

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

Date: 1 February 2024

Public Authority: London Borough of Harrow
Address: Civic Centre
Station Road
Harrow
Middlesex

Decision (including any steps ordered)

1. The complainant has requested legal advice provided to the London Borough of Harrow in regards to its legal challenge against the Mayor of London's decision to extend the Ultra Low Emissions zone (ULEZ). The London Borough of Harrow ("the Council") refused parts 1 and 2 of the request citing Legal Professional Privilege (LPP) and stated that information within the scope of parts 3(a) and (b) of the request was not held. The Council provided some information within the scope of parts 3(c)(i) and (ii) of the request. For procedural reasons the Commissioner has considered this element of the complaint under regulation 12(4)(a) (information not held) and regulation 12(5)(b) (the course of justice) of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(b) of the EIR to withhold the requested information sought at parts 1 and 2 of the request, and that it does not hold any further information within the scope of parts 3(a) and (b) of the request.
3. The Commissioner does not require further steps.

Request and response

4. On 28 July 2023 the complainant wrote to the Council and requested information in the following terms:

"Dear Harrow Council,

I am emailing under the Freedom of Information Act 2000 to request the following information:

***** Start of Request *****

Harrow Council, along with several other local authorities, recently took legal action to challenge the Mayor of London's plans to extend the Ultra Low Emission Zone (ULEZ). Today, 28th July, the High Court ruled that the ULEZ expansion was lawful and within the Mayor's powers.

In relation to the legal action taken, please could you provide me with the following information:

1. All legal advice provided to the Leader of Harrow Council. I would expect this to include (but not be limited to):
 - a. All advice from Harrow Council's internal legal team (including documents as well as emails correspondence)
 - b. All advice from any external legal expertise commissioned by Harrow Council (including documents as well as emails correspondence)
 - c. All advice on the specific grounds for the legal challenge (including documents as well as emails correspondence)
 - d. All advice on the likelihood of the High Court upholding the legal challenge in the favour of Harrow Council (including documents as well as emails correspondence)
2. Discussion of legal advice:
 - a. All email correspondence between the leader of Harrow Council and both internal and external legal advisors, that discuss the advice, including the merits of the legal action and the likelihood of the success of that legal action.
3. The following cost information:

- a. Forecast/estimated costs to Harrow Council of the legal challenge, including both internal and external costs
- b. The amount approved by Harrow Council to spend on this legal challenge
- c. The actual costs of the legal challenge, including:
 - i. Internal costs
 - ii. External costs (including but not limited to legal fees and communications)

***** End of Request *****

Please provide the information in electronic/digital form.

If it is not possible to provide the information requested due to the information exceeding the cost of compliance limits identified in Section 12, please provide advice and assistance, under the Section 16 obligations of the Act, as to how I can refine my request.

If you can identify any ways that my request could be refined I would be grateful for any further advice and assistance.

If you have any queries please don't hesitate to contact me via email and I will be very happy to clarify what I am asking for and discuss the request. My contact details are below.

Thank you for your time and I look forward to your response."

- 5. The Council responded on 22 August 2023. It stated that it held information within scope of parts 1 and 2 of the request, however it was withholding the information because it is subject to Legal Professional Privilege (LPP), however the Council did not state which provision contained within FOIA it was relying on. In respect of part 3 of the request, the Council provided information within scope of parts 3(c)(i) and (ii) and gave a narrative explanation as to why full costs of the legal challenge are not yet known.

- 6. The Council offered the following public interest test arguments:

"The general public interest inherent in this exemption 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 administration of justice. There are no specific, clear, and compelling

public interest considerations here that outweigh the public interest in protecting the information. Any public interest in the ULEZ challenge is fully met by information already in the public domain about the outcome of the case and the publication of the High Court judgment.”

7. On 4 September 2023, the complainant wrote to the Council to request an internal review. In their request, the complainant referenced the Commissioner’s guidance on when information subject to LPP can no longer be considered confidential¹, and stated that they believed that the information did not fall to be considered as privileged as the Deputy Leader of the Council had made a comment² on social media concerning the legal challenge’s chance of success. Resultingly, the complainant concluded that information sought at parts 1 and 2 of their request should be disclosed.
8. The complainant also reiterated their request for information within scope of parts 3(a) and (b) of their request.
9. Following an internal review the Council wrote to the complainant on 28 September 2023. It stated that it was maintaining its position with regard to parts 1, 2 and 3(c)(i-ii) of the request and stated that information within scope of parts 3(a) and (b) of the request was not held.

Scope of the case

10. The complainant contacted the Commissioner on 9 October 2023 to complain about the way their request for information had been handled. The complainant maintained their belief that by virtue of the Deputy Leader of the Council’s statement on social media, the “substance” of the advice had been disclosed therefore the confidentiality of the material within scope of parts 1 and 2 of the request had been waived.
11. The Commissioner considers the scope of the request to be whether the Council is entitled to withhold the requested information sought at parts 1 and 2 of the request on the basis that the information is subject to

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/> relevant wording: “In an FOI context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered confidential.”

² “The court case was absolutely not ‘vexatious’. And the 5 Councils were advised by their Counsel that there was a reasonable chance of success.”

legal professional privilege, and whether the Council holds information within scope of parts 3(a) and (b) of the request.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
13. The Commissioner has had sight of a sample of the information within scope of the request and he is satisfied that, as it is information relating to an environmental policy, it is information on measures affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(5)(b)

14. Regulation 12(5)(b) provides that 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.
15. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP, it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted.

The Council's position

16. The Commissioner wrote to the Council to establish its reasons for withholding the information sought by parts 1 and 2 of the complainant's request.
17. In its submissions the Council explained that the information sought comprises confidential communications between the Council (as the client) and HB Public Law as the Council's lawyers, and between HB Public Law and third parties for the dominant purpose of assisting in the preparation of the case. The Council stated that the communications were exclusively for the purpose of giving or receiving legal advice, and the information was communicated by HB Public lawyers clearly acting in their capacity as professional legal advisors to the Council.
18. Having considered the withheld information the Commissioner is satisfied that it contains confidential communications between a client and a professional legal advisor, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
19. In respect of the complainant's allegation that the requested information was no longer privileged as the Deputy Leader of the Council had made reference to it in a public forum, the Council stated:

"There has been no waiver of privilege, and we have made clear that the public statement from the Deputy Leader of the Council on social media, on 29 July 2023, said only that the legal case was not vexatious and that the councils had been advised by counsel that there was a reasonable chance of success. No documents or correspondence, or any substantive details whatsoever of the legal advice sought and received, were disclosed and, therefore, this statement clearly does not amount to a disclosure of the substance of the information sought, and does not constitute a waiver of legal professional privilege by the Council."

20. The Commissioner accepts the Council's position that the substance of the material captured by parts 1 and 2 of the request has not been disclosed to the public via the social media statement made by the Deputy Leader of the Council (as per paragraph 7 above), and therefore the information remains protection by LPP.
21. The Commissioner recognises that ULEZ remains a live political issue and he cannot disregard the possibility of a further legal challenge being brought against the Mayor of London, either by the London Borough of Harrow or separate Council. The Commissioner considers that disclosing the withheld information would reveal the strengths and weaknesses of the Council's legal challenge, and thus risk unbalancing the level playing field under which any future legal proceedings by any party are meant to be carried out.
22. Furthermore, in its submissions the Council drew the Commissioner's attention to the decision³ of the Upper Tribunal (UT), in which it had established that an adverse effect on the course of justice can arise from the undermining of the general principles of legal professional privilege and of the administration of justice. At paragraph 50 of the decision, the UT acknowledges that:

"... in determining whether disclosure "would adversely affect the course of justice", the IC or tribunal is not limited to considering the effect (if any) on the course of justice in the particular case in which disclosure is sought. The IC can and must take into account the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisors will not be subject to disclosure. In our judgement that submission is correct."
23. Based on the above the Commissioner is satisfied that disclosure of the requested information sought at parts 1 and 2 of the request would have an adverse effect on the course of justice. He considers that there is particular weight attributed to this position when factoring in the recency of the Council's High Court appeal and the sustained public debate around ULEZ. He has therefore decided that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

³ DCLG v Information Commissioner & WR [2012] UKUT 103 (AAC) (28 March 2012): <https://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>

Public interest test

24. 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.
25. The Council stated that the public interests arguments in favour of disclosure of information at parts 1 and 2 of the request, while not explicitly outlined by the complainant in their grounds of complaint, would be likely to include points on accountability, public sector transparency and the furthering of public debate. However, the Council maintained that it had been, and remained, fully accountable and transparent with regard to matters pertaining to the ULEZ litigation, and that the High Court Judgement⁴ (handed down in public on 28 July 2023) had suitably addressed the legal challenges:

"...the debate, including the legal arguments have been fully aired and heard in a public court and there is no further public interest in the disclosure of the withheld information, namely the specific detailed legally privileged communications and documents that came into existence predominantly in contemplation of and preparation for the subsequent litigation which took place. There are no indications whatsoever that any of the councils acted in any way improperly or in breach of any laws or regulations in seeking to challenge the imposition of a London traffic scheme with which they disagreed, and therefore that the information requested would shed light on any wrongdoing. The Council had every right to challenge the introduction of ULEZ, and the imposed disclosure of the legal advice they received in confidence from their lawyers would seriously weaken the confidence that councils have that legal advice they ask for and receive will remain confidential and undermine their ability to seek advice and conduct litigation appropriately and thus erode the rule of law and the individual rights it guarantees.

There is no allegation that there is anything particularly significant about the actual withheld information and what it reveals, such that the public interest favours the disclosure of the withheld information."

26. The Commissioner considers that there is a strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the legal

⁴ [London Borough of Hillingdon & Ors, R \(On the Application Of\) v Mayor of London \(Re ULEZ Expansion\) \[2023\] EWHC 1972 \(Admin\) \(28 July 2023\) \(bailii.org\)](#)

system. The ability to do so provides informed decision making and ensures that local authorities make legally robust decisions.

27. The Commissioner accepts that, where the actions of the Council had the potential to affect a large number of people, as in the case of the ULEZ legal challenge, an argument can be made for there to be proportionate transparency, which might include the disclosure of information subject to LPP. In this case, the Commissioner has no evidence that the specific subject matter of the request is of significant interest to the public to the degree that it overrides the public interest in maintaining the exception. He considers that broader public interest in ULEZ matters has been met by information already made public via the High Court Judgement, and in the surrounding media coverage. Conversely, he considers there is a strong interest in allowing the Council to seek legal advice in support of its broader statutory responsibilities without this being undermined.
28. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly.

Regulation 12(4)(a) – information not held

29. In respect of the information sought by parts 3(a) and (b)⁵ of the request, the Commissioner asked the Council to detail the searches it had undertaken when responding to the request.
30. The Council stated:

“We have asked our Finance officers, including our Director of Finance, who advised that we had not set aside any specific reserves for the ULEZ case and that the total cost would be funded from the Council’s revenue budget and general contingency.”
31. Consequently, the Council maintains that the request information is not held.
32. The Commissioner considers that the narrative explanation provided by the Council gives a reasonable account of why forecasted costs and details of Council approved amounts are not held.

⁵ 3. “The following cost information:
a. Forecast/estimated costs to Harrow Council of the legal challenge, including both internal and external costs
b. The amount approved by Harrow Council to spend on this legal challenge”

33. The Council also provided further information within scope of parts 3(c)(i) and (ii) of the request, concerning that actual costs of the legal challenge:

"i. Internal costs

The internal officer time was dealt with under existing budgets. However, we can confirm that HB Public Law recorded 50.5 hours on the ULEZ case.

ii. External costs (including but limited to legal fees and communications)

The external spend was £151,755.20 (including VAT). This was Harrow's contribution as the costs were shared with the other boroughs."

34. The Commissioner considers that the Council has provided all of the information it holds within the scope of parts 3(a),(b) and (c) of the request.
35. As per paragraph 3 above, the Commissioner does not require any further steps to be taken.

Right of appeal

36. 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

37. 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.

38. 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

Jonathan Slee
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