

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

**Date:** 29 November 2018

**Public Authority:** Gosport Borough Council  
**Address:** Town Hall  
Gosport  
Hampshire  
PO12 1EB

**Decision (including any steps ordered)**

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1. The complainant has requested legal advice relating to a planning matter. Gosport Borough Council withheld the requested information under the exemption for legal professional privilege – section 42 of the FOIA. During the Commissioner's investigation the public authority reconsidered the request and withheld the information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Gosport Borough Council wrongly handled the request under the FOIA and breached regulation 5(1), regulation 14(1) and regulation 14(5)(a) of the EIR but that it correctly withheld information under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

## Background

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4. In November 2017 the complainant instructed planning consultants to submit a planning application to Gosport Borough Council (the "council") for the erection of 5 mixed use hangars.
5. At a meeting of the council's Regulatory Board in February 2018 it was resolved that planning permission be granted, however, the council subsequently sought legal advice and in May 2018 the application was refused.

## Request and response

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6. On 31 May 2018, the complainant wrote to Gosport Borough Council (the "council") and requested information in the following terms:

*"...As the Members' right to conduct its business in this way derived from Counsel's Opinion that was given to the Borough Solicitor, it is vital that our client is presented with copies of that exchange ie the Instruction to Counsel that was issued by your Council and the Opinion that was provided."*

7. The council responded on 19 June 2018. It stated that the requested information *"...is exempt from disclosure because it is a legally privileged document and exempt from FOI."* The council did not provide the complainant with the option to request an internal review, instead directing them to refer their concerns to the Commissioner.

## Scope of the case

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8. On 20 July 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the investigation it occurred to the Commissioner that, given the nature of the request, it was likely that the information was environmental in nature. The Commissioner, therefore, directed the council to reconsider the request under the EIR. The council took this step and confirmed that it was withholding the information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(b) of the EIR.

## Reasons for decision

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### Is it environmental information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.

12. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form 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) and (b) as well as measures or activities designed to protect those elements...'*

13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.

14. In this case the withheld information relates to the use of land within the context of planning permission. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").

15. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.

#### **Regulation 14(1) – refusal to disclose information**

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
17. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
18. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

#### **Regulation 14(5)(a) – internal review**

19. Regulation 14(5)(a) provides that a refusal notice issued under regulation 14(1) of the EIR shall inform the applicant:  
  
*"...that he may make representations to the public authority under regulation 11"*
20. In this case the council failed to inform the complainant of their right to request an internal review of the handling of their request. The Commissioner has, therefore, found that the council breached regulation 14(5)(a) of the EIR.

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

21. The council has withheld the entirety of the requested information under regulation 12(5)(b).
22. 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”.

23. 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 law<sup>1</sup>. 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.
24. 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?*

25. The council has explained that the withheld information consists of correspondence between the council (as client) and its external Barrister. It confirmed that the correspondence was made for the sole purpose of obtaining legal advice and it was communicated in a legal adviser’s professional capacity, both in terms of the instructions to Counsel and the resulting Counsel’s opinion.
26. 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.
27. 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

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

proceedings. In this context 'cherry picking', or only revealing part of the advice given, isn't permitted.

28. 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, 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.
29. The council confirmed that the legal advice was sought in relation to a decision taken by its Regulatory Board (or Planning Committee). It explained that elements of the advice were summarised in a public report to the Regulatory Board and in correspondence with the complainant. However, the council has confirmed that the information made public does not reveal the substance of or focus of the legal advice. In light of this, therefore, the council maintains that the privilege attached to the advice has not been lost.
30. 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.
31. 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.
32. 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**

33. 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 requested information*

34. The council has acknowledged that the complainant is aggrieved by its decision in relation to the substantive planning matter. It noted that withholding the information runs against the general principle of transparency to enable a free exchange of views and more effective participation by the public in environmental decision making. The council has suggested that disclosing the information might assist the complainant and the public in general in understanding how the council arrives at planning decisions.
35. The complainant has argued that they are directly and materially affected by the council's handling of the substantive planning matter. The council's initial position that the planning application be approved and its subsequent decision to refuse the application suggest to the complainant that maladministration has occurred. Disclosure of the information would serve the public interest in transparency and accountability by confirming whether this is indeed the case.

*Public interest arguments in maintaining the exception*

36. The Commissioner considers that there is a strong public interest in the council 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.
37. The council has argued that disclosing the advice would have an adverse effect on its interests in terms of the ability of the Monitoring Officer to ensure good governance and robust decision making. More importantly, it has argued, disclosing the information would erode the concept of LPP and mean that future legal advice would be less effective, due to the prospect of it having to be made public.
38. The council has also highlighted the fact that the matter is still live and that there is potential for its decisions in relation to the substantive matter to be subject to challenge.



*Balance of the public interest*

39. 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.
40. 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”.
41. 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.
42. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. She also notes that the complainant has concerns that the council has committed maladministration. However, the Commissioner has not been presented with any compelling evidence that this is the case, nor does she consider that it falls within her remit to determine whether maladministration has taken place. She also considers that the planning process and other dispute procedures provide mechanisms for such issues to be addressed and concerns about maladministration, can be progressed in other arenas than under the EIR.
43. In addition, 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.
44. Furthermore, the Commissioner considers that the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant’s interests against those of the council and its ability to undertake planning matters and inquiries on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.



45. 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).
46. 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.

## Other matters

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47. Although they do not form part of this decision notice the Commissioner would like to record the following matters of concern.

48. Paragraph 1 of the code of practice issued under regulation 16 of the EIR (the "EIR code") states:

*"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided<sup>2</sup>."*

49. Paragraph 56 of the EIR states:

*"Where a request for information is refused or partially refused in accordance with an exception, the EIR requires that the authority notify the applicant which exception has been claimed and why that exception applies. Public authorities should not unless the statement would involve the disclosure of information which would itself be withheld in accordance with the EIR merely paraphrase the wording of the exception. They should state clearly in the decision letter the reason why they have decided to apply that exception in the case in question. The EIR also requires authorities, when withholding information, to state the reasons for claiming that the public interest in maintaining the exception outweighs the public interest in disclosure. Public authorities should specify the public interest factors (for and against disclosure) that they have taken into account before reaching the decision (again, unless the statement would involve the disclosure of information which would itself be withheld in accordance with the EIR). They should also include details of the complaints procedure."*

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)

50. In handling this request the council initially failed to provide legitimate reasons for withholding the requested information and failed to offer the complainant an internal review. In view of the council's practice in these regards, the Commissioner has concerns that it might not understand its obligations under the EIR and that it has not provided staff with adequate training.
51. The Commissioner considers that, in future, the council will ensure that requests for information are handling in accordance with the statutory obligations set out in the EIR and that its practice will conform to the recommendations of the EIR code.

## **Right of appeal**

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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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**