/02/23. For the avoidance of doubt this request does cover emails passing between Norfolk County Council and the barrister or barristers instructed, it refers to a **written advice/opinion in which the barrister(s) sets out his or her understanding of the law as it applies to the issue and provides some legal conclusion**".

3. The Council responded on 28 April 2023 and stated that the information requested was exempt under regulation 12(5)(b) of the EIR. The Council upheld this position at the time of its internal review dated 31 May 2023.

Scope of the case

4. The complainant contacted the Commissioner on 1 June 2023 to complain about the way their request for information had been handled.
5. The scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied regulation 12(5)(b) to the request.

Reasons for decision

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

6. Regulation 12(5)(b) states 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
7. In this case, the Council has withheld legal opinions and other confidential communications between professional legal advisors engaged by the Council's solicitors and the Council for the purpose of seeking and giving legal advice in relation to the Norwich Western Link (NWL) project. The Council considers the withheld information to be covered by legal professional privilege (LPP), specifically 'advice privilege'.
8. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice on specific legal concerns. He therefore considers the information to be covered by LPP on the basis of advice privilege.
9. The Council has confirmed that the legal advice has been issued either directly to the Council itself or via its solicitors. The Council confirmed that it directly engaged the lawyers issuing the advice and it has not been shared with anyone outside the Council. The Commissioner is aware of no evidence suggesting that this privilege has been lost.

10. The Council considers that disclosure of the withheld information will have an adverse effect on the course of justice as it relates to legal advice sought at a key stage of an ongoing development project, which is currently at pre-planning application stage. The matter is very much live, and the Council is considering the viability of delivery of the project.
11. The Council confirmed that delivery of the project will be the subject of a public consultation exercise and it is also likely to be subject to a public inquiry. Disclosure of the withheld information prior to any consultation or inquiry would significantly affect the Council's position.
12. As the withheld information is subject to LPP and relates to a live matter, 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. The Commissioner will now go on to consider the public interest test.

Public interest test

13. 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. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
14. The Council has acknowledged the public interest in the importance of openness, transparency and accountability that would be achieved through disclosure of the withheld information.
15. The Council also accepts that disclosure would improve public understanding of decision-making in respect of the project in question.
16. The complainant pointed out that the Council is looking to spend around £300 million on the NWL project, which involves the construction of a three mile road. Part of the budget will be coming from central government funding but a significant proportion will be funded by the Council itself. Expenditure on the project by the Council will therefore have an adverse impact on Council funding in other areas, such as its budget for social and child services. This will have an impact on a substantial proportion of Council residents.
17. The complainant pointed out that the Council is the developer of this project and as such the need for transparency is greater than normal as it will be presenting the planning application to its own planning committee. The complainant considers there is a greater risk, therefore

of conflict and bias in the determination of the application. There is no suggestion that the application will be referred for independent consideration.

18. The complainant believes that the public has a right to know how the Council is intending to fulfil its planning obligations in respect of the road in question. They consider that the fact that the Council has sought legal advice about the application suggests that there is some uncertainty around planning issues associated with the project. In view of the amount of public money involved, the complainant considers that the public should have sight of the legal advice and be aware of any possible weaknesses in the legal status of the project.
19. The complainant advised that the council does not have a proven track record of transparency in respect of planning matters. It held a public pre-planning consultation about the project between August and October 2022, and to date it has still not published the results of that consultation.
20. In relation to the public interest in favour of maintaining the exception the Council referred to the strong inbuilt public interest in maintaining the principle of LPP. It believes that confidentiality in seeking and obtaining legal advice is essential in order for it to discharge its public duties effectively, particularly when it concerns important matters relating to land development.
21. The Council pointed out that the matter to which the legal advice relates in this case is live, the development is currently at a crucial pre-application stage and the Council is preparing to submit a planning application. The legal advice is key to the preparation of the application as it gives advice which will influence the way in which the Council develops its proposals in the context of relevant legislation and government policy. The Council explained that it is currently awaiting a decision from the Department of Transport as regards funding and a planning application will then subsequently be submitted.
22. The Council feels strongly that it should be able to consult with its lawyers in confidence to obtain legal advice. The disclosure of such advice would be likely to affect the free and frank nature of current and any future legal exchanges between the Council and its advisers, to its detriment. The Council referred to the Commissioner's guidance on LPP and agrees that the confidentiality of legal advice is fundamental to the English legal system.
23. The Council explained that the public will have opportunities to fully engage in the planning process of this development at the appropriate time in the future. It confirmed that the planning application for the scheme will be preceded by a public consultation. In addition, both the

planning process and the process of seeking statutory orders (compulsory purchase order and side roads order) include opportunities to submit comments and objections to the proposals and for a public inquiry to be held. As such, the public will have opportunities to engage in the process as the scheme proposals are progressed.

Balance of the public interest

24. In relation to the public interest in disclosure, the Commissioner recognises that there is a general public interest in transparency and accountability around public authority decision making. He acknowledges that there is a specific public interest in openness regarding matters which have a potential impact on the environment. In this case, the Commissioner accepts that disclosure would provide the public with information relating to project in question and would increase public participation in decision making.
25. In balancing the opposing public interest factors the Commissioner considers it necessary to take into account the in-built public interest in the maintenance of LPP. 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. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice appropriately and/or conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
26. In reaching a decision on this case, the Commissioner has taken into account both party's arguments, the nature of the withheld information and the timing of the request. The Commissioner accepts that at the time of the request and at the time of the internal review, matters concerning the land in question were ongoing, and are still ongoing at the time of this decision notice. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the Council's ability to obtain free, frank and high quality legal advice without the fear of premature disclosure.
27. In weighing up the public interest in this case, whilst the Commissioner accepts that there are strong arguments in favour of disclosure, he does not consider that in this case, there are sufficient or compelling enough arguments in favour of disclosure which would override the inbuilt public interest in information remaining protected by LPP.
28. The Commissioner's decision is, therefore, that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

29. 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 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

30. 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

31. 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.
32. 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

Joanne Edwards
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF