

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

Decision notice

Date: 19 January 2015

Public Authority: Aylesbury Vale District Council
Address: The Gateway
Gatehouse Road
Aylesbury
Buckinghamshire
HP19 8FF

Decision (including any steps ordered)

1. The complainant has requested the internal correspondence between named officers at Aylesbury Vale District Council ('the Council') regarding the complainant's planning application.
2. The Commissioner's decision is that the Council has correctly applied Regulation 12(5)(b) to withhold some of the information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 5 March 2013, the complainant wrote to the Council and requested information in the following terms:

"Whilst there was a lot more information in the files it is still not complete as there is missing information with you [four named officers]. Accordingly I would now make a Freedom of information request to search all the e-mail files on your respective computers. It appears that certain specific and relevant information has been deliberately withheld by you and these parties to stop me accessing all the information which under the Freedom of Information Act I am entitled to.

I say the above as the draft letter from [named officer] dated 21st November 2012 sent to [four named officers] that he was concocting is missing and there is only the final version sent out to my planning lawyer the 5th December 2012 after you all had your input! Also missing is the notes of the meeting he had with you all on that same day."

5. The Council responded on 18 March 2013 seeking clarification of the request. On the same day the complainant responded as follows:

"On Coppice Cottage for the period from 1st July 2012 to date is the period. The specific areas where there is internal correspondence between the offices [sic] by e-mail I require to see and hence my request for my computer expert to access the computers of the officers [six named officers].

We have identified that on the 21st November correspondence between [named officer] and the [four named] officers concerning a draft response with comment in red and their responses.

Correspondence between [named officers]—subject Counsel's opinion—11th to 21st January 2013.

Due to the fact that we have now established that material and relevant correspondence is missing from the file we now require to see evidence of correspondence between the offices [sic] [three named officers] for the period from 1st December 2011 to 30th September 2012.

On the Springwood file there is no correspondence from 1st November 2012 to date although correspondence has transpired.

It is clear that file notes are being selectively put into these files by the officers and under the Freedom of Information Act we are entitled to see all correspondence kindly ensure this is undertaken."

6. On 22 March 2013 the Council contacted the complainant to explain that due to the volume of information it considered within the scope of the request it required 40 working days to respond to the request.
7. The Council responded on 9 May 2013 and provided some information within the scope of the request. It withheld the remaining information in reliance of section 42(1) – legal professional privilege.
8. Following an internal review the Council wrote to the complainant on 19 July 2013. It stated that the Council was now relying on Regulation 12(5)(b) of the EIR to withhold the information it considered to be legally privileged.

Scope of the case

9. The complainant initially contacted the Commissioner on 28 August 2013 to complain about the way his request for information had been handled. The complainant provided the Commissioner with the necessary information to take forward the complaint on 30 January 2014.
10. The Commissioner has investigated whether the Council is entitled to rely on Regulation 12(5)(b) of the EIR to withhold some of the information sought by the complainant.
11. The Commissioner provided his preliminary view in this case on 23 July 2014, and did not receive a response from the complainant. Therefore the case was deemed to have been informally resolved at that time. However, the complainant later contacted the Commissioner to provide copies of emails he had sent in response, but which were not received. It is unclear why the emails were not received by the Commissioner.
12. In the circumstances, the case was subsequently reopened in order to issue this Decision Notice. This is because the complainant made it clear in an email of 31 October 2014 that he did not accept the preliminary view provided by the Commissioner.

Reasons for decision

Background information

13. There has been a history between the Council and the complainant of issues concerning the planning application and permitted development in respect of the complainant's property, which was purchased in September 2010. In June 2012 the complainant lodged an appeal with the Planning Inspectorate against the Council's refusal of his application for retrospective planning permission.
14. The complainant alleges that officers at the Council have collaborated against him in matters concerning the planning application.

Is the requested information 'environmental information'?

15. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies that definition it must be considered for disclosure under the terms of the EIR.

16. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
17. The Council has provided the Commissioner with the withheld information and the information which it had disclosed to the complainant both intentionally and inadvertently in respect of his planning application. In examining this information the Commissioner is satisfied that the information sought by the complainant is environmental information because it relates to matters concerning the development of the complainant's property; consequently he considers that the request should be dealt with under the EIR.

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

18. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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).
19. The Council advised the Commissioner that the Council's solicitor had been instructed to provide legal advice about the enforcement issues arising in respect of the complainant's property and the legal dispute between the complainant and the Council regarding the refusal of the planning application.
20. Having reviewed the withheld information the Commissioner is satisfied that it attracts LPP. The information may be characterised as internal communications between the Council's in-house legal adviser and officers working in the Council's planning department. It is information which constitutes requests for legal advice or the provision of legal advice from a properly qualified person, or communications which discuss issues associated with that legal advice.
21. The Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.
22. 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 explained that there must be an "adverse" effect that would result from the disclosure of the requested information. The Tribunal's decision in *Hogan and*

Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030) interpreted the word “would” as being “more probable than not”.

23. The Commissioner notes that the Upper Tribunal, in the case of DCLG v Information Commissioner & WR [2012] UKUT 103 (AAC) (28.03.2012) GIA/2545/2011, has considered the significance of LPP under the EIR. It has set a precedent in its decision which states that it is relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on a particular case.
24. There are two types of privilege – legal advice privilege and litigation privilege. The Council has advised the Commissioner that, in this case, it wishes to rely on both limbs. It explained that the Council considered that disclosure;

“would also adversely affect the Council’s ability to fairly defend itself against the various challenges brought by [the complainant],”
25. The Council explained to the Commissioner that at the time of the request the correspondence was the subject of a protracted legal dispute and litigation. This remains the position as the Council is an interested party affected by the judgement pending from a second Judicial Review. The Council pointed out that disclosure of the advice would reveal the arguments, strengths and weaknesses which the Council may have, resulting in: “unbalancing the level field under which regulatory decision making and adversarial proceedings are meant to be carried out...”
26. The Commissioner accepts the Council’s position and considers that disclosure of the legal advice would adversely affect the Council’s ability to defend itself should it be faced with further legal challenges in connection with the planning application.
27. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest test

28. Regulation 12(1)(b) requires that, where the exception in 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 has applied the requirement of regulation 12(2) which states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Arguments in favour of disclosing the requested information

29. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis of how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
30. The Council acknowledged this inherent public interest in the interests of openness, transparency and accountability.
31. 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. In this regard, during the Tribunal's deliberations in *Foreign and Commonwealth Office v Information Commissioner* [Appeal number EA/2007/0092] the Tribunal commented that where there is reason to believe that a public 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, then there is a case to be made for disclosure of the privileged information.
32. When the Commissioner reviewed the withheld information and considered the circumstances of this case, he found no evidence of the above factors.
33. The complainant has explained to the Commissioner that his concerns do not focus on the Tribunal's comments in paragraph 31. He is concerned that the advice itself has a bias. He supports this opinion with reference to a formal complaint made by his lawyer against the Council's solicitor after viewing information inadvertently disclosed by the Council during the complainant's visit to the Council offices.
34. The Commissioner explained to the complainant that the 'presentation' and the specific content of the advice is not germane to the application of regulation 12(5)(b). He went on to explain that no substantive weight can be given to the argument that the information should be disclosed in order to determine whether the Council has acted appropriately with respect to the advice of its lawyer. This is particularly so, given the Commissioner's observation at paragraph 32.

Arguments in favour of maintaining the exception

35. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
36. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* [EA/2005/0023] when it stated:
- “...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...”
37. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
38. In this case the Commissioner is aware that the complainant has his own legal representation, described as ‘his Planning Lawyer’. The Commissioner therefore considers that disclosure of the withheld information would be unfair since parties seeking to challenge the Council’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 Council’s ability to defend its legal position.
39. The Council explained that given the complexity and contentious nature of the issues that regulatory and enforcement work gives rise to, the ability to seek legal advice in confidence is essential in ensuring the propriety and integrity of the decision making process. The Council stated that in circumstances like the complainant’s:
- “applicants rely upon technical legal arguments and have the benefit of confidential legal advice themselves.”

40. The Council also argued that disclosure of legally privileged information would harm the administration of planning controls generally because it would mean that public authorities would be deterred from seeking legal advice to avoid others with a vested interest taking unfair advantage of any advice received.

Balance of the public interest

41. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. 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.
42. However, having regard to the circumstances of this case, the Commissioner does not consider 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.
43. The complainant has stressed to the Commissioner his concerns regarding:

"the basis of this actual advice and how it is presented to the officers..... In simplistic terms a council officer or council lawyer must not show bias when dealing with a public situation."
44. The Commissioner acknowledges these concerns which are specific to the complainant's case. However, the public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
45. Following his inspection of the withheld information, the Commissioner does not consider that there are any factors that would equal or outweigh the particularly strong public interest inherent in this exception.
46. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. However, he considers that the planning appeal process provides mechanisms for issues to be addressed. He notes that the complainant has already had two Judicial Reviews with the second judgement currently pending. Where there are broader concerns about the conduct of a public authority, these can more appropriately be remedied via arenas other than the EIR.

47. In addition, 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 and enforcement matters on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.
48. The Commissioner has therefore concluded that the Council has correctly applied regulation 12(5)(b) and that, in this case, the public interest favours maintaining the exception.

Other matters

49. During a visit to the Council offices the complainant was provided with copies of emails to which LPP could have applied. It appears that it was not the Council's intention to disclose this information. However, as the disclosure was made as part of an EIR response, which is to the world at large, this information is no longer confidential and therefore no longer protected by LPP. The complainant is already in possession of this information.
50. However, in making this disclosure the Council has not waived its application of regulation 12(5)(b) in respect of the remaining information to which LPP applies. The number of documents released amounts to a small proportion of the total number of privileged documents. The disclosed documents do not reveal the content or substance of the remaining information. Consequently the remaining information will keep its quality of confidentiality and regulation 12(5)(b) applies.

Right of appeal

51. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

52. 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.
53. 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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