

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

Date: 30 January 2019

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

Decision (including any steps ordered)

1. The complainant has submitted a request for information to Fareham Borough Council ("the Council") about legal advice received by the Council in respect of planning application matters. The Council withheld the information under section 42(1) of the FOIA and regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that the Council is entitled to withhold the information under section 42(1) FOIA and regulation 12(5)(b) EIR. However, in failing to consider the request under the EIR, the Council breached the requirement of regulation 14.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 28 January 2018 the complainant wrote to the Council and requested information in the following terms:

I request a copy of the QC opinion sought and received by FBC in respect of the Cranleigh Road Appeal, and referred to by Head of FBC Legal Services during Planning Committee on 24th January.

5. The Council responded on 27 February 2018. It stated that the requested information was withheld under section 42(1) FOIA.
6. The Council responded further on 28 February 2018 to provide the outcome of the public interest test. As part of this, it released part of the withheld information (two summary paragraphs), but continued to withhold the remainder.
7. On 9 March 2018 the complainant asked the Council to undertake an internal review.
8. The Council provided the outcome of its internal review on 23 May 2018. It upheld its original position.

Scope of the case

9. The complainant subsequently complained to the Commissioner about the Council's position.
10. The Commissioner considered that majority of the requested information was likely to fall under the EIR, and invited the Council to consider its position under regulation 12(5)(b) EIR, in addition to section 42(1) FOIA.

Reasons for decision

Is part of the information environmental?

11. Information is 'environmental' if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect the elements of the environment listed in regulation 2(1)(a) will be environmental information.

12. The Commissioner notes that the majority of the withheld information represents legal advice about planning application matters following a Planning Inspector's decision to allow an appeal (against the Council's previous refusal of a planning application) by a developer. The Commissioner considers that this information relates to planning applications, and as such, considers that the information relates to an activity that will affect, or be likely to affect, the state of the elements such as 'landscape'. The Commissioner considers that such information would fall under the EIR.
13. The Commissioner further notes that the remainder of the withheld information represents legal advice about the Council's position in respect of the Planning Inspector's decision to make a partial award of costs against the Council. The Commissioner considers that such information would fall under the FOIA.

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

14. Regulation 12(5)(b) EIR 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.
15. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' is 'more probable than not'.
16. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Tribunal described legal professional privilege as 'a fundamental condition on which the administration of justice as a whole rests'. The Commissioner accepts that disclosure of legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
17. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with

confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

Is the exception engaged?

18. The Council has provided a copy of the withheld information to the Commissioner. The Commissioner has identified that it represents legal advice from a Counsel to officers within the Council, and is dated 15 September 2017. The Council has explained that it considers the legal advice is subject to litigation privilege. The Council also confirmed that any associated confidence has not been lost through the information being disclosed to any third parties.
19. In the circumstances of this case the Commissioner understands that the legal advice was sought following a decision by the Planning Inspectorate which allowed a planning application (that had previously been refused by the Council). The legal advice addresses the option of challenging that decision, and contains a detailed consideration of the merits and legal interpretation of the Council's position in respect of planning application matters. The Council has explained that this legal advice remains 'live', and will be relied upon in defending current planning inquiries and potential judicial review proceedings (for which the Council has already received pre-action letters).
20. Having considered the above, the Commissioner recognises that disclosure of the information would undermine legal professional privilege, and that the disclosure would also affect the Council's ability to defend itself in related legal challenges. The Council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.
21. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

The public interest test

22. Regulation 12(1)(b) requires that, where the exception under 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 her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

The public interest in disclosure

23. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
24. In the circumstances of this case the complainant has explained to the Commissioner that he holds concerns about whether the legal advice received by the Council confirms with the description ascribed to it by the Chair of the Planning Committee, which indicated that the Council was required to allow certain planning applications. The complainant is further concerned that the Planning Committee may be allowing controversial planning applications on the assumed basis that it has no other choice, (i.e. that any subsequently appeal may find against the Council).

The public interest in maintaining the exception

25. The Council has confirmed that the information relates to live and ongoing matters that will be subject of planning inquiries and potentially, judicial review proceedings. The public disclosure of the information would impede the Council's ability to defend its position in these matters. The disclosure would also mean that the Council's position in planning application matters was known to prospective developers, who would be able to rely upon the detail of its content to structure planning applications in a manner that prevented the Council from refusing on legitimate grounds; this would have significant implications for the Council when seeking to implement the emerging local plan.
26. The Council has also confirmed that two summary paragraphs have been disclosed in response to the request. These paragraphs confirm the outcome of the legal advice and the implications for the Council, and were drafted by the legal advisor with the intention that they could be published without any loss of confidence to the legal advice. The Council considers that this information provides appropriate transparency about the advice that it has received.

27. As already indicated, the Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
28. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges, and may deter public authorities from seeking legal advice. The Commissioner's published guidance¹ on regulation 12(5)(b) states the following:

In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.

29. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without needing to disclose its legal advice in advance. This would provide an unfair advantage to opposing parties, who would not be likewise constrained by having their legal arguments known in advance.
30. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Tribunal recognised this in the *Bellamy* 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...

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https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

31. The above 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, as described above.

Balance of the public interest

32. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the Council.
33. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions. However, having appraised the withheld information itself, and the wider circumstances of the matter, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the Council's right to obtain legal advice in confidence.
34. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. To equal or outweigh that public interest, 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.
35. Having considered the context of the request, the Commissioner recognises that the legal advice relates to planning application matters that may have significant implications for development within the borough of Fareham. However, there is no evidence available to the Commissioner that indicates that the Council is acting incorrectly, and the Commissioner is aware that planning application decisions may be challenged and subject to appropriate review; the existence of such mechanisms limit the public interest in disclosure in this case, particularly in that these mechanisms are seemingly now being used. In such a scenario, the Commissioner recognises that it is important the Council be able to seek, and receive, legal advice in order to fulfil its duties as a planning authority.
36. Having considered the above Commissioner is satisfied that the public interest favours maintaining the exception, and that the Council has correctly applied regulation 12(5)(b).

Section 42(1) FOIA – Legal professional privilege

37. Section 42(1) FOIA states that:

Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

38. The legal advice that would fall under the FOIA considers the Council's position in challenging the Planning Inspector's award of costs against it, and is interconnected with the legal advice that falls under the EIR. The Council has explained that this legal advice remains 'live' and may be relied upon in similar proceedings.
39. The Commissioner has considered the withheld information, in addition to the Council's arguments (as outlined above for the purposes of regulation 12(5)(b) of the EIR). Having done so, the Commissioner recognises that the withheld information represents legal advice that is subject to litigation privilege. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently, the Commissioner accepts that section 42(1) is engaged.

The public interest test

40. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
41. However, and as outlined in the arguments considered under the EIR, the public disclosure of this information would impede the Council's ability to defend its position in these matters. The Commissioner recognises that there is a strong public interest in ensuring that the Council is able to seek appropriate legal advice in relation to planning appeals and their outcome, particularly in that the Council must carefully consider its position (and the use of public monies) in challenging an outcome. Additionally, the Commissioner notes that there is no evidence that the Council has acted incorrectly in these matters.
42. The Commissioner has therefore concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption has been correctly applied.

Regulation 14 EIR – Refusal to disclose information

43. Regulation 14 EIR requires that where a public authority refuses to disclose information under an exception, this is stated in writing within 20 working days after the date of receipt of the request.

44. In this case, did the Council did not consider the information under the terms of the EIR until invited to do so by the Commissioner. As such, the Council did not seek to withhold information under the EIR until outside of twenty working days, and consequently breached regulation 14 EIR.

Right of appeal

45. 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

46. 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.
47. 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