

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 December 2020

Public Authority: London Borough of Ealing
Address: Perceval House
14-16 Uxbridge Road
Ealing W5 2HL

Decision (including any steps ordered)

1. The complainant has requested all correspondence between Ealing Council ("the Council") and Clarion Housing from June 2018 onwards. The Council disclosed some information and withheld some on the basis that it was exempt from disclosure under regulation 12(5)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner's decision is that Council has correctly applied regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 14 February 2019, the complainant wrote to the Council and requested information in the following terms:

I'd like to request a freedom of information search for correspondence between Ealing Council and Clarion Housing.

Any and all correspondence dating from June 2018 to date.

This would include correspondence from any solicitor working on behalf of Clarion Housing which would be dated after January 1st 2019.

This would include recent communications regarding boundary and land disputes for land behind Seaford road W13 as part of the new Sherwood Close development.

5. The Council responded on 5 March 2019. It disclosed some information and stated some further information (namely email correspondence) was withheld under the exception provided by regulation 12(5)(b).
6. On 5 March 2019, the complainant asked the Council to undertake an internal review in respect of the applied exception, and further, of whether additional recorded information was held.
7. Following an internal review, the Council wrote to the complainant on 27 March 2020. It stated that all recorded information had been disclosed, apart from that email correspondence withheld under the exception.

Scope of the case

8. The complainant contacted the Commissioner 9 April 2019 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of the case to be the determination of whether the Council is entitled to rely upon regulation 12(5)(b) to withhold the information.

Reasons for decision

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

10. Regulation 12(5)(b) EIR provides an exception from the duty to disclose information where the 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*". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
11. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' is 'more probable than not'.
12. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Tribunal described legal professional privilege as 'a fundamental condition on which the administration of justice as a whole rests'. The Commissioner accepts that disclosure of legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
13. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these 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. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

Is the exception engaged?

14. The Council has provided a copy of the withheld information to the Commissioner. The Commissioner has identified that it represents an email chain representing legal advice from an external solicitor to Clarion Housing Association and the Council, and the subsequent relaying of that advice to specific officers. The Council has advised that it considers the legal advice is subject to advice privilege. The Council has also advised that any associated confidence has not been lost through the information being disclosed to third parties.
15. In the circumstances of this case the Commissioner understands that the legal advice has been sought in respect of a specific boundary demarcation in which both the Council and Clarion Housing have a mutual interest. The legal advice addresses the potential implications for parties following any determination on the boundary. The Council has explained that this matter remains 'live' and has not yet been resolved.
16. Having considered the above, the Commissioner recognises that disclosure of the information would undermine legal professional privilege, and that the disclosure would also affect the Council's ability to defend itself in related legal challenges. The Council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly do as challenges may be made by persons not bound by the legislation. This situation would be unfair.
17. 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.

The 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.

The public interest in disclosure

19. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
20. In the circumstances of this case the complainant has explained to the Commissioner that he understands the Council is facilitating a boundary change that will impact a number of residents on his road. The disclosure of the information would therefore allow residents the ability to scrutinise this matter and allow a 'level playing field' between parties.

The public interest in maintaining the exception

21. The Council has confirmed that the information relates to live and ongoing matters that have not yet been resolved. As such, the public disclosure of the information would impede the Council's ability to defend its position in these matters.
22. As already indicated, the Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
23. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges and may deter public authorities from seeking legal advice. The Commissioner's published guidance¹ on regulation 12(5)(b) states the following:

In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.

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

24. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without needing to disclose its legal advice in advance. This would provide an unfair advantage to opposing parties, who would not be likewise constrained by having their legal arguments known in advance.
25. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Tribunal recognised this in the *Bellamy* case 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 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...

26. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect, as described above.

Balance of the public interest

27. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the Council.
28. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions. However, having appraised the withheld information itself, and the wider circumstances of the matter, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the Council's right to obtain legal advice in confidence.
29. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. 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 amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.

30. Having considered the context of the request, the Commissioner recognises that the legal advice relates to a boundary matter that will have implications for all affected parties. However, there is no evidence available to the Commissioner that indicates that the Council is acting incorrectly, and the Commissioner understands that the matter may be referred to the Courts should parties wish to challenge any future action. In such a scenario, the Commissioner recognises that it is important the Council be able to seek, and receive, legal advice as an involved party.
31. Having considered the above Commissioner is satisfied that the public interest favours maintaining the exception, and that the Council has correctly applied regulation 12(5)(b).

Right of appeal

32. 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

33. 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.
34. 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
Head of FoI Casework and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF