

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 October 2020

Public Authority: Reigate & Banstead Borough Council

Address: Town Hall
Castlefield Road
Reigate, RH2 0SH

Decision (including any steps ordered)

1. The complainant has requested information relating to decisions about a Core Strategy Plan (relating to housing supply). Reigate & Banstead Borough Council refused the request, withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that Reigate & Banstead Borough Council has correctly withheld the requested 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 26 November 2019, the complainant wrote to Reigate & Banstead Borough Council (the "council") and requested information in the following terms:

"I wish to know the reasons why the Council chose to maintain the current housing requirement rather than attempt to increase housing supply in response to the changes in planning policy and guidance. This decision runs contrary to the Council's publicised strategy from June 2018 until April 2019 and, despite repeated requests to the parties concerned, I have not been provided with any explanation for choosing one option over the other. I am aware that a great deal of consideration was given to this decision, none of which has been documented in the Core Strategy review or made publicly available elsewhere. Therefore please can you provide me with copies of all communications (emails, texts, meeting notes etc.) from/to any of the individuals listed below, for the period 1 April 2019 to 30 June 2019, relating to the Core Strategy update process (including the invitation to tender for a housing needs assessment), Core Strategy review process and the Local Development Scheme:

[redacted]"

5. The council responded on 20 January 2020. It stated that it was withholding the requested information under the exception for internal communications – regulation 12(4)(e) of the EIR.
6. Following an internal review the council wrote to the complainant on 9 February 2020. It stated that it was maintaining its position.

Scope of the case

7. On 3 March 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation the council confirmed that it was applying an additional exception to withhold the information, namely, the exception for the course of justice – regulation 12(5)(b). The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

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

9. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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.”

10. The Commissioner has issued guidance on the application of regulation 12(5)(b)¹. The guidance confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would result through the disclosure of, otherwise confidential, information covered by LPP.

11. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* (Bellamy) 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 communications or exchanges come into being for the purposes of preparing for litigation.”²

12. There are two categories of LPP – litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies when no litigation is in progress or contemplated. In both cases, the communications must be confidential, made between a client and

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

²

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

professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

Is the exception engaged?

13. The council has confirmed that the entirety of the withheld information, which consists of instructions to counsel and counsel's advice, is subject to LPP. The council explained that the information relates to its review of its Local Plan (Core Strategy). It confirmed that the outcomes of the review and the related decisions were undertaken publicly in a report to council on 2nd July 2019.
14. In order to attract LPP, the information must be communicated confidentially in a professional capacity between a client and a professional legal adviser.
15. Having viewed the withheld information and referred to the council's submissions the Commissioner is satisfied that the information is subject to LPP and that it therefore falls within the scope of the exception.
16. The council has confirmed that the legal advice has not been subject to unrestricted disclosure and that, whilst a summary of the advice has been made public, the confidentiality attached to the content of the advice itself has not been lost.
17. In relation to adverse effects to the course of justice, following the decision of the Upper Tribunal in the case of *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), the Commissioner considers that adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. Whilst the Commissioner accepts it is not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; she considers that there would need to be special or unusual factors in play for this not to be the case.
18. The Commissioner has concluded that the information is subject to LPP and 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. She has gone on to consider the public interest test.

Public Interest Test

19. 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.

Public interest in disclosure

20. The Commissioner recognises that there is a public interest in ensuring the fullest participation in matters relating to planning, which would enable members of the public to be more familiar and better informed on the matters that would have an impact on their lives.
21. The Commissioner also acknowledges that there is a public interest in ensuring that public authorities have reached decisions on the basis of sound advice.
22. The complainant has argued that, as the Core Strategy Review has been completed and the matter is no longer live, no harm can come from disclosing details of the council's decision making process.
23. The complainant also considers that, as the advice was sought, on one hand, to mitigate the risk of judicial review and as no judicial review has been brought, the risk has passed and the advice is no longer relevant.

Public interest in maintaining the exemption

24. The Commissioner considers that there is a strong public interest in public authorities 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 which, in turn, would have a negative impact upon the quality of decisions made by the council which would not be in the public interest.
25. The council has affirmed that disclosure of the information would lead to a weakening of confidence in the general principle of LPP and this risk is a highly weighted factor in favour of upholding the exemption.
26. The council has explained that the Core Strategy Plan (CSP) will be rolled out in the borough over a 5 year period and disclosing the information will undermine its ability to defend the legal grounding for its decisions in this regard.

Balance of the public interest

27. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.
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 Commissioner recognises that the complainant has genuine concerns about the CSP to which the information relates and legitimate reasons for having sight of the council's legal advice.
30. The Commissioner is mindful that the public interest is time and context sensitive and she accepts that, with the passage of time, the sensitivity of the information may diminish.
31. The council has argued that the CSP is to be implemented Borough-wide over a 5 year period. The maintaining of confidence in the acquisition of legal advice is, therefore, required to ensure that the best possible plan, given all considerations, has been adopted. The protection of this confidence, therefore, is with the purpose of maintaining the council's priority in delivering the best service to those in the Borough, which exceeds the public interest test in disclosing the information.
32. The council maintains that the protection of LPP ensures that it continues to have confidence in its ability to seek independent legal advice that supports it to act lawfully and meet its statutory requirements. The council considers that this supports the public interest test in maintaining the exception to a high degree as it enables the council to deliver sustainable growth, whilst protecting the environment of the borough that residents and communities value.
33. Whilst the Commissioner is alive to the complainant's concerns about the integrity of the process followed by the council, she does not have any direct evidence that these concerns have foundations.
34. The Commissioner is mindful that authorities must be able to engender trust amongst the population they serve and that even the perception of inadequacies or anomalies in decision-making processes can result in reputational damage. However, it is not the Commissioner's role to

determine whether authorities have followed correct procedures in relation to planning matters; other remedies are available for such concerns to be addressed. The matter under consideration here is whether disclosure would serve the public interest to a greater extent than allowing the course of justice to be protected from harm.

35. In the absence of evidence that the matter has been mishandled by the council and, as it is not the Commissioner's role to judge whether authorities have appropriate governance and decision-making arrangements in place (except where these relate to information rights), the Commissioner has not given the complainant's argument in favour of disclosure much weight.
36. In relation to the complainant's assertion that the advice in question is no longer relevant as no judicial review has been brought, the Commissioner considers that there is no requirement for the relevant issue to be 'live' for the disclosure of legally privileged legal advice under the EIR to have (more probably than not) an adverse effect on the course of justice. This was confirmed 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 referenced previously, 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 privilege³.
37. Notwithstanding the above, the Commissioner notes that the legal advice is still relatively recent and relevant, particularly given the 5 year cycle of the CSP. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's strategy. She acknowledges that this would result in adverse effect to the course of justice by revealing the council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
38. 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 in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "*If application of the first two stages has not resulted in disclosure, a public authority should go*

³ <http://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>

on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

39. Having considered the available evidence, including the relatively recent nature of the advice and its relevance to the ongoing CSP, and the general harm to LPP which disclosure would cause, the Commissioner has concluded that, in this case, 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.
40. As the Commissioner has determined that all the withheld information is subject to the exception in regulation 12(5)(b) she has not gone on to consider the council’s application of the exception in regulation 12(4)(e) to the same information.

Right of appeal

41. 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

42. 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.
43. 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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