

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

Decision notice

Date: 21 January 2019

Public Authority: South Downs National Park Authority
Address: South Downs Centre
North Street
Midhurst
West Sussex GU29 9DH

Decision (including any steps ordered)

1. In five requests, the complainant has requested documents and particular email correspondence associated with a Southern Water water supply site at Shoreham-by-Sea. South Downs National Park Authority (SDNPA) confirmed it does not hold some of the information; it released some information and withheld the remainder that it holds under regulations 12(4)(e) (internal communications), 12(5)(b) (course of justice/legal professional privilege) and 13 (personal data).
2. The Commissioner's decision is as follows:
 - The withheld information is excepted from release under regulation 12(4)(e) and regulation 12(5)(b) and the public interest favours maintaining these exceptions.
3. The Commissioner does not require the SDNPA to take any remedial steps.

Request and response

4. On 9 March 2018 the complainant submitted five requests for information to SDNPA. The first was submitted in the following terms:

"Under the Freedom of Information Act, I require a copy of ALL documents which relate to The Shoreham-by-Sea Water Supply Works Site at Steyning Road, BN43 5FH.

I require a copy of ALL email which contain a discussion of the aforementioned site or any matter related to the site and which were sent/received between [Named Individual] and the following officers:

- 1. To/From [Officer 1] between Oct 1, 2016, and March 9, 2018.*
 - 2. To/From [Officer 2] between Oct 1, 2016, and March 9, 2018.*
 - 3. To/From [Officer 3] between Oct 1, 2016, and March 9, 2018.*
 - 4. To/From [Officer 4] between Oct 1, 2016, and March 9, 2018.*
 - 5. To/From [Officer 5] between Oct 1, 2016, and March 9, 2018.*
 - 6. To/From [Officer 6] between Oct 1, 2016, and March 9, 2018.*
 - 7. To/From [Officer 7] between Oct 1, 2016, and March 9, 2018.*
 - 8. To/From [Officer 8] between Oct 1, 2016, and March 9, 2018.*
 - 9. To/From [Officer 9] between Oct 1, 2016, and March 9, 2018.*
 - 10. To/From The Environmental Agency between Oct 1, 2016, and March 9, 2018.*
 - 11. To/From [Officer 10] between Oct 1, 2016, and March 9, 2018."*
5. The complainant submitted a further three requests that are similar to the above request in that they are, again, for documents associated with Shoreham-by-Sea Water Supply Works and email correspondence between, from and to various of the above individual and officers, and to and from the Environment Agency, and that were associated with the water supply site in question.
6. The complainant submitted a fifth request in the following terms:
- "I require a copy of ALL email which contain a discussion of the aforementioned site or any matter related to the site and which were sent/received between [Officer 3] and [Officer 5] between Oct 1, 2016, and March 9, 2018."*
7. SDNPA responded on 6 April 2018. With regard to the first four requests, SDNPA confirmed it does not hold some information, it released some information and withheld other information under regulations 12(4)(e), 12(5)(b) and 13. It explained that it considered the public interest favoured maintaining the exceptions. SDNPA withheld the information it holds within the scope of request 5 under regulation 12(4)(e) and again confirmed that it considered the public interest favoured maintaining this exception.

8. The complainant requested an internal review on 11 May 2018 and presented a series of public interest arguments for disclosure. SDNPA provided an internal review on 19 June 2018. It maintained its position.

Scope of the case

9. The complainant first contacted the Commissioner on 20 June 2018 to complain about the way his requests for information had been handled.
10. The Commissioner's investigation has focussed on whether SDNPA can rely on regulations 12(4)(e), 12(5)(b) and, if necessary, regulation 13 to withhold the disputed information, and the balance of the public interest.
11. The SDNPA has confirmed to the Commissioner that its responses to the complainant and its submission to the Commissioner take account of both elements of the first four of the complainant's requests; that is, the requests for 'documents' and the requests for email correspondence.

Reasons for decision

Regulation 12(4)(e) – internal communications

12. Regulation 12(4)(e) of the EIR says an authority may refuse to disclose information to the extent that the request involves disclosure of internal communications. This regulation is subject to the public interest test under regulation 12(1)(b).
13. As the Commissioner notes in her published guidance on the application of regulation 12(4)(e), the term '*internal communications*' is not defined in the EIR and is normally interpreted in a broad sense. She has considered the meaning of '*internal*' and '*communications*' separately.
14. With regard to the term '*internal*', the Commissioner notes in her guidance that "...an '*internal*' communication is a communication within one public authority".
15. With regard to '*communications*', the guidance notes that '*the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file... It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others*'.

16. SDNPA has confirmed to the Commissioner that the information it has withheld under this regulation comprises email correspondence between its officers that has not been shared beyond the SDNPA. As such, SDNPA considers that this information retains the qualities necessary to be considered internal communications. SDNPA has confirmed that it has disclosed such information that has been shared with third parties such as officers outside of the SDNPA.
17. In its submission, SDNPA has advised that it considers that its legal advisors at West Sussex county Council (such as Individual 1, who is a solicitor) can be categorised as its internal officers and a necessary part of its thinking space, rather than external third parties. The Commissioner agrees.
18. In addition to any 'documents' relating to the water supply site in question, the requests include requests for:
 - email correspondence between Individual 1 and particular officers and correspondence to and from the Environment Agency
 - email correspondence between Officer 1 and particular officers and correspondence to and from the Environment Agency
 - email correspondence between Officer 3 and particular officers and correspondence to and from the Environment Agency
 - email correspondence between Officer 2 and particular officers and correspondence to and from the Environment Agency
 - email correspondence between Officer 3 and Officer 5.
19. SDNPA has provided the Commissioner with the information it is withholding under regulation 12(4)(e) and she has reviewed it. She notes that it comprises, broadly:
 - (i) Email correspondence from Officer 1 to Individual 1 and particular Officers. The longer email chains associated with this correspondence include: correspondence from an individual who appears to be related to the complainant and from the complainant (about the planning complaint and FOIA matters); correspondence from officers and individuals not referred to in the requests and also planning maps and diagrams
 - (ii) Email correspondence from Officer 3 to Individual 1 and particular Officers, including some not referred to in the requests. It includes longer email chains of correspondence from and to some of the Officers referred to in the requests and correspondence to and from the complainant.

- (iii) Email correspondence between a member of SDNPA staff not referred to in the requests and Individual 1 and Officers named in the request. Again, this includes a longer email chain of correspondence from some of the Officers referred to in the requests and correspondence to and from the complainant.
- (iv) Email correspondence between Officer 2 and other Officers referred to in the requests, including, as above, correspondence in longer email chains. The email chains also include a planning map and copies of letters to a resident associated with the planning application in question.
- (v) Email correspondence between Officer 5 and Individual 1 and other Officers referred to in the requests – but not Officer 3 (request 5). It includes, as above: wider correspondence in longer email chains that includes correspondence to and from individuals not named in the request (such as Southern Water and 4D Delivery Ltd); correspondence from the complainant (regarding his planning complaint and FOI matters); planning enforcement complaint documents and documents associated with tree planting matters. SDNPA has also applied the exception under regulation 12(5)(b) to some of this particular correspondence.
- (vi) Email correspondence between Officer 4 and other Officers referred to in the requests and including, as above, wider correspondence in longer email chains that includes correspondence from individuals not named in the requests and correspondence from the complainant.

All the correspondence was generated between the dates given in the complainant's request.

- 20. In its submission, SDNPA has noted that some of the material above that it has provided to the Commissioner contains information that does not fall within the scope of the request (such as, the Commissioner assumes, point (iii) above) and so this has not been disclosed to the complainant. SDNPA says it has disclosed any information that has been shared with third parties (ie with officers outside of the authority). Where it has identified that this had not been the case in its original response it has rectified this by now disclosing that information.
- 21. SDNPA has confirmed that the remainder of the information withheld under regulation 12(4)(e) is between its internal officers and has not been shared beyond the authority. It says it is therefore confident that this information retains the qualities necessary to be considered internal communication.

22. The Commissioner is satisfied that the withheld information within scope of the requests is email correspondence – and associated attachments – between Individual 1 and Officers referred to in the request – and between those Officers. The Commissioner's guidance states: '*An internal email sent from one individual within a public authority to multiple recipients within that public authority will clearly constitute an internal communication.*' The emails in this case were all sent internally between members of SDNPA staff in relation to complainant's planning complaint and matters associated with FOI requests he had submitted.
23. The exception is clearly engaged in relation to the internal emails. As noted above, the withheld information also includes – as attachments – correspondence between SDNPA and external parties such as Southern Water and 4D Delivery Ltd . The information in these documents falls within the scope of the requests because it was attached to internal communications.
24. Paragraph 35 of the Commissioner's guidance on regulation 12(4)(e) states that if '*...the document only falls within the request because it was attached to an internal communication...in these circumstances the exception will be engaged for both the internal communication and the attachment*'. In relation to the email attachments in this case, these materials do only fall within the scope of the request as a result of being attached to internal communications. The Commissioner therefore finds that the exception provided by regulation 12(4)(e) is engaged in relation to both the internal emails and the attachments to those emails.

Public interest test

Arguments in favour of disclosing the information

25. SDNPA authority has provided the following arguments:
- to promote accountability and transparency in its decision making in relation to planning enforcement matters;
 - to promote the accountability and transparency of public authorities in upholding standards of integrity and ensuring justice and fair treatment for all;
 - to promote accountability and transparency in the spending of public money and in ensuring fair commercial competition in a mixed economy; and
 - to allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.

26. The complainant has also provided arguments to support his position that the information should be released. He is concerned that SDNPA may have been involved in maladministration and a 'cover up' in relation to a number of matters. These include the particular planning permission that the complainant says SDNPA granted to a water utility company and which he says has resulted in the supply of water being negatively affected; trade effluent that the complainant says is being discharged and a consultations procedure that the complainant says was not followed. The complainant considers SDNPA is deliberately trying to frustrate any investigation of these matters.

Arguments in favour of maintaining the exception

27. In its submission, the SDNPA has presented the following arguments:

- The need for a 'safe space' to formulate and debate issues away from public scrutiny. This enables the authority to develop and debate ideas and live issues, in private and without external interference, distraction or pressure.
- The need to exchange views during a live, ongoing investigation without the risk of disclosure inhibiting frankness and candour. As issues are ongoing the exchange of pertinent, sincere views being able to be promoted without any frustrating or suppressing factors is important.
- The significance or sensitivity of the information, particularly that in relation to allegations of misconduct against individuals within the authority.

28. The SDNPA says that, on balance, it maintains that disclosing these internal communications would not serve the public interest. It says it would harm its ability to conduct its ongoing review of the planning issues raised and to undertake fair process in relation to investigating complaints and responding to numerous FOIA/EIR requests. SDNPA has confirmed that it has disclosed all the information it considers it is required to disclose and considers that this is sufficient to ensure the public interest is served.

29. The SDNPA has noted that in his request for an internal review, the complainant raised a number of further allegations (referred to above) which he considered meant that the public interest would only be served by disclosure. SDNPA says that the reviewing officer considered that the majority of these allegations were not, in fact, matters relevant under FOIA/EIR but, rather, were complaints about the SDNPA's service. SDNPA says it advised the complainant that these concerns would be forwarded for consideration under its complaints process.

Balance of the public interest

30. The Commissioner's published guidance on regulation 12(4)(e) advises that public interest arguments relating to this exception should always relate to the content and sensitivity of the particular information in question, and the circumstances of the request.
31. The Commissioner has considered the competing arguments. She accepts that there is a public interest in disclosure in promoting transparency and accountability around decisions made by public authorities. The Commissioner also accepts that there is a public interest in allowing the public to better understand how these decisions are reached.
32. However, any public interest in disclosure has to be balanced against the prejudice that would be caused to the ability of the SDNPA to carry out its planning and customer service responsibilities.
33. The Commissioner accepts the SDNPA's argument for free and frank discussions to inform decision making and that these are required in order for it to be efficient and effective. She has considered the SDNPA's argument relating to the need for 'thinking space' for discussions. Having reviewed the information in question, the Commissioner notes that it is not particularly sensitive, but she agrees that there is a need for a safe space for a public authority to be able to carry out discussions.
34. The Commissioner has also considered the timing of the request. It appears to her that at the time the complainant submitted his request, his dispute with SDNPA – regarding the planning matter - was still ongoing. The complainant's request is for relevant information dating from October 2016 but up to the day before he submitted his request. As such, the Commissioner considers that releasing this information could have prejudiced the SDNPA's activities at that time, since the issues were still 'live'.
35. The complainant has made particular allegations against the SDNPA but has not provided her with any compelling evidence to support these allegations. The Commissioner has therefore not been persuaded that there are concerns about SDNPA's handling of this particular planning matter. Such concerns might strengthen the public interest argument for the release of the disputed information. As it is, while the information may be of interest to the complainant the Commissioner considers that it has limited wider public interest.
36. The Commissioner acknowledges that the EIR carries a presumption of release. However, on this occasion she is satisfied that, at the time of

the request, the public interest favoured maintaining the regulation 12(4)(e) exception. The SDNPA was still involved in an ongoing dispute with the complainant about a planning matter. It was appropriate that it could discuss the issues internally without external interference, distraction or pressure. These could arise if its internal communications and discussions were to be released into the public domain under the EIR.

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

37. Regulation 12(5)(b) of the EIR says an 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. This regulation is also subject to the public interest test under regulation 12(1)(b).
38. The successful application of the exception is therefore 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.
39. In her published guidance on regulation 12(5)(b) the Commissioner recognises that the 'course of justice' element of the exception at regulation 12(5)(b) is very wide in coverage and includes material covered by legal professional privilege (LPP).
40. However, the fact that the information is capable of attracting LPP is not sufficient for it engage regulation 12(5)(b). For the exception to be engaged its disclosure must have an adverse effect on the course of justice.
41. As long as it can be shown that disclosure would produce an adverse effect, as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test. The term 'would have an adverse effect' is taken to mean that it is more probable than not that the adverse effect would happen.
42. The Commissioner's interpretation of LPP is guided by the First-Tier Tribunal's description of the meaning of the concept in *Bellamy v the*

Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023). The Tribunal described LPP as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchange between the client and his, her or its lawyers, as well as exchange which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."

43. The principle of LPP is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). There must be a real prospect or likelihood of litigation rather than just a fear or possibility.
44. In its submission, the SDNPA has confirmed that it is relying on the first two limbs of 12(5)(b), namely the course of justice and the ability to receive a fair trial. The SDNPA has also confirmed that the withheld information is subject to one of the two types of privilege within the concept of LPP – namely advice privilege.
45. The SDNPA has confirmed to the Commissioner that the information it has withheld under regulation 12(5)(b), and which it has provided to the Commissioner, comprises email correspondence between certain of its officers and its legal team at West Sussex County Council. (As it has explained to the complainant, West Sussex County Council provides SDNPA's legal services.) SDNPA has also applied regulation 12(5)(b) to information discussed at paragraph 19(v).
46. SDNPA has confirmed that the communications are for the sole or dominant purpose of obtaining legal advice. It has also confirmed that where the legal advisor has been copied into emails, or where the content does not relate to the provision of legal advice, it has already disclosed this information to the complainant. Having reviewed the correspondence to which the SDNPA has applied regulation 12(5)(b) the Commissioner is satisfied that it is as the SDNPA has described and that the first of the conditions at paragraph 38 is met.
47. The SDNPA has gone on to argue that disclosing legal advice would inhibit its management of the issues the complainant has raised with it. This would adversely affect SDNPA's ability to conduct its ongoing review of the planning issues raised to and to undertake fair process in

relation to investigating the complainant's complaints, and responding to his requests for information.

48. SDNPA maintains that it is essential, especially in light of ongoing planning enforcement matters, that it has 'thinking space' in order to consider and discuss matters fully and frankly without the fear that the information will be disclosed. It says that disclosing this information would also set a precedent that will have a chilling effect on the future management of enforcement matters. SDNPA considers that this will harm the effective operation of the planning function as it would prevent the free and frank discussion between colleagues that are necessary to deliver the most effective planning outcomes.
49. In addition to the points the SDNPA has made, the Commissioner notes that LPP exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice.
50. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the First Tier Tribunal have recognised that disclosure would likely prejudice this integrity.
51. The Commissioner is mindful of the view of the Upper Tribunal, also referred to in her guidance, namely that:

"... it was 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 the particular case".
52. She also recognises that the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
53. In this case, having considered the matter and having viewed the withheld information, the Commissioner is satisfied that the withheld information relates to legally privileged information and that disclosure of that information would have an adverse effect on the course of justice. The second of the conditions at paragraph 38 has therefore been met and the Commissioner is satisfied that the SDNPA was entitled to engage the exception at regulation 12(5)(b) in respect of the information held on that basis. She has gone on to consider the third of the conditions at paragraph 38 – the public interest test.

Public interest test

54. The SDNPA has confirmed that its public interest arguments are the same as those it used for the application of regulation 12(4)(e). The complainant's public interest arguments are also those noted under the regulation 12(4)(e) analysis.

Balance of the public interest

55. The Commissioner accepts that there is always a general public interest in disclosure, deriving from the purpose of EIR. She accepts that there is some public interest in disclosing information to present a full picture. The Commissioner also recognises that the complainant has a personal interest in this case.
56. However, in considering where the balance of the public interest lies in the circumstances of this case, the Commissioner has given due weight 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.
57. The Commissioner considers that there is a significant public interest in maintaining LPP due to the importance in safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice, which in turn is fundamental to the administration of justice.
58. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the SDNPA. However, no such arguments or evidence are present.
59. Having considered the withheld information and the SDNPA's and the complainant's submissions, the Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception.
60. The Commissioner therefore finds that regulation 12(5)(b) applies and that the public interest favours withholding the information. Because the Commissioner has found that the withheld information is exempt from release under regulation 12(4)(e) and/or regulation 12(5)(b) in its entirety, it has not been necessary to consider the small amount of personal data contained in the withheld information to which the SDNPA has applied the regulation 13(1) exception.

Right of appeal

61. 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

62. 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.
63. 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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