

FOI Ref

9211

Response sent

8 Jul 2021

(CCC) Parkers Tavern

The Counsel advice, from the independent barrister, to the legal department within Cambridge Council in response to the sitting license application by the University Arms, as stated within the details below.

“By reverting to our legal department, they then sought counsel advice which is via an independent barrister and it was returned very clearly that we are unable, by the clauses stipulated in the act, to endorse the sitting out licence and use the space for the purpose the hotel wish to. The legal risk of challenge to the Council was simply too high.”

Response:

We have reviewed your request and can confirm that the council does hold the information you are referring to. We find that the information you are seeking is exempt under Freedom of Information under s39 – Environmental Information – as it concerns the management of land which includes policies, regulations or legislation that apply to land management. This means there is no right of access to it under FOI, however, we have considered your request under the Environmental Information Regulations 2004 (EIR)

We find exception 12(5)(b) – disclosure would adversely affect the ability of the authority to conduct an inquiry of a criminal or disciplinary nature, applies, this includes material considered to attract Legal Professional Privilege, (LPP). This is a qualified exception which requires the application of a public interest test to be applied to see whether it is reasonable to disclose the requested information into the public domain.

Legal professional privilege is a rule or principle which protects the confidentiality of communications between a client and their legal adviser, allowing the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses or criticism of their client's position.

For the information to be capable of attracting legal professional privilege the information must form part of a communication either from the client to their legal adviser, or the legal adviser to the client. It has been made quite clear that the information is an exchange between the Council and an external legal adviser, i.e. Barrister. And this has been undertaken in a formal context. There is a difference between advice privilege and litigation privilege. Whilst advice gained under LPP is usually gained with the prospect of legal challenge, the information held by the council here is considered to be covered under advice privilege, but does retain the potential to be covered under litigation privilege

Exception 12(5)(b) is a qualified exemption and not absolute and therefore is subject to the public interest test as set out in s12(1)(b). Meaning that although the exemption is engaged the information can only be withheld if in all the

circumstances of the case the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.

The Information Commissioner states in its guidance on LPP “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.”

Given the strong inherent public interest in maintaining communications attracting legal professional privilege, any factors in favour of disclosure, such as transparency and accountability must be factors that are of equal or higher weight.

The council considers the following factors in favour of maintaining the exception

- The concept of LPP ensuring that the council is able to receive full and frank advice from legal advisors – it is in the public interest that the Council is able to gain fair and frank advice in a safe environment and without the risk of any ‘chilling’ effect as a result of concerns of disclosure of that material into the public domain
- The advice in question was not limited to the specifics of the request but encompassed the entire ability for the Council to operate commercial activities on its estate of public open spaces under the Cambridge City Act 1985 and other relevant legislation at the time – it has been provided for the Council to effectively and continuously manage its public open space estate and has not been provided for dissemination to the public at large.
- This material if released could inhibit the ability of the Council to take enforcement action both currently and in the future, should cases of breach occur
- Disclosure of such information could be taken out of context, misinterpreted and prejudice future considerations of public open space estate management that falls within its duties
- Disclosure of the material would be at risk of having a significant adverse effect on the ability of the Council to conduct fair assessments of commercial activity requests thus creating an additional cost burden to the Council and would not be in the interests of the community it serves.

We find that at the current time our assessment shows that the exception 12(5)(b) should be upheld

We appreciate you will be disappointed in this response, but hope that you find the explanations provided helpful.