

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

Date: 7 May 2025

Public Authority: Fareham Borough Council
Address: Civic Offices
Civic Way
Fareham
Hampshire
PO16 7AZ

Decision (including any steps ordered)

1. The complainant requested information about a specific planning permission and Section 106 Agreement. Fareham Borough Council (the Council) provided some information and withheld other information under regulation 12(5)(b) (course of justice) of the EIR and regulation 13(1) (personal data) of the EIR. During the course of the Commissioner's investigation the Council disclosed some additional information to the complainant, but maintained its reliance on regulations 12(5)(b) and 13 of the EIR.
2. The Commissioner's decision is that the Council correctly applied regulation 12(5)(b) to the request. The Commissioner does not require any steps to be taken.

Request and response

3. On 17 June 2024 the complainant wrote to the Council and requested information in the following terms:

"I write in respect of planning permission reference P/22/1812/FP ("the Permission") and the Section 106 Agreement dated 29 May 2024 relating to the Permission ("the S106"). I write to request the following

information and documentation pursuant to the Environmental Information Regulations 2004 ("Regulations"):

All documents, including but not limited to letters, emails, memos, file notes, meeting minutes, legal advice and attendance notes in respect of the drafting of obligations at paragraph 3 of Schedule Four to the S106, relating to what is described within the published minutes of the Council's Planning Committee meeting of 13 March 2024 as obligations "To secure potential connection points for construction of a connecting road from the development site to land to the north (Vero) and south (Land rear of 63 Warsash Road within HA1) in accordance with a scheme of works to be approved by the Council, in the event this access is required to facilitate development of adjacent sites".

In particular, I have been asked by [organisation name redacted]'s board to obtain all such documentation relating to the Council's decision, as set out in an email from [name redacted], Council solicitor, to our solicitor ([name and solicitor redacted]) of 22 April 2024, to substantially amend the Council's own drafting in respect of the connection points, and removing both principles guiding the delivery of those connection points and associated wording that had previously been agreed as between the applicant and the Council, in order that [name of organisation redacted] can understand the circumstances which led to the change in the Council's position more than six months after the original drafting had been issued".

4. The Council responded on 16 July 2024 and provided some information but withheld some information under regulations 12(5)(b) and 13 of the EIR.
5. On 9 August 2024 the complainant requested an internal review of the Council's handling of the request, specifically in relation to its application of regulation 12(5)(b) to withhold some parts of documents and other documents in their entirety.
6. The Council provided the outcome of its internal review on 27 September 2024 and upheld its position that the remaining information was exempt under regulation 12(5)(b) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner on 7 October 2024 to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the Council disclosed some additional information to the complainant, but maintained its reliance on regulations 12(5)(b) and 13 of the EIR.

9. As the complainant has not challenged the Council's application of regulation 13 of the EIR, the scope of the Commissioner's decision in this case is to determine whether the Council has correctly withheld the remaining information under regulation 12(5)(b) of the EIR.

Reasons for decision

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

10. Regulation 12(5)(b) states that a public authority may 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
11. The Council has withheld some documents in their entirety and other parts of documents including comments made on a draft Section 106 Agreement by its legal department. The Council considers the withheld information to be covered by legal professional privilege (LPP), specifically 'advice privilege'.
12. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice in relation to a specific planning application. He therefore considers the information to be covered by LPP on the basis of advice privilege.
13. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential. Having referred to the Council's submissions, the Commissioner is satisfied that the content of the advice has not been subject to unrestricted disclosure and that it, therefore, remains subject to LPP.
14. The Council has argued that disclosure of information relating to how it and its legal advisors discuss, negotiate and refine legal agreements would give an unfair advantage to developers in relation to negotiating Section 106 Agreements. Any loss of its ability to seek confidential legal advice would have an adverse effect on the course of justice and may "hinder advice, limit opinion, questions and commenting in relation to that advice and ultimately result in poor decision making".
15. 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.

Public interest arguments in favour of disclosure

16. The Council accepts that there is a public interest in transparency in relation to planning issues, including the drafting of legal agreements. Disclosure of the withheld information would provide assurance to the public that appropriate legal advice is obtained when drafting legal documents.
17. The complainant pointed out that the requested information relates to significant amendments which the Council made to the Section 106 Agreement. The amendments impact directly on the planning and development of the local area. They consider that disclosure would allow the public to understand the rationale behind the changes made which would in turn foster trust and allow the public to scrutinise the amendments.
18. The complainant argues that transparency in the planning process is critical in maintaining public confidence in the Council's planning decision process, particularly as such legal agreements have significant implications for the community.
19. The complainant accepts, however, that some of the information requested will be subject to LPP. However, they consider that the Council should have considered each piece of information relevant to the request on an individual basis to ascertain only the information subject to LPP and then redact only privileged information.

Public interest arguments in favour of maintaining the exception

20. The Council considers that there is a significant public interest in it having a safe space to have an open exchange and free and frank discussion and exchange of opinion when drafting legal agreements.
21. The Council pointed out that legal advice between itself and its legal advisors is obtained on the understanding that confidentiality between the parties remains at all times.
22. The Council explained that Section 106 Agreements are required in order to "make otherwise unacceptable development acceptable, by ensuring that appropriate mitigation for the impact of the development is secured for the benefit of the new occupiers and the wider public. This ensures where possible that the development makes a positive contribution to the local area and community".

23. The Council considers that disclosure of the withheld information would provide an unfair advantage to developers as it would reveal drafting strategies. This advantage could be used in the future to benefit developers when negotiating Section 106 obligations. This could undermine the Council's position when seeking the best outcome for local communities.
24. The Council pointed out that Section 106 Agreements themselves are required to be made public and it accepts that there is a clear public interest in knowing what mitigation measures or benefits any proposed development bring with them. The Council considers that the planning application and Section 106 Agreement in this case is specific to a small group of individuals who are seeking to obtain information they would not normally be privy to in respect of the drafting of the Agreement. The requestor in this case has indicated that they wish to understand the circumstances which lead to a change in the Council's position in this case. However, the Council does not consider that there is a wider public interest in the public having access to the nature of the legal advice in this case and disclosure would not serve to increase public understanding of Section 106 Agreements.

Balance of the public interest

25. The Commissioner accepts that there is a general public interest in transparency and accountability around public authority decision making. He acknowledges that there is a specific public interest in openness regarding matters which have a potential impact on the environment. In this case, the Commissioner accepts that disclosure would provide the public with information to allow them to better understand decisions the Council has taken in relation to the amendments made to the Section 106 Agreement. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
26. LPP is a fundamental principle of justice and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
27. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing

common law concept. The Information Tribunal recognised this in the Bellamy¹ 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..."

28. To equal or outweigh the public interest in maintaining a claim of LPP, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed. 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 has received or evidence of a significant lack of transparency.
29. The Commissioner notes that the withheld information in this case relates to a Section 106 Agreement which is dated 29 May 2024. Therefore, at the time of the request, on 17 June 2024, the legal advice was recent.
30. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has taken into account the circumstances surrounding the request, both the Council's and the complainant's arguments, the timing of the request and the nature of the withheld information. 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. The Commissioner's decision is, therefore, that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
31. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the

¹ Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

Regulation 12 exceptions. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(4)(d) was applied correctly.

Right of appeal

32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
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