

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

Date: 29 November 2022

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 2JH

Decision (including any steps ordered)

1. The complainant has requested all documentation the council holds relating to the accessway and access rights at the Grange Park Droppingwell, Kimberworth which includes maps, written correspondence between the council and landowners who have access to the site, details of advice the council has sort from professionals including costs and any other documentation that mentions this access.
2. The Commissioner's decision is that regulation 12(5)(b) of EIR is fully engaged and that Rotherham Metropolitan Borough Council ("RMBC") is entitled to rely on regulation 12(5)(b)- of the EIR to withhold the requested information. However, the public authority breached reg 5(2) of EIR as it failed to issue its refusal notice within 20 working days.
3. The Commissioner does not require RMBC to take any further steps.

Request and response

4. On 27 January 2022, the complainant wrote to RMBC and requested information in the following terms:

"I would like to make an FOI request for any and all documentation the council holds in relate to the accessway and access rights at the grange park Droppingwell, Kimberworth, this is specifically in relation to maps, written correspondence between the council and any landowners who may have access to the site from Droppingwell road , any advice the council has sort from professionals including costs and any other documentation that mentions this access"

5. RMBC responded on 25 March 2022. It provided some redacted documents within the scope of the request relating to access rights (as it contained personal information) but refused to provide information related to legal costs from counsel and recent correspondence related to access due to legal issues were still subject to contention between the council and others. It cited section 42 and section 43(2) as its basis for doing so. In its response, it also stated:

"It should be noted that when reviewing your request for information the Council also considered this under the Environmental Information Regulations 2004 (EIR).

However, please note that under the EIR, the outcome would be no different to that under the FOIA as the information would be exempt from disclosure by virtue of Regulation 12(5)(b) of the EIR.

The Council would also be required to make the same considerations under the EIR."

6. On the 25 March 2022, the complainant wrote to RMBC and requested an internal review citing the following as the reasons for doing so:

"None of the documents postdate the purchase of the land by the current land owner in 2000.although some of the documents are helpful, it's the current situation around the access of the land by the current owner that is in question and their interpretation of their access right over the first 250 yards. I know that a lot of correspondence has taken place between RMBC and the current owner, I have also now been instructed by the head of legal services that there are no plans to pursue any of the information legally, therefore there is no reason under section 42 to withhold any information, furthermore, withholding any information post 2000 would not be fulfilling my request in full."

7. Following an internal review, RMBC wrote to the complainant on 7 June 2022. It maintained its original position to refuse to provide information related to advice from legal counsel on the access to land but revised its

position to provide an overall costings figure of monies paid for Counsel in relation to planning issues for the Droppingwell Tip.

Reasons for decision

8. The complainant contacted the Commissioner on 9 August 2022 to complain about the way his request for information had been handled.
9. Although the Commissioner has not seen the requested information, he believes that information, not already released to the complainant, is related to a dispute over land access and falls under regulation 2(1)(c) of the EIR which defines what constitutes environmental information. For procedural reasons this case has been assessed under the EIR.
10. The Commissioner has noted that RMBC has disclosed five official copies of Register of Title to the complainant where they had no obligation to do so as these documents were publicly accessible via direct contact with the Land Registry and would have been covered by the exemption s21 of FOIA. Additionally, RMBC has provided financial costings of legal advice obtained thus far and considers that the scope of the remaining information of the request can be refused under regulation 12(5)(b) of the EIR.
11. The following analysis also sets out why the Commissioner has concluded that SMBC was entitled to rely on regulation 12(5)(b) – legal professional privilege in this case.
12. Regulation 12(5)(b) allows a public authority to 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.
13. For advice privilege to apply, the information must record confidential communications and advice made between a client and professional legal adviser, acting in their professional capacity.
14. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
15. Having considered the withheld information, the Commissioner notes that it constitutes communications with Counsel in relation to ongoing legal disputes which remain a subject of contention between the Council

and others, and it is important that that SMBC rights to conduct exchange of views as to their legal rights and obligations with their legal advisers when necessary.

16. Although there is no immediate litigation in progress or immediately anticipated, this may not be the case in the future whilst disputes continue. The Commissioner accepts the councils view that once the information enters the public domain, legal privilege is lost, and therefore accepts that the information attracts advice privilege.
17. Regulation 12(5)(b) is therefore engaged.

Public Interest Test

18. Having concluded that the exception is engaged, the Commissioner must carry out a public interest test (PIT) into the application of the exception as required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
19. 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 there is a significant lack of appropriate transparency.
20. The Commissioner has noted that RMBC has provided the complainant with the costings of legal advice obtained thus far in order to provide as much transparency as possible with regards to public monies used to fund legal advice and has provided some register of title (land) documents that could have been publicly obtained from other means. Additionally, the complainant's current employment at RMBC may have provided access to documents requested without the need to use the FOI regime.
21. The Commissioner agrees with RMBC's assessment that the public interest in disclosure does not outweigh the public interest in maintaining the concept of legal professional privilege and obtaining external legal advice. RMBC has applied the test correctly to refuse disclosure of information it considers could jeopardise potential future litigation from its disclosure.
22. The Commissioner therefore considers that the balance of the public interest favours the exception being maintained.

Regulation 5(2)

23. The complainant made the request for information on 27 January 2022. RMBC did not provide its response until 25 March 2022, which falls outside the requirements in EIR to respond within 20 working days .
24. The Commissioner does not require RMBC to take any further steps.

Right of appeal

25. 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

26. 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.
27. 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

Catherine Fletcher
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF