

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

Date: 21 May 2024

Public Authority: Redcar & Cleveland Borough Council
Address: Redcar & Cleveland House
Kirkleatham Street
Redcar
Yorkshire
TS10 1RT

Decision (including any steps ordered)

1. The complainant requested legal advice relating to a playing field. Redcar & Cleveland Borough Council (the "Council") withheld the information under the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the Council correctly withheld the requested information under regulation 12(5)(b) but that it failed to complete an internal review in time and breached regulation 11(4).
3. The Commissioner does not require further steps.

Background

4. The request for information relates to King George V Playing Fields at Guisborough.
5. The land in question is owned by Redcar & Cleveland Borough Council (the "Council") and part of it is leased to Guisborough Town Football Club. There are local concerns about the Council's management of the land and, more recently, about a fence erected around football pitches¹.
6. The request relates to the complainant's concerns about the legality of the Council's approach to the land and seeks disclosure of legal advice relied on by the Council.

Request and response

7. On 8 November 2023, the complainant wrote to Redcar & Cleveland Borough Council (the "Council") and requested the following information:

"...in relation to King George V Playing Field" I am writing to request the legal advice / information that the Council have received and are relying upon to maintain their stance that there are no legal obligations."
8. The Council responded on 5 December 2023 and confirmed that it was withholding the information under the exception for the course of justice (regulation 12(5)(b)).
9. On 19 December 2023 the complainant asked the Council to carry out an internal review. On 8 March 2024 the Council provided its internal review response which confirmed that it was maintaining its position in relation to the application of regulation 12(5)(b).

Scope of the case

10. On 12 March 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
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¹ See, for example:

<https://www.darlingtonandstocktonimes.co.uk/news/19504304.guisborough-town-denies-land-grab-gets-permission-fence-off-pitches/>

11. The Commissioner has considered whether the Council correctly withheld the requested information.

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. In this case the requested information consists of legal advice relating to decisions about the use of land. The Commissioner is, therefore, satisfied that the information constitutes a measure as defined by regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

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

14. Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect the course of justice, the ability of a person to receive a fair trial and the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
15. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to Legal Professional Privilege (LPP) and information about investigations or proceedings carried out by authorities.

The withheld information

16. The withheld information consists of legal advice relating to the use of land (owned by the Council) at King George V Playing Fields at Guisborough.
17. The Council has confirmed that it considers that the advice is subject to both LPP and litigation privilege.

LPP and Litigation Privilege

18. LPP exists to ensure complete fairness in legal proceedings and protects advice given by a lawyer to a client and confidential communications between them about that advice.
19. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. In order for it to be applicable there must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties providing that they are made for the purposes of the litigation.
20. The Council has stated that the advice was originally obtained from counsel where, as now, there was no litigation in progress, but it was contemplated, which was the reason for obtaining the advice. It has confirmed that the advice was provided by a professional legal advisor to the Council as client, that the communication with the advisor was for the sole or dominant purpose of obtaining legal advice, and that the advice was communicated in the legal advisor's professional capacity.
21. The Council has confirmed that the advice has not been made available to the public or any third party, nor has it been subject to partial "cherry picking" disclosure, so privilege has not been waived.

22. The Council has suggested that litigation privilege is additionally applicable here as litigation is still contemplated (as evidenced by the complainant's continuing interest in the matter and the fact the issue remains live).
23. The Commissioner's guidance confirms that litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. The guidance states that, in order for information to be covered by litigation privilege:

"There must be ongoing litigation or a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation."²

24. In this instance the Commissioner has concluded that the Council has not demonstrated that the dominant purpose for which the advice was sought and the context within which the advice was sought satisfy the conditions for litigation privilege. However, he accepts that the information is subject to advice privilege.
25. Having considered the Council's submissions and referred to the withheld information, the Commissioner considers that disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information when the matters to which the information relate are still 'live'. The Commissioner considers that disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the Council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.
26. The Commissioner has also referred to the decision of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011, which confirmed that in considering whether information subject to LPP engaged the exception, it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/#Litigation>

administration of justice generally, and not simply the effect on the particular case.

27. Taking all of the above factors into account, the Commissioner has concluded that, in this case, disclosing the information would result in adverse effects to the course of justice, specifically by disclosing information subject to LPP and litigation privilege. He has gone on to consider the public interest.

Public interest in disclosure

28. The Council confirmed that it considered whether the public interest in promoting transparency, accountability, public understanding and involvement outweighs the prejudice which would be caused by disclosure of the information.
29. The Council also acknowledged that 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.
30. The complainant has argued that there is a legitimate public interest in transparency about the issue the information relates to due to the significant impact on the public. The complainant has submitted that residents of Guisborough use the playing field on a freely accessible basis and is of great importance to them given the increasingly reduced freely accessible green space in Guisborough.
31. The complainant considers that disclosure of the legal advice is crucial to the reasoning for, and understanding of, the Council's decision and legal obligations which are being challenged, to enable the public to see the whole picture. The complainant has further argued that it is imperative that residents and Council taxpayers can assess on an informed basis whether the Council are making good decisions to ensure the best interests of residents, and can demonstrate accountability for those decisions. The complainant considers that disclosure is required to maintain public trust and to determine whether the Council upholds standards of integrity and ensures justice.
32. The complainant has further suggested that the Council's actions in relation to the land are not supported by other interpretations of its legal obligations. They have also suggested that the Council has a history of maladministration and poor practice in relation to planning matters and these heighten the need for transparency.

Public interest in maintaining the exception

33. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice. Central to this is the importance of the principle enshrined in LPP and litigation privilege. The Council has acknowledged this and argued that frankness between a lawyer and their client serves the wider administration of justice. The Council considers that, if the information were to be disclosed such frank communication may be compromised in future cases, prejudicing the Council's ability to seek full and frank legal advice.
34. The Council has stated that the advice relates to a specific set of facts rather than a general point of law and, whilst the advice was received some time ago, the issue is still effectively "live".
35. The Council has suggested that opposition to the substantive matter to which the advice relates, is minimal and that the complainant's concerns do not necessarily reflect the concerns of the broader public.

Balance of the public interest

36. 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.
37. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) states:

"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"³.
38. The Commissioner recognises that the complainant and the wider community have genuine concerns about the substantive matter (the

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

use of King George V Playing Fields) and legitimate reasons for having sight of the council's legal advice.

39. The Council considers that the matters to which the withheld advice remain live and that, therefore, there is an enhanced need to protect the integrity of information subject to LPP. The Commissioner acknowledges that the matter is still live. Not least, this is reflected in the complainant's interest in accessing information associated with the matter, which has also been the subject of other decision notices⁴.
40. Whilst he does not doubt the complainant's good faith in claiming that the Council's actions in relation to the land do not reflect its legal obligations, equally, the Commissioner has no concrete reason to accept this conclusion, nor is he required to assess the validity of the legal advice. What is clear, however, is that the advice in question is not stale and its disclosure would impact on the Council's ability to explain or defend its legal position in these matters.
41. In addition, as both the Commissioner and the Upper Tribunal have consistently found and, as noted above, it is relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case.
42. In order to justify precipitating these adverse effects the Commissioner considers that there should be reasonable grounds for believing the public interest in disclosure counterbalances any such damage to the course of justice. In this case, whilst the Commissioner acknowledges the complainant's genuine interest in the matter, he is not convinced that their arguments in favour of disclosure are predicated on a correct understanding of the nature of the withheld information or the operation of the exception.
43. Whilst the Commissioner recognises there is a public interest weighting in favour of disclosure he must consider the broader public interest in allowing the Council to consider and carry out its legal obligations without these being undermined. He considers that, given that the advice is relevant to current or future decisions regarding the land, disclosure would have tangible adverse effects on the Council's ability to carry out its legal and planning functions. Whilst he is sympathetic to the complainant's concerns he considers that other legal remedies for

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022884/ico-153810-w0g3.pdf>

challenging any decisions made by the Council in this regard are more appropriate than disclosure under the EIR.

44. The EIR is, of course, intended to facilitate public access to environmental information and in certain circumstances it is entirely appropriate that information exposing wrongdoing or flawed decision making be made public.
45. Whilst the Commissioner accepts the complainant's interest in this matter, he does not consider that the arguments in favour of disclosure meet the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP. Whilst not a deciding factor, he is additionally mindful that public concerns in this case are not monopolised by the complainant as, in addition to the interests of the Council, there would seem to be a public interest in protecting other users of the land, such as those using the leased football pitches.
46. The Commissioner has concluded that, in this case, the arguments in favour of disclosure in this case do not carry significant, specific 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).

Procedural matters

Regulation 11 – internal review

47. Regulation 11 sets out the obligations of public authorities in relation to complaints about the handling of a request (internal reviews).
48. Regulation 11(1) states:

“Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.”
49. Regulation 11(4) confirms that any authority receiving a request for internal review should provide a complainant with a response within 40 working days.
50. In this case the complainant wrote to the Council on 19 December 2023 and asked it to review its handling of their request. The Council provided

its review response on 8 March 2024, outside the time for compliance set in regulation 11(4).

51. The Commissioner has, therefore, concluded that the Council breached regulation 11(4).

Right of appeal

52. 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

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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