

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

Decision notice

Date: 26 April 2012

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested information relating to planning enforcement files at a specific address. The Commissioner's decision is that Cheshire East Council has correctly applied the exception where 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.

Request and response

2. On 19 May 2011 the complainant wrote to Cheshire East Council ('the council') and requested information in the following terms:

"We require sight of all planning enforcement files regarding land at [specified address] with the exception of any third party sensitive information i.e. neighbours complaints or support of enforcement actions. And in particular all files, dept memos, legal advice, up to and including the discontinuance of proceedings and any documentation thereafter."
3. The council responded on 14 June 2011. It stated that the complainant is aware of documents that are already available to the public but has already declined the offer to inspect these files. It also stated that further information is held relating to non-compliance with an enforcement notice but such information is being withheld on the

grounds that release would impede the council in its ability to conduct an enquiry of a criminal nature and on the grounds of confidentiality of proceedings where such confidentiality is provided by law (regulations 12(5)(b) and 12(5)(d) of the EIR). In relation to the public interest it stated that although it is recognised there are arguments in favour of openness and transparency, since release could compromise the authority's ability to instigate a new prosecution and take effective further action, it is considered necessary to uphold these exceptions.

4. An internal review was provided on 8 July 2011. The council confirmed that there are two files of documents relating to the proceedings which were commenced by the council and subsequently discontinued. It stated that the complainants had already seen the majority of the information and upheld its previous decision to withhold the remaining requested information under regulations 12(5)(b) and 12(5)(d). It was explained that although there is no information as to whether or not the council intends to implement proceedings in the future, it is incumbent on the council, and in the public interest, to ensure that any information which might prejudice this is not released in advance into the public domain. The council also stated that some information could be released under the Data Protection Act 1998 in response to a subject access request and requested payment of a fee if the complainants wished to pursue this.

Scope of the case

5. The complainants contacted the Commissioner to complain about the way their request for information had been handled.
6. The information requested which constitutes the personal data of the complainants' has been dealt with by the council under the Data Protection Act 1998. The personal data aspect of the complaint made to the Commissioner is dealt with as a data protection request for assessment (under case reference RFA0406796) and is therefore outside the scope of this decision notice.
7. The Commissioner is aware that the complainants have copies of the documents that are already in the public domain (for example, information relating to the planning application, public inquiry and enforcement notice) and that these are not the documents the complainants are interested in. Any information already relayed to the complainants is outside the scope of this decision notice.
8. The Commissioner therefore considered the council's handling of 5 pieces of correspondence.

Reasons for decision

9. The council claimed that the information is legal advice which is subject to legal professional privilege and that it is therefore exempt from disclosure under regulation 12(5)(b) of the EIR. Under this regulation a public authority can 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.

10. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Information Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*¹ as;

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)

11. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.

12. In the case of *Kirkaldie v ICO & Thanet District Council*² the Tribunal stated that,

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”. (paragraph 21)

¹ Appeal no. EA/2005/0023

² Appeal no. EA/2006/0001

13. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'.
14. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse affect on the course of justice.
15. There are two types of privilege, namely; legal advice privilege and litigation privilege. In this case the council has sought to rely on advice privilege.
16. For advice privilege to apply, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
17. In response to the Commissioner's enquiries, the council have confirmed that:
 - the information is correspondence between council officers and legal professionals, both in-house and external;
 - each of the documents has been created for the purpose of seeking or providing legal advice;
 - the legal advice related to enforcement action; and
 - that the confidentiality of the advice is retained.
18. The Commissioner has reviewed the withheld information. Based on that review and the council's submission detailed in the paragraph above, the Commissioner is satisfied that the withheld information is subject to legal professional privilege.
19. The Commissioner has therefore gone on to consider whether the disclosure of the withheld information would have an adverse affect on the course of justice.
20. In *Archer v ICO & Salisbury District Council*³ the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice,

³ Appeal no. EA/2006/0037

the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.

21. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*⁴ in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
22. The Commissioner notes that legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
23. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
24. The Commissioner has therefore borne in mind the fact that ordering disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by this request when making his decision in this case.
25. The council submitted that disclosure would adversely affect the course of justice as, if released, it would impede the council's ability to implement legal proceedings in the future. The council explained that this is a long standing case which has been 'current' since 1999 and is emphatically a 'live' issue.

⁴ Appeal no's. EA/2005/0026 & EA/2005/0030

26. The Commissioner has seen the withheld information and considered the council's argument and is satisfied 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 case is still 'live'. 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. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.

The public interest test

27. 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.
28. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

29. The council recognised that there are arguments in favour of openness and transparency and that disclosing the withheld information could support clarity and fairness in decision making by public bodies.
30. The Commissioner agrees with the council's submission in favour of disclosing the information as its release would promote accountability and transparency and allow the public to better understand the basis of the council's decision and its legal justification for a particular course of action.
31. The complainants submitted that the council seemingly have no intention to ever restart the proceedings and therefore, as it must have finished its inquiry; there is nothing that disclosure could impede. They have stated that it is of great public interest to establish why, at such great cost to the public, under who's decision and for what reason, the council pursued and then discontinued proceedings. They stated that without knowing why the council discontinued proceedings they are left in limbo with an enforcement notice on their home and a continuing criminal accusation against them that can't be removed, which they believe the council knows is flawed and un-enforceable. They have submitted that by refusing to disclose the requested information, the council are knowingly covering up an abuse of process and possibly

protecting themselves from litigation and release would prove serious wrongdoing.

32. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO*⁵ which considered the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..." (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

33. Having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.

Public interest arguments in favour of maintaining the exemption

34. The council stated that as this case is still very much 'current', disclosure of the requested information would compromise its ability to instigate a new prosecution and take effective further action and it would not be in the public interest to prejudice future legal proceedings. It explained that if such legal opinions were to be disclosed to individual's who have been and continue to be the subject of enforcement action, and/or to the general public, the ability of planning authorities to take effective enforcement action would be harmed because any weaknesses in the case for enforcement, as well as strengths, would be exposed. It stated that disclosure would effectively provide a 'blueprint' on how to evade successful prosecution and would inappropriately limit the powers of public bodies.

⁵ Appeal no. EA/2007/0092

35. The Commissioner accepts the council's arguments that, if disclosed, the advice could be analysed for weaknesses which could then be exploited in future. The Commissioner has given this argument significant weight as it would effectively cause an imbalance in the level playing field which should be present within the adversarial process. As legal professional privilege is one of the guarantees of a fair trial, the Commissioner would not expect privilege to be waived in cases where disclosure might prejudice the rights either of the authority itself or any third party to obtain access to justice.
36. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the Bellamy case, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
37. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".
38. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
39. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

40. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
41. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
42. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at Regulation 12(5)(b) outweighs the public interest in disclosure of the information.
43. As the Commissioner has found that the above exception applies, he has not considered whether the exception at Regulation 12(5)(d) applies, where disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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