

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

Decision notice

Date: 12 April 2012

Public Authority: London Borough of Tower Hamlets
Address: Chief Executive's Department
Town Hall
Mulberry Place
5 Clove Crescent
London
E14 2BG

Decision (including any steps ordered)

1. The complainant requested information relating to a site at Heron Quays West from the London Borough of Tower Hamlets ("the council"). Following the disclosure of some information, the only outstanding issue was the council's decision to withhold information on the basis that it was covered by legal professional privilege and was excepted under regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the council correctly relied on regulation 12(5)(b) to withhold the majority of the information, with the exception of some information, mostly comprising of attachments to the withheld emails. In relation to the information that should have been disclosed, the council breached regulation 5(1) and 5(2) of the EIR. The Commissioner also found a breach of regulation 11 of the EIR because the council did not conduct a timely internal review.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
4. Disclose the following information to the complainant (for clarity the numbers refer to the council's numbering in the bundle of withheld information provided to the Commissioner):

- Item number 14 and 23 – disclose the emails (including attachments) dated 25 May 2010, 21 May 2010 and 20 July 2010 between the council and the Government Office for London (“GOL”)
 - Item 9 – disclose the attachment to the email dated 29 June 2010 (letter from law firm, Ashurst, to the council)
 - Item 16 – disclose the attachment to the email dated 21 May 2010 (letter to GOL dated 2 November 2009)
 - Item 17 – disclose the attachments to the email dated 28 July 2010 (information relating to British Water Board agreement)
 - Item 20 – disclose the attachments to the email dated 29 July 2010 (“the Order”, “side agreements” and “the letter from GOL”)
 - Item 22 – disclose the attachment to email dated 20 July 2010 (letter from GOL dated 1 July 2010)
 - Item 25 – disclose the attachment to the email dated 9 July 2010 (correspondence from GOL)
 - Item 30 – disclose the attachment to the email dated 10 September 2010 (letter from GOL dated 10 September 2010)
5. For clarity, when the Commissioner asked the authority to provide copies of all of the withheld attachments to him, the authority failed to do so upon request. The authority gave various reasons, including that the attachment was not considered by the council to be “particularly relevant”, could not be located easily or was available from another authority upon request. The Commissioner was not persuaded that any of the attachments fell outside the scope of the request. On the balance of probabilities, the Commissioner believes that the attachments are held by the authority and no convincing reasons for the failure to disclose this information have been presented.
6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

7. On 27 May 2011, the complainant requested information from the council in the following terms:

"Would you please supply a copy of all communications (internal and external) that concern the site at Heron Quays West between the end of Public Inquiry in November 2009 and the end of January 2011 and as are held by the Council.

I note that at the end of July 2010 the Council was obtaining counsel's advice with regard to pursuance of the Order. I trust that a copy of the advice received, together with instructions, will be included with your response to this information request".

8. The council replied on 21 July 2011. It said that the request was manifestly unreasonable under regulation 12(4)(b) of the EIR. It also cited the exception relating to internal communications provided by regulation 12(4)(e). It said that the public interest did not favour disclosure.
9. The complainant requested an internal review on 21 July 2011.
10. The council completed an internal review on 6 October 2011. It said that it had decided to withdraw its reliance on the previous regulations cited and it said that it was no longer sure whether the EIR applied to the information. The council said that it had disclosed all the information falling within the scope of the request, other than information that was covered by legal professional privilege. It cited regulation 12(5)(d) under the EIR and section 42 of the Freedom of Information Act 2000 ("the FOIA") in the alternative.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way the request for information had been handled. She specifically asked the Commissioner to consider whether the council had correctly withheld information because it was subject to legal professional privilege. The complainant also complained that the council had not conducted an internal review within 40 working days.
12. For clarity, within the bundle of information that the council provided to the Commissioner, it identified that it had not provided information that it believes the complainant would already have access to, such as correspondence sent by or to the complainant, or that is already publicly

available. The Commissioner has scoped this information out of his investigation.

Reasons for decision

Is the information “environmental”?

13. In its internal review, the council expressed doubt about whether the information should be considered under the EIR. The Commissioner has considered this issue and is satisfied that it should be considered under the EIR. The information relates to a development and a compulsory purchase order. Any information that would or would be likely to affect the land will be environmental information in accordance with regulation 2(1)(c) of the EIR.

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

14. Under this exception, a public authority can refuse to disclose information to the extent that 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”.
15. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege and, even though the council originally relied on regulation 12(5)(d) of the EIR and section 42(1) of the FOIA, the council subsequently clarified that it wished to rely on regulation 12(5)(b).
16. The council told the Commissioner that it wished to rely on legal advice privilege, which is designed to protect the right to request and to receive full and frank legal advice in confidence. The Commissioner considered the withheld information and was satisfied that the majority of it represented communications with qualified lawyers in a relevant legal context (that being in this case discussions surrounding a compulsory purchase order). The council explained that the project was a collaborative effort between the council and Canary Wharf Group and there was a privileged arrangement between the legal representatives of these parties. The Commissioner accepts that this was the case. The council confirmed that the information had not been shared with third parties to the extent that it would cease to be confidential and the Commissioner was therefore satisfied that the majority of the communications attracted legal professional privilege.
17. The Commissioner was not however satisfied that all of the information had been correctly withheld using this exception. In particular, the

Commissioner noted that the council had withheld some emails between itself and the Government Office for London. The basis on which these communications could be covered by legal advice privilege was not apparent to the Commissioner and the council made no reference to these particular communications when submitting arguments to the Commissioner.

18. The Commissioner also noted that when supplying the withheld information to the Commissioner, the council had little regard to the fact that many of the emails contained attachments. An attachment will not automatically be covered by legal professional privilege simply because it is attached to an email that is. The council made no attempt to explain why it had determined that all the attachments were privileged.
19. The Commissioner considered the nature of the attachments and he was not satisfied that the majority had been correctly withheld. Many comprised of correspondence with the Government Office for London and there was no evidence presented to the Commissioner to suggest that this relationship was privileged. The council also withheld a letter from a law firm despite commenting that it "more or less" quotes a letter that has already been disclosed. In view of this comment, the Commissioner was not persuaded that the information was privileged because it no longer appears to be confidential. The authority also sought to withhold some information which has been referred to as "side agreements" and information concerning the British Water Board. No argument was put to the Commissioner to justify why this information was privileged. An erroneous assumption appears to have been made that this information would automatically attract privilege by virtue of being attached to a privileged email. The authority also erroneously claimed that this information was not relevant or should not be considered because it was available upon request from another authority.
20. For clarity, the remainder of the Commissioner's rationale below only relates to the information that he has found was covered by legal advice privilege.
21. 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 has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
22. In accordance with another Tribunal decision *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”.

23. The Commissioner accepts 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.
24. 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”.
25. The Commissioner accepts that disclosure of information that is subject to legal professional privilege would undermine this important and well-established common law principle. This would in turn undermine a lawyer’s capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the council’s ability to defend itself if it faced a legal challenge. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
26. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant information.

Public interest arguments in favour of disclosing the requested information

27. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
28. In this case, the Commissioner appreciates that disclosure of the legal advice would help the public to understand more about the actions taken by the council in respect to this particular issue.

Public interest arguments in favour of maintaining the exemption

29. As already indicated, the Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.

30. 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 or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

31. 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 the other side being put at an advantage by not having to disclose its own legal advice in advance.

32. 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 Information 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..."

33. 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 arguments

34. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the authority's right to obtain legal advice in confidence.
35. The Commissioner observes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved,

where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information and consideration of the circumstances, the Commissioner could see no obvious signs that these factors were engaged in this case. It is the Commissioner's view that the level of transparency was appropriate, particularly given the fact that the compulsory purchase order in question did not actually proceed because it was not considered necessary in the circumstances.

Procedural matters

36. The council should have disclosed some information. It therefore breached regulation 5(1) and 5(2) of the EIR which creates a general obligation upon public authorities to provide environmental information within 20 working days.
37. The council took more than 40 working days to carry out its internal review. That breached regulation 11 of the EIR.

Right of appeal

38. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. 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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