

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 January 2016

Public Authority: Durham County Council
Address: County Hall
Durham
County Durham
DH1 5UE

Decision (including any steps ordered)

1. The complainant has requested legal advice relating to a planning application. Durham County Council refused the request under the exception to adverse affect to the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that Durham County Council has correctly withheld the information under regulation 12(5)(b) and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 16 September 2015, the complainant wrote to Durham County Council (the "council") and requested information in the following terms:
"At the meeting of the Planning Committee on Monday, September 14, the public was cleared from the Council chamber while certain allegedly "confidential" legal advice was given to members while considering a planning application for housing at Parkhill....I therefore request a copy of the legal advice that was given to the Committee and relied upon by members in making their decision on this application."
5. The council responded on 21 September 2015. It stated that it was withholding the information under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR).

6. Following an internal review the council wrote to the complainant on 30 September 2015. It stated that it was maintaining its position.

Scope of the case

7. On 5 October 2015 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 his investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(b) of the EIR.
9. The complainant agreed that they were content for this matter to be dealt with alongside a separate complaint to the Commissioner relating to a request for the same information submitted by another party. The decision in this case is, therefore, reproduced in this associated decision notice (ICO reference: FER0601925).

Reasons for decision

Regulation 12(5)(b) – Adverse affect to the course of justice

10. Regulation 12(5)(b) of EIR 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 enquiry of a criminal or disciplinary nature."

Is the exception engaged?

11. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

12. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

13. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [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 communication or exchanges come into being for the purpose of preparing for litigation¹".
14. There are two types of privilege – legal advice privilege and litigation privilege.
15. In this case the council has stated that the withheld information attracts legal advice privilege. The council explained that the communication was between a council solicitor and client – councillors at a planning meeting. It clarified that press and public were excluded from the meeting and the advice was provided to a restricted number of councillors on a confidential basis and that it has not been disclosed more widely. The council, therefore, contends that the privilege attached to the advice has not been lost.
16. The council confirmed that, in applying the exception, it was relying on the Upper Tribunal judgement in *DCLG v Information Commissioner & WR* [2012], UKUT 103 (AAC) case number GIA/2545/2011, which finds that the undermining of the general principle of legal professional privilege would result in adverse effects to the course of justice.

¹ EA/2005/0023, para 9

17. Having viewed the withheld information the Commissioner is satisfied that it constitutes a communication between a lawyer and a client, in this case, the council, and that this advice has not lost the quality of confidentiality.
18. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to planning, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
19. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Public Interest Test

20. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the information

21. The council has acknowledged that the planning application to which the legal advice relates is a matter of concern for the local community and that disclosure would assist transparency and public understanding of the rationale for its decision making.
22. The complainant has argued that the planning application in question follows a (in their view) similar previous application which was refused planning permission. The complainant has noted that the application relates to a large housing development which would have an impact on the local community. There is, therefore, a public interest in knowing the reasoning behind the granting of the application, particularly in light of the potential environmental impact on the community.
23. They have also raised concerns about the council's decision to exclude the public from the portion of the planning meeting at which councillors were presented with the legal advice in question. Disclosure of the information would assist in dispelling concerns about the clandestine nature of the decision process.

24. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.

Public interest in maintaining the exception

25. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the weighting of such arguments, as they have been submitted to him by the council.
26. The council has argued that, at the time of the request, the developer was in the process of appealing a previous planning decision (see above) and a public inquiry was ongoing on relation to the site in question so the advice related to a live issue. Although the appeal has subsequently been withdrawn (with the granting of planning permission for the new application) the council has argued that the matter of costs still remains to be resolved and disclosure would reveal its legal position, something which would undermine the principle of LPP and benefit those opposed to the council's position.
27. The council has further argued that the planning and legal process provides parties with other remedies to scrutinise and challenge its decision making.

Balance of the public interest

28. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that 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, which in turn is fundamental to the course of justice.
29. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege

itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.

30. Whilst the Commissioner accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice this general principle does not in itself overturn the public interest in preventing adverse effect to the course of justice.
31. Although the genuine interest of the local community in the council's decision in this regard and disagreement with the approach taken is relevant, the Commissioner does not consider it to be decisive. For this counterbalancing to take place, there would need to be specific arguments or evidence demonstrating that an equivalent or greater public interest would be served by disclosure.
32. The Commissioner considers that there would need to be compelling evidence of, for example, maladministration or misuse of public funds to provide a sufficient counterbalance to the impact of disclosure on LPP rather than simply a contrary view. In the absence of such arguments or evidence the Commissioner considers that there is a stronger weight to the arguments for maintaining the exception. He also acknowledges that there are remedies within planning law and the wider legal context for parties to challenge planning decisions made by public authorities. The EIR does not provide an automatic route of access to circumvent these channels.
33. The Commissioner acknowledges the complainant's concerns about the council's decision to exclude the public from its consideration of the legal advice at a public meeting, however, this is not a matter for him; it is for the council to decide how it administers its meetings and its decision-making process.
34. The Commissioner considers that, in this instance, the context within which the information was created and the ongoing legal process provides a powerful argument for maintaining the exception because of the obvious impact on the course of justice.
35. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, he 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).
36. 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.

Right of appeal

37. 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@hmcts.gsi.gov.uk

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

38. 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.
39. 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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