

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

Decision notice

Date: 31 March 2016

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

Decision (including any steps ordered)

1. The complainant has requested legal advice relating to a planning matter. Aylesbury Vale District Council withheld the information under section 42 of the FOIA (the exemption for legal professional privilege). During the Commissioner's investigation the council reconsidered the request under the EIR and withheld the information under the exception for adverse affect to the course of justice - regulation 12(5)(b).
2. The Commissioner's decision is that Aylesbury Vale District Council:
 - Wrongly handled the request under the FOIA and breached regulation 5(1);
 - Failed to issue an EIR refusal notice in time and breached regulation 14;
 - Correctly applied regulation 12(5)(b) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 24 September 2015, the complainant wrote to Aylesbury Vale District Council (the "council") and requested information in the following terms:

"I request release of the legal advice provided to AVDC as detailed in a briefing note on Neighbourhood Planning circulated to members on 31st July 2015."

5. The council responded on 29 September 2015. It stated that it was withholding the requested information under the exemption for legal professional privilege – section 42 of the FOIA.
6. Following an internal review the council wrote to the complainant on 19 November 2015. It stated that it was maintaining its position.

Scope of the case

7. On 11 January 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council handled the request under the correct access regime and whether it had legitimately withheld the requested information.
9. At the outset of his investigation the Commissioner invited the council to reconsider the request under the EIR as it appeared likely that the withheld information constituted environmental information. The council agreed that the request should have been handled under the EIR and it confirmed that it was applying regulation 12(5)(b) to withhold the information.

Reasons for decision

Is It Environmental Information?

10. At the outset of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR. The Commissioner has set down below his reasoning in this matter.
11. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'

12. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
13. In this case the subject matter of the withheld information relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
14. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
15. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR
17. In these circumstances the Commissioner believes that it is appropriate for him to find that the council breached regulation 14(1) of EIR which

requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the Council actually dealt with the request under FOIA.

18. As the council addressed this failing during the course of his investigation the Commissioner does not require it to take any steps in this regard.

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

19. Regulation 12(5)(b) provides 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."

20. In applying this exception to the withheld information the council directed the Commissioner to a recently issued decision notice (ICO reference: FER0600226, issued 25 February 2016) which related to a request for the same information and confirmed that it was relying on the same submissions in the current case¹.
21. Having viewed the previously issued decision notice the Commissioner noted that, in so far as this related to the withheld legal advice which is the subject of this complaint, this concluded that the exception had been correctly engaged and that the balance of the public interest favoured disclosure.
22. In their submissions to the Commissioner the complainant has pointed to events that have occurred after the time of the internal review. However, the Commissioner is only able to consider the context at the time a request is made so he has not considered these further.
23. On the basis of the council's submissions in this case the Commissioner is satisfied that the circumstances at the time of the request under investigation are sufficiently similar for the decision he reached in

¹ Published on the ICO website here: <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623636/fer0600226.pdf>

FER0600226 to be transposed here. The relevant sections of the decision notice for FER0600226 are appended at the annex to this decision notice.

24. For the above reasons, the Commissioner has concluded that the exception in regulation 12(5)(b) is engaged and that the public interest favours withholding the information.

Right of appeal

25. 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

26. 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.
27. 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

**Annex – regulation 12(5)(b) analysis from decision notice (ICO)
reference FER0600226**

Regulation 12(5)(b)

28. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

“the course of justice, 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.”.

29. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met; (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on one or more of the factors cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.
30. Regulation 12(5)(b) of the EIR, specifically the reference to the ‘course of justice’, and section 42 of FOIA share common ground in that both may cover information that attracts legal professional privilege. However, in contrast to section 42 of FOIA, a public authority seeking to apply regulation 12(5)(b) of the EIR is required to take the additional step of demonstrating that disclosure would adversely affect the course of justice.
31. The council says that the external advice and emails between council officers and the barrister relating to the advice are subject to legal professional privilege.
32. Legal advice privilege generally applies where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:
- the communications must be made between a professional legal adviser and client;
 - the communications must be made for the sole or dominant purpose of obtaining legal advice; and
 - the information must be communicated in a legal adviser’s professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.

33. The advice is between a professional legal advisor and his client, the council, and the dominant purpose of the information is to seek and provide advice. The Commissioner is therefore satisfied that the information is subject to legal professional privilege.
34. The next question as regards the application of Regulation 12(5)(b) is whether a disclosure of that information would have an adverse effect upon the course of justice.
35. As regards this the council pointed to the general weakening of the doctrine of legal professional privilege and the ability to seek and receive full and frank advice if the information were to be disclosed. It highlighted that the advice had fed into the policies on a number of inquiries, planning appeals and judicial reviews, and that some of these were still ongoing. It said that:

"... the legal advice is not stale or out of date and is current. There is a potential on fairness to the council in having in to disclose its legal advice, as once disclosed LPP is waived, and the advice could be used by any party against the council.

There are currently a number of outstanding inquiries, planning appeals/judicial review:

- 1. Haddenham call-in inquiry (by Secretary of State)*
- 2. Great Horwood call-in inquiry (by Secretary of State)*
- 3. Moreton Road Buckingham – outstanding application pending for consideration*
- 4. Haddenham Neighbourhood Plan judicial review*

All the above matters are in some way contained within counsel legal advice the subject of LPP in this instance."

36. The Commissioner is therefore satisfied that a disclosure of 'live' advice which is currently being relied upon in a number of ways by the council would cause an adverse effect upon the course of justice.
37. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1). In doing so he has taken into account the general presumption towards the disclosure of the information as required by Regulation 12(2).

The Public Interest

The public interest in the disclosure of the information

38. The Commissioner has considered the public interest arguments for the disclosure of the information.
39. Generally, where a 5 years supply of housing is held, and a planning application is outside of an agreed neighbourhood plan then the application can be refused on that basis. The Commissioner understands that the court judgement finds that a planning application outside of the neighbourhood plan cannot be refused for this reason where there is no completed 5 year plan. The application must therefore be considered under other policies such as sustainability. Some weight will however still be placed on the refusal of the application due to the fact that it does not fall within the neighbourhood plan. Effectively the court judgement has put into question the weight and relevance accorded to neighbourhood plans where there is insufficient land already identified for future housing supply.
40. In general the public interest in the disclosure of the information relates to creating greater transparency on planning issues where the local community has already considered land which is appropriate for development. In particular, disclosure would shed light on the council's policies and decision making regarding the weight accorded to neighbourhood plans in planning decisions where the lack of a 5 year supply of houses would effectively mean that the 'plan' is considered out of date.
41. Any reduction in the weight due the lack of an identified 5 year supply may obviously result in development occurring in areas where the community does not want that to occur, i.e. outside of the areas identified in the neighbourhood plan. This has the potential to affect land and house values, the nature of communities in villages and small towns, and ultimately has the potential to create pressures on the local infrastructure. It should be noted however that the weight is only one factor amongst many taken into account in the consideration of planning applications.
42. The Commissioner notes that there was initially a great deal of confusion and concern over the meaning of the decision, and there was a suggestion that the district council had decided to approve 2 new developments which fell outside of the neighbourhood plans on the basis of the judgement. Following an initial briefing some parties urged parish councils to cease work on neighbourhood plans as they considered they were now 'worthless' following the court's decision as the district council acknowledged that it did not have a 5 year plan in place.

43. The council then sought to reduce these concerns and tried to clarify exactly what the court judgement meant in terms of neighbourhood plans. Clearly a disclosure of the legal advice which the council was relying upon would clarify to interested parties the legal status of neighbourhood plans and may serve to alleviate fears that the work being carried out by various parish councils in creating neighbourhood plans was not in vain following the decision of the court.
44. More widely, the move towards planning decisions being taken locally within communities may be affected by the court decision. There is therefore a wider public interest in clarifying the extent to which local neighbourhood plans can have an effect on planning decisions where there is no identified 5 year supply of housing, and the legal advice would obviously aid in this.
45. The clarity on this which would be shed by the disclosure of the withheld information would obviously benefit local communities who are working to develop neighbourhood plans, and serve as a warning where other councils do not have a 5 year housing supply already identified.

The public interest in maintaining the exception

46. 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 important principle of legal professional privilege. This view has also been supported by the Information Tribunal.
47. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, *"a fundamental condition on which the administration of justice as a whole rests"*.
48. The Commissioner therefore considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, well established and important common law principle. The Information Tribunal affirmed this in the Bellamy case 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..."
49. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, laid out (at paragraph 60 of its

judgement) the following public interest factors in favour of maintaining the exemption at section 42 of FOIA, which is the exemption for legal professional privilege. The arguments are equally as valid in the case of Regulation 12(5)(b) where information subject to legal professional privilege is concerned.

"a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.

b. Were legal advice disclosed routinely, there would be disincentive to such advice being sought and/or a disincentive to seeking advice based on full and frank instructions.

c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between a public authority and its legal advisers.

d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.

e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed."

50. This 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.
51. Referring to the information withheld under Regulation 12(5)(b) specifically within this case the Commissioner notes that the issue was an ongoing issue at the time of the request. A disclosure of the advice at this stage of the proceedings may undermine the legal position of the council by disclosing information which it may need to rely upon in future litigation to defend its position and its decisions in regards to various ongoing planning decisions and inquiries.

52. The courts and the Tribunals have identified a number of factors which can create a stronger public interest in information subject to legal professional privilege being disclosed. These include:
- There is a large amount of money involved;
 - large number of people affected;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
53. The Commissioner has considered these factors. He considers that development involves large amounts of money, and notes that the advice could be beneficial for developers, planning authorities and those involved in planning and neighbourhood plans and would have interest nationwide. This point was raised by the complainant to the council in his request for information.
54. The Commissioner considers that there has been no lack of transparency by the council over the issue, nor has it misrepresented the content of the advice or only disclosed partial advice with a view to misrepresenting the content.

Conclusions

55. The Commissioner has considered the above. There are ways to overturn planning decisions made by planning authorities through appeals, requests for a 'call in' by the Secretary of State and through judicial reviews. For the most part, the planning authority in this case (the council) would need to rely upon the legal advice it has received in order to defend its decision on a case.
56. The council has pointed out that in the event of any appeal appellants are able to seek their own legal advice on the issue of the weighting to be applied in the circumstances above. It considers that a disclosure of its advice would be detrimental to its position and would undermine its ability to defend its position in legal proceedings. The Commissioner agrees with that argument.
57. Whilst the Commissioner recognises the advice contains information which could be used widely to clarify the situation following the judgement the Commissioner must also recognise that the council has real concerns that doing so could affect its ability to defend itself in identifiable and ongoing legal disputes over planning.

58. The Commissioner therefore considers that the public interest in the exception being maintained outweighs that in the information being disclosed in this instance.