

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

Date: 27 January 2014

Public Authority: Snowdonia National Park Authority
Address: National Park Office
Penrhyndeudraeth
Gwynedd
LL48 6LF

Decision (including any steps ordered)

1. The complainant requested copies of legal opinions in relation to certain planning obligation agreements. Snowdonia National Park Authority ('the Authority') confirmed it held two legal opinions but it considered the information exempt under section 42 of the FOIA as the information was subject to legal professional privilege. At the time of its internal review, the Authority stated that it considered the request should have been handled under the EIR as opposed to the FOIA and the information was exempt from disclosure under regulation 12(5)(b). The Commissioner's decision is that the Authority has correctly withheld the information on the basis of regulation 12(5)(b). The Commissioner does not require any steps to be taken.

Request and response

2. On 12 August 2013, the complainant referred to an earlier request he had sent to the Authority relating to three specific properties and requested information in the following terms:

"The Authority obtained a legal opinion on the use of Section 106 planning obligations to restrict occupancy, price and tenure of the dwellings mentioned below [details given in the earlier request]. Please supply a copy".

3. The Authority asked the complainant to clarify whether his request was for the original legal advice about the subject matter or for legal advice relating to the more recent applications to remove the planning agreements on the specific properties in question.
4. The complainant clarified that his request was for "sight of all legal opinions which are germane to the subject".
5. The Authority responded on 4 September 2013 confirming that it held two legal opinions relevant to the request but considered the information exempt under section 42(1) of the FOIA as the information was subject to legal professional privilege.
6. On 4 September 2013, the complainant requested an internal review of the Authority's refusal to disclose the information requested.
7. The Authority provided the outcome of its internal review on 17 September 2013. It indicated that it considered the request to fall within the scope of the EIR as opposed to the FOIA and stated that the requested information was exempt under regulation 12(5)(b) of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 17 September 2013 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the information he had requested should be disclosed.
9. The scope of the Commissioner's investigation is to determine whether the Authority should disclose the two legal opinions held relevant to the request, or whether it was correct in relying on regulation 12(5)(b) of the EIR as the basis to withhold the information.

Reasons for decision

Background

10. The request in this case relates to Section 52 and Section 106 Agreements. Section 106 of the Town and County Planning Act 1990 substantially re-wrote Section 52 from the former Town and Country Planning Act 1971. Section 52/Section 106 refers to the concept of agreements (known as "planning obligation agreements," or more commonly "Section 106 Agreements"), under which a developer is

subject to detailed arrangements and restrictions beyond those that a planning condition could impose, or by which they make agreed financial contributions beyond the immediate building works to offset development effects on the local community.

11. The withheld information refers to legal advice about local occupancy agreements associated within Section 52/Section 106 Agreements. A local occupancy agreement restricts ownership of homes in communities to local people, and is designed to help people buy homes in their own community and to restrict the influx of "second homes".

Regulation 12(5)(b) – Legal professional privilege

12. Under this exception, a public authority can refuse to disclose information to the extent 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
13. The success, or not, of an application of regulation 12(5)(b) in terms of LPP will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

14. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
15. The Authority has withheld two legal opinions it obtained from Counsel in connection with two separate cases. It considers the information attracts litigation privilege and disclosure would adversely affect the course of justice.
16. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or

contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

17. One of the documents comprises legal advice in a case about the settlement of litigation in an Upper Lands Tribunal case. The Authority confirmed that litigation was ongoing at the time the advice was sought. The second document comprises legal advice which was sought as a result of an individual indicating they would be applying to the Lands Tribunal to discharge the covenant on a particular property. The Authority confirmed it obtained the advice to assist in connection with the contemplated litigation.
18. Based on the representations provided and the content of the withheld information, it is clear to the Commissioner that one of the documents comprises legal advice where litigation was ongoing at the time the document was created and the other document comprises legal advice where there was a real prospect of litigation at the time the legal advice was sought.
19. The Commissioner is satisfied that the withheld information consists of communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice to assist with litigation. The Commissioner is therefore satisfied that the withheld information is subject to LPP.
20. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request, and there is therefore no suggestion that privilege has been lost.

Would disclosure have an adverse effect on the course of justice?

21. The Authority argues that the legal advice in question is not case specific, that is, just to the cases it was obtained in connection with. It contends that the advice will be relevant to any future legal cases or appeals which may be brought against it. The Authority explained that there are numerous similar agreements in existence (both Section 106 and Section 52 Agreements). The legal advice is of continuing use to the Authority in contemplating settlement terms and assessing any

application for the discharge or variation of such agreements in any future appeals or legal challenges. The Authority considers that the legal advice is, therefore, still very much "live". The Authority considers that disclosure would leave it at a considerable disadvantage in defending any future cases, which would be unfair and would undermine the course of justice.

22. It is the Commissioner's general view that any disclosure of information subject to LPP is very likely to have an adverse effect on the course of justice simply through the weakening of the doctrine. This would, in turn, undermine a legal adviser's capacity to give full and frank legal advice and would have the effect of discouraging parties from seeking legal advice.
23. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a prejudicial effect and that, as a result, regulation 12(5)(b) is engaged. He has therefore gone on to consider the public interest test.

The public interest test

24. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, 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 his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the information

25. The Authority acknowledges that it is in the public interest to know how public money is spent. Disclosure will provide clarity and openness in its decision making process and corresponding expenditure.
26. The complainant explained to the Commissioner that he was surprised that the Authority had refused to provide the information in question for two reasons. Firstly, the fact that the Authority has asserted that the legal opinions support its stance in such appeals. Secondly, the complainant provided the Commissioner with a copy of legal advice he had received from a neighbouring local authority relating to the subject matter. He advised that the legal advice was disclosed following a decision taken by the local authority in question to discharge local occupancy restrictions in light of the legal advice received. He feels that these two points support his view that the information he has requested should be disclosed.

Public interest arguments in favour of maintaining the exemption

27. In this case, in relation to the public interest in favour of maintaining the exception, the Authority put forward the following arguments:

- Section 106 or Section 53 Agreements are private agreements with the property owner in relation to that property only. There is no wider public interest as the issue does not affect the majority of the general public – there is only limited public interest for those individuals who have such agreements in place on their property.
- The legal opinions are not limited to the two particular cases on which the advice was sought but are relevant in all applications to remove Section 53 Agreements from properties. As such, the legal advice is considered to be 'live' in that it is currently being used as a basis of defence of any new applications to discharge or vary such agreements/covenants of this type. Disclosure of the legal advice would give an unfair advantage to other parties seeking to bring a challenge as it would show the strengths and weaknesses of the Authority's stance, thereby putting it at a disadvantage.
- The Authority advised that the complainant in this case has lodged a number of appeals relating to such agreements against the Authority, which he has 'lost' on appeal. As the cases have been concluded, the complainant has cited this as a reason for the Authority to release the legal advice requested. However, the Authority explained that the removal of these planning obligation agreements is a live, and contentious issue. It confirmed that some cases have been lost on appeal, whilst others have been won. The Authority advised that differing legal opinions exist on the enforceability of such agreements, and each local planning authority's local development plan policies will have a direct bearing on whether the cases can be upheld at appeal. The Authority advised that some local planning authorities had taken a decision not to defend such agreements as their local plan policies do not adequately support the reasons for having such agreements in place. However, the Authority believes that its local plan policies do support the continued need for such agreements, and appeals are defended as such. In its initial refusal notice, the Authority stated that "2 recent appeals on these types of agreements have been won by the Authority, therefore proving that the Authority still defends such cases based on the legal opinions received". The Authority considers that disclosure of the legal advice will jeopardise its defence in any current and future appeals of this nature.
- Legal professional privilege has long been established and maintained for good reasons. Full and frank legal advice aids the Authority to comply with its legal obligations. Without such advice, the Authority would be unable to carry out its duties effectively.

Balance of the public interest arguments

28. 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.
29. The Commissioner believes there is a public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance in relation to the Authority's decisions regarding appeals/challenges of this nature and may assist the public in understanding the legal basis for such.
30. In relation to the complainant's representations, as outlined at paragraph 26 of this notice, the Commissioner would point out that he considers each complaint on a case by case basis. The fact that a neighbouring local authority has chosen to disclose legal advice it received on the matter does not mean that the Authority should disclose the requested information in this case. The Commissioner accepts the representations submitted by the Authority in this case – ie that different legal opinions exist on the matter and that each local authority's local development plan will have a direct bearing on whether a legal challenge can be successfully defended on appeal. He also notes that some local authorities have taken the decision not to defend such appeals in the future, but the Authority in this case maintains that its local plan policies support the need for such agreements. The Commissioner has therefore not attached any weight to this argument. Further, as outlined in paragraph 20 of this notice, the Commissioner considers that privilege has not been lost in relation to the requested information and he has seen no evidence to suggest that the legal advice sought has been misrepresented by the Authority.
31. The Commissioner considers there is a strong public interest in the Authority 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. This in turn may have a negative impact upon the quality of decisions made by the Authority which would not be in the public interest.

32. The Commissioner notes that disclosure of the information would be unfair since parties seeking to challenge the Authority's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the Authority's ability to defend its legal position in any current or future appeals/challenges. There is a public interest in maintaining the integrity and fairness of the course of justice and there are legal mechanisms, such as the planning appeal process in place for those wishing to challenge the Authority's position in relation to such agreements.
 33. The Commissioner notes that the individual cases on which the legal advice was sought were concluded at the time of the request. However, he accepts that the legal advice in question would still be relied on by the Authority in any current or future similar challenges/appeals and he therefore accepts that the issues to which the legal advice relates were live at the time of the request. The legal advice cannot, therefore, be said to have served its purpose. He considers that this factor carries considerable weight in favour of maintaining the exception as disclosure would result in adverse effect to the course of justice by revealing the Authority's legal strategy to potential opponents and undermining the principle that legal advice remains confidential.
 34. The Commissioner appreciates that, in general, there is a public interest in public authorities being as accountable as possible in relation to its decisions. In reaching a view on where the public interest lies in this case, the Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, he considers that significant weight should be attributed to the fact that the legal advice was live in that it would be relied on by the Authority in defending any similar future appeals/challenges. It is clear to the Commissioner in this case that 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 therefore determines that regulation 12(5)(b) has been applied correctly by Authority.
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Right of appeal

35. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

Anne Jones
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