

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

Date: 7 September 2018

Public Authority: Mid Sussex District Council
Address: Oaklands
Oaklands Road
Haywards Heath
West Sussex
RH16 1SS

Decision (including any steps ordered)

1. The complainant requested that he be provided with a copy of legal advice obtained by Mid Sussex District Council ("the Council") which the Council had referred to in relation to its decision to allow a development on land at East Grinstead.
2. The Commissioner's decision is that the Council correctly withheld the information under regulation 12(5)(b) of the EIR, since the information is covered by legal professional privilege and disclosure would adversely affect the course of justice. She is satisfied that the balance of the public interest lies in maintaining the exception.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 10 December 2017, the complainant wrote to the Council and requested information in the following terms:

"I should be pleased if you would provide me with the name of the lawyers who gave their advise [sic] to the Council and an assurance that they have not or do not work for your Council in any other capacity. I should also be pleased to receive their written communication to your Council on this matter. I wish to seek this under the freedom of information act."

5. The Council provided a partial response on 11 December 2017, informing the complainant that the legal advice had been obtained from an independent planning barrister. It then responded fully on 2 January 2018. It provided the name of the barrister, and explained that he was not a Council employee. The Council also explained that it was withholding the information it held falling within the scope of the request under section 42 of the FOIA – Legal professional privilege.
6. Following an internal review, the Council wrote to the complainant on 18 January 2018. It stated that it now considered that the withheld information was environmental in nature and had therefore considered the request under the EIR, but, despite the presumption of disclosure, it still considered that the information was legally privileged and was withholding it under regulation 12(5)(b) of the EIR as it considered that disclosure would adversely affect the course of justice.

Background to the request

7. The Commissioner is aware that the request related to the Council's decision to approve the development of a property in East Grinstead, despite having initially refused permission on one particular ground. The ground for refusal related to concerns over the adverse impact on the Ashdown Forest Special Protection Area ("SPA") and Special Area of Conservation "SCA".
8. The Council informed the complainant that, in subsequently granting permission for an identical proposed development, it was relying on legal advice that its approach sufficiently mitigated any impact on the Ashdown Forest SPA and SCA. It was this legal advice which the complainant sought in his request for information.

Scope of the case

9. The complainant contacted the Commissioner on 21 March 2018 to complain about the way his request for information had been handled.

10. The Commissioner notes that the withheld information in this case comprises an item entitled *Advice* prepared by the named barrister, an email from the barrister to an officer at the Council, and an item entitled *Addendum Advice* also prepared by the barrister.
11. The analysis which follows considers whether the Council has correctly withheld all of this information under regulation 12(5)(b) of the EIR.

Reasons for decision

Is the information environmental?

12. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

13. It is important to ensure that requests for information are handled under the correct access regime, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
14. The Commissioner has considered the withheld information in this case and is satisfied that, since the legal advice relates to the impact of development in the Ashdown Forest SPA and SCA, it is information on activities affecting or likely to affect the elements and factors of the environment as defined at regulations 2(1)(a) and 2(1)(b).
15. She is therefore satisfied that the information falls within the definition of environmental information at regulation 2(1)(c) and that the Council considered the request under the correct access regime.

Regulation 12(5)(b) – adversely affect the course of justice

16. Under regulation 12(5)(b) 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.
17. The Commissioner's guidance¹ notes that this exception is broad in nature, explaining that it can, potentially, be widely applied to information held in relation to the administration of the course of justice. This may include legally privileged information; information gathered in relation to law enforcement, investigations and proceedings; and, as stated in the wording of the exception, information whose disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
18. The Commissioner has previously determined that 'the course of justice' includes planning matters, as in this case, since the planning application process comprises various legal steps under the relevant legislation and there is a right of appeal (for the applicant) as well as the right to comment and raise a complaint (for affected parties).

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

19. The additional requirement necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)*², when the Information Tribunal highlighted that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception.
20. The Commissioner's guidance also notes that, in accordance with the Tribunal decision in *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030)*³, the interpretation of the word 'would' (in would adversely affect) is "more probable than not".

Is the exception engaged?

21. The Council has argued that the three pieces of information are covered by legal professional privilege, which may include litigation privilege or advice privilege. In this case the Council argues that the information is covered by advice privilege.
22. The Commissioner has considered the three pieces of information and is satisfied that they represent legal advice from a legally qualified person. The Commissioner is also satisfied that there was no evidence to indicate that the legal advice had been shared with third parties to the extent that it had lost its confidential character. Therefore she is satisfied that the information is covered by legal professional privilege.
23. The Commissioner has therefore considered whether disclosure of the information would have an adverse effect on the course of justice.
24. The Tribunal in *Woodford v IC (EA/2009/0098)*⁴ confirmed that the test for 'would adversely affect' in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information:

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i23/Archer.pdf>

³

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

⁴ http://www.bailii.org/uk/cases/UKFTT/GRC/2010/2009_0098.pdf

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."

25. She is therefore satisfied that the exception is engaged, and has gone on to consider the balance of the public interest in disclosing the information.

The public interest test

26. Regulation 12(5)(b) is a qualified exemption and is, therefore, subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

The complainant's view

27. The complainant is unhappy that the Council granted planning permission for a property despite initially having refused permission for an identical development.
28. The Council explained to the complainant that it had initially refused permission on one single ground (relating to concerns over an adverse impact on the Ashdown Forest SPA and SCA), but then obtained legal advice. It was then satisfied that its approach would mitigate any impact on the Ashdown Forest SPA and SCA, as is required under the Community Infrastructure Levy Regulations 2010 ("the CIL regulations").
29. Therefore, the complainant considers that it would be reasonable to be allowed to view the advice which the Council had received on this matter.

The Council's view

30. The Council has explained that it has considered the presumption of disclosure in the EIR, and that it is aware that there is always a public interest in a public authority conducting its business in a transparent manner.
31. It has also offered general arguments relating to the principle behind legal professional privilege, and stressed the importance of this in this case since *"the issue remains current and would still feature in any planning committee report or planning appeal in the relevant area of the District."*

32. The Council has further argued that "*mitigation of any adverse effects on the Ashdown Forest remains a current issue applicable to development in about 1/3 of the Mid Sussex District. Disclosure of the advice would prejudice the Council as a Local Planning Authority in its capacity to deliver development permissions in a substantial part of the District. This would include much-needed affordable housing.*"

33. On balance, it is the Council's view that the public interest lies in the exception being maintained.

The balance of the public interest

34. Previous ICO decision notices have determined that, other than in exceptional circumstances, there is a strong public interest in a public authority withholding information which relates to the administration of the course of justice, particularly in the case of information which is covered by legal professional privilege, due to the importance of the principle which underlies it: to safeguard openness in all communications between client and lawyer in order to ensure access to full and frank legal advice. In the Commissioner's view, that principle is fundamental to the administration of justice.

35. It has been determined in previous decisions that disclosure of such information would have an adverse effect on the course of justice by weakening the general principle behind legal professional privilege. A public authority has a right to gather information, and to obtain views, as to its legal rights and obligations.

36. Previous ICO decision notices have, therefore, often determined that to disclose information which has been gathered for such purposes would adversely affect the course of justice. This has been found to be especially the case where the nature of the subject matter is 'live'.

37. The Commissioner has also determined in previous cases that it is important that, if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.

38. The Commissioner therefore considers that the general public interest inherent in maintaining this exception, particularly in the case of information which is covered by legal professional privilege, will always be strong. This applies to this case.

39. However, although she considers there will always be an initial weighting towards maintaining the exception, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.

40. She has viewed the withheld information. She notes that it does not relate only to the planning application which led to the complainant's request, but rather is general legal advice for the Council regarding compliance with relevant legislation.
41. Under planning legislation, including section 106 of the Town and Country Planning Act 1990 (the "TCPA") and the CIL regulations, it is necessary for a local authority to seek to mitigate the impact of what would otherwise be 'unacceptable development' by requiring developers to make financial contributions. These contributions are referred to in the TCPA as "*planning obligations*".
42. In the case of Mid Sussex District Council and other local authorities, there is a requirement for these contributions to be made to the Strategic Access Management and Monitoring strategy (SAMM) and the Suitable Alternative Natural Greenspace strategy (SANG).
43. The Commissioner notes that details of the SAMM and SANG in Mid Sussex are published by the Council. These documents explain the mitigation strategies in detail.
44. In the Commissioner's view, there is likely to be some wider public interest in the withheld information. The Council's strategies and procedures in relation to these mitigating financial contributions are not just of interest to the complainant, nor just to residents of Mid Sussex; all local authorities must address the issue of planning obligations, and there are evidently a number of ways of complying with the relevant legislation. A local authority's position on this matter is of potential interest to anyone who has concerns over the impact of, or is affected by, future development.
45. The Commissioner is mindful, however, that any local authority's approach to its planning obligations could potentially be subject to legal challenge. Indeed, she is aware that local authorities are frequently challenged on planning matters, including their interpretation and application of the relevant laws.
46. In this specific case, she notes that the Council has confirmed, as explained previously, that the advice remains of current importance to the ongoing development of the local area. The issue therefore remains 'live'.
47. She considers that disclosing the information would considerably disadvantage the Council in the event of a legal challenge and would undermine the principle behind legal professional privilege.
48. She is not satisfied that this is outweighed by any wider public interest in the disclosure of the information.

49. The Commissioner has therefore determined that the balance of the public interest lies in maintaining the exception, and that the Council was correct to withhold the information under regulation 12(5)(b).

Right of appeal

50. 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

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

51. 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.
52. 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