

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

Date: 18 June 2019

Public Authority: Cheshire West and Chester Council
Address: 4 Civic Way
Ellesmere Port
CH65 0BE

Decision (including any steps ordered)

1. The complainant has requested information about Park Fields, Parkgate. Cheshire West and Chester Council disclosed some information but withheld other information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Cheshire West and Chester Council has correctly withheld the requested information under regulation 12(5)(b) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant represents Friends of Park Fields (FoPF), a 120 member voluntary community-based organisation recognised by Cheshire West and Chester Council. The complainant provided background information about the subject of their request; this is summarised below.
5. Park Fields in Parkgate were acquired by Neston Urban District Council (NUDC) in 1937 under the provisions of section 164 of the Public Health Act 1875, expressly for use for "public walks and pleasure grounds". In 2006-7 an attempt was made by NUDC's successor authority - Ellesmere Port and Neston Borough Council (EPNBC) to support and grant an exclusive lease of some 70% of Park Fields to a local youth football club (Neston Nomads). The proposal was called-in by some councillors and, following local pressure, EPNBC sought Counsel's opinion on the legitimacy of its proposed actions. Shortly after receipt of the opinion the council discontinued its support for this.
6. Neston Nomads football club made a further approach to Cheshire West and Chester Council (the 2009 successor authority to EPNBC) in September 2017, requesting preferential and restricted access for their football activities within a proportion of Park Fields.
7. Within this context, the complainant sought information associated with Counsel's opinion to the council in relation to the usage of Park Fields.

Request and response

8. On 3 June 2018, the complainant wrote to Cheshire West and Chester Council (the "council") and requested information in the following terms:

"All correspondence between CWaC "Localities" department and the CWaC "Legal Department" – and internally within these two departments – from March 2017 to date, in relation to the legal states, land tenure and permitted usages of the area known as Park Fields, Parkgate. This includes letters, emails, memoranda, file notes and any other relevant documentations, including logs of emails and/or telephone conversations; file notes of what was discussed and any decisions made – or proposals propounded - thereon."
9. The council responded on 3 July 2018. It stated that it was withholding the requested information under the exception for the course of justice – regulation 12(5)(b) of the EIR.

10. Following an internal review the council wrote to the complainant on 8 October 2018. It disclosed some information but maintained its reliance on regulation 12(5)(b) to withhold the outstanding information. It also withheld some information under regulation 13 (the exception for personal data).

Scope of the case

11. On 9 January 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(5)(b) to withhold the information. The complainant confirmed that they wished the Commissioner to exclude the information withheld under regulation 13 from their request and the scope of the Commissioner's investigation.
13. The complaint suggested that they would be willing for their complaint to be resolved informally should the council agree to disclose a summary of the requested information. The council declined to do this so the Commissioner has considered whether the council correctly applied regulation 12(5)(b).

Reasons for decision

14. The council has withheld Counsels Opinion and internal email correspondence relating to the advice on any proposals which might be submitted for consideration in the future for Park Fields.
15. Under this exception a public authority can refuse to disclose information on the basis that "...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".
16. The Commissioner's guidance explains that '*an inquiry of a criminal or disciplinary nature*' is likely to include information about investigations into potential breaches of legislation, for example, planning law or

environmental law¹. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.

17. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Information 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".

Is the exception engaged?

18. The council has stated that the withheld information contains legal advice or was created for the purpose of legal advice in relation to the usages of Park Fields, Parkgate. Specifically, the information consists of Counsel's Advice obtained in 2007 by the council's predecessor authority, Ellesmere Port and Neston Borough Council and emails between the council's legal and localities teams relating to the matter.
19. Once a public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures.
20. Waiver is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. In this context 'cherry picking', or only revealing part of the advice given, isn't permitted.
21. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under the EIR. This is because the EIR is concerned with disclosures to the world at large rather than disclosures to a limited audience. In an EIR context,

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

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 to be confidential.

22. The council confirmed that it is satisfied that the confidentiality attached to the withheld information has not previously been lost. It reiterated that, mindful of the context of the request, its internal review made clear that this information remains relevant to consideration of any similar legal issues by the council and therefore remains confidential. The council explained that a synopsis of information was provided to the complainant following the internal review, collated by Legal Services after Counsel's advice had been considered; however, the council confirmed that the substance of the advice had not been disclosed.
23. Having considered the council's arguments and referred to the withheld information and publically available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.
24. The Commissioner is of the view that disclosure of information of information subject to LPP, particularly relatively recent legal advice which remains live and relevant, will have an adverse effect on the course of justice. She considers the likelihood of this happening to be more probable than not. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
25. 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.

The public interest test

26. 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 her 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

27. The council has acknowledged the general principle in favour of disclosure under the EIR. It has also recognised the importance of transparency in relation to administrative actions and decision making.

28. The council has further accepted that it is obliged to provide reasoned explanations for decision and actions and to allow the public to understand the rationale behind its decisions.
29. The complainant considers that the legal advice and the lawful and legally permissible bases for permissible developments on Park Fields should be made public. Disclosure, it has argued, would reassure FoPF and the wider community and/or assist the public in taking any necessary action to protect Park Fields from unlawful usage or developments.
30. The complainant has identified the fact that the land in question is owned by the council. The Commissioner recognises that the fact that the land is publically owned carries some weight in terms of the accountability of the council in its role as custodian of the land on the public's behalf. It is arguable that there is an enhanced need for transparency particularly given concerns in the local community that exclusive use of the land or part of the land might be granted to a private party, in contravention of the law regarding land use.

Public interest in maintaining the exception

31. 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.
32. In addition to the above, the council has stated that interested persons (Officers making decisions on behalf of the council) must be allowed to discuss options and advise of the legal risks involved in such options. It has argued that it should be entitled to be informed of the advantages and disadvantages and associated risks and benefits of its actions or position and to make its decision in private
33. The council has confirmed that the advice remains "live" in relation to consideration of matters relating to the use of Park Fields.
34. The Council has acknowledged that there may be a need for enhanced transparency in relation to public parkland and open spaces, which have special protections. However, it stated that it must consider any requests or proposals regarding potential usage put to it on their own merits and cannot have a 'blanket' policy to refuse to consider such matters. The withheld information assists it in setting out its legal approach to such applications.

Balance of the public interest

35. 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.
36. 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”.
37. The Commissioner recognises that the complainant and the wider community have genuine concerns about the potential usage of Park Fields and legitimate reasons for having sight of the council’s legal advice. She further acknowledges the complainant’s concerns about the council’s prospective handling of proposals in this regard, particularly given the history associated with the matter. However, potential developers may also have an interest in accessing the council’s legal position in order to potentially formulate proposals in a way that would seek its undermining, without the council gaining reciprocal access to their legal arguments.
38. The Commissioner notes that the legal advice is still current. 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 in such scenarios. 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.
39. Whilst the Commissioner recognises there is a public interest weighting in favour of disclosure she must consider the broader public interest in allowing the council to consider and carry out its legal obligations without these being undermined. She considers that, given that the advice is relevant to current or future applications, disclosure would have tangible adverse effects on the council’s ability to carry out its legal and planning functions, potentially something which would be to the detriment of the goals of those seeking to protect the integrity of Park Fields. Whilst she is sympathetic to the complainant’s concerns she considers that other remedies for challenging any decisions made by the

council in these matters are available and disclosure via the EIR would circumvent and prejudice these processes.

40. The Commissioner also considers that the fact that the council disclosed some information in response to the request has gone some way to serving the public interest in this matter.
41. Whilst the Commissioner accepts the complainant's interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
42. The Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. She 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).
43. 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

44. 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

45. 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.
46. 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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