

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

Decision notice

Date: 29 February 2012

Public Authority: South Ribble Borough Council
Address: Civic Centre
West Paddock
Leyland
PR25 1DH

Decision (including any steps ordered)

1. The complainant has requested South Ribble Borough Council ('the council') to release copies of all internal and external legal advice it received in respect of a particular planning application when the application was subject to a planning inquiry and later judicial proceedings.
2. The Commissioner's decision is that the council has correctly withheld the requested information under regulation 12(5)(b) of the EIR.
3. The Commissioner requires no further steps to be taken.

Request and response

4. On 13 October 2011, the complainant wrote to the council and requested information in the following terms:

"I wish to make a formal request under the Freedom of Information Act in relation to an application which was refused at appeal (APP/F2360/A/10/2141624/NWF) and from which the local authority sought to undertake Judicial Review Proceedings. I am aware that this has been refused by the high court, and since this matter has been determined my request relates to any internal as well as external legal advice which was sought by the authority relating to this matter only i.e. the Judicial Review Proceedings and the appeal as above."

5. The council responded on 2 November 2011. It stated that it considered the requested information was exempt from disclosure under section 42 of the Act.
6. Following an internal review the council wrote to the complainant on 14 November 2011. It stated again that it considered the requested information was exempt from disclosure under section 42 of the Act.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the council had acted appropriately by withholding the requested information under section 42 of the Act.
8. During the Commissioner's investigation it was established that the council holds 18 documents or emails which fall within the scope of the complainant's request, some which relate to the planning inquiry and some which relate to the judicial proceedings. The council reviewed its handling of the request and decided to release six of the documents to the complainant. This notice will now focus on the remaining 12 documents or emails.
9. During the Commissioner's investigation the council also agreed with the Commissioner to consider the request under the EIR, as on reflection it noted the request related to environmental information. The council informed the Commissioner that it wished to rely on regulations 12(4)(d) and 12(5)(b) of the EIR.
10. The Commissioner will first consider the council's application of regulation 12(5)(b) to all 12 remaining documents or emails. He will only go on to consider regulation 12(4)(d) of the EIR if he considers regulation 12(5)(b) does not apply.

Reasons for decision

11. 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, 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.
12. The council argued that all remaining 12 documents are subject to legal professional privilege and therefore fall within the definition of this

exception. The Commissioner will now consider whether legal professional privilege falls within the scope of this exception and if it does whether the remaining withheld information is covered by such privilege.

13. In the Information Tribunal hearing of *Kirkaldie v Information Commissioner and Thanet District Council (EA2006/001)* the Tribunal stated that the purpose of this exception was reasonably clear and that:

“it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.

In this hearing the Tribunal decided that legal professional privilege is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

14. As the Commissioner is satisfied that regulation 12(5)(b) of the EIR covers information which is subject to legal professional privilege, it is now necessary for him to consider whether the remaining withheld information in this case attracts such privilege.

Is the information subject to legal professional privilege?

15. There are two types of legal professional privilege; advice privilege and litigation privilege. The council claimed in this case that the remaining withheld information is subject to advice privilege.
16. For advice privilege to apply, the council must demonstrate that each communication was written with the dominant purpose of giving or the receiving of legal advice.
17. The Commissioner has reviewed the remaining withheld information. Some of the information is emails requesting or obtaining legal advice, other information is draft documents which were attached to such emails which were forwarded to an internal legal adviser for comment. One of the 12 remaining documents is a file note detailing discussions that took place relating to this issue and contains details of legal advice the council received. The Commissioner is therefore satisfied that all of the remaining documents were created for the dominant purpose of giving or receiving of legal advice either from the council's internal legal team or its external legal adviser and that they are all subject to advice privilege.

18. As the Commissioner is satisfied that the requested information is subject to legal professional privilege it is now necessary for him to consider whether disclosure of this information would have an adverse affect.

Would disclosure have an adverse affect?

19. The council argued that disclosure would adversely affect its legal advisers from advising the council in a proper unrestricted manner in the future. Disclosure would therefore hinder the council's ability to prepare properly in future inquiries or major legal cases at the preparation stage.
20. The council also considered the issues to which this information relates to still be 'live'. It stated that although the planning inquiry and judicial proceedings had come to an end recently, it did not consider the issues to be resolved and anticipated further action being taken. It stated that it was awaiting the outcome of another planning inquiry on the land in question and considered the issues discussed in the remaining withheld information were relevant to similar planning applications it has and will have in the future elsewhere. The council argued that disclosure would adversely affect its ability to fight this case further if this indeed becomes necessary and other cases which have or will have similar issues.
21. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)* the Information Tribunal set out the various authorities relating to legal professional privilege and described it as:

"a fundamental condition on which the administration of justice as a whole rests".
22. The Commissioner accepts that if information subject to legal professional privilege were to be disclosed to the public, this would undermine the common law principle on which it rests. He also accepts that it would adversely affect the council's ability to obtain such advice in the future and this would in turn adversely affect its ability to manage its assets effectively and make future decisions.
23. The Commissioner also notes in this case that the requested information is a 'live' issue. As the council stated, there is another planning inquiry underway on this land and the information also has wider implications for other planning applications of this nature. The council also advised that further legal proceedings could not be ruled out. Disclosure prior to this case being finalised would adversely affect the council's ability to defend its position and therefore damage its prospects. It could also

adversely affect the council's ability to defend its position in respect of future applications which raise similar issues. The Commissioner considers the council should be able to defend its position without having to reveal its position in advance.

24. The Commissioner accepts that disclosure would also place public authorities in a weakened position when compared to other persons not bound by the EIR or the Act. Legal professional privilege must apply equally to all parties to ensure that there is a level footing in legal proceedings.
25. For the above reasons, the Commissioner has concluded that disclosure in this case would adversely affect the course of justice and therefore that regulation 12(5)(b) of the EIR applies.
26. As the Commissioner has concluded that regulation 12(5)(b) applies in this case he now needs to go on to consider the public interest test.

Public interest test

27. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request under this legislation.
28. In its submissions to the Commissioner the council did not explain any of the arguments it considered in favour of disclosure. It only outlined its position that it considered the public interest in maintaining this exception outweighed any public interest in disclosure and the reasons why.
29. The Commissioner has given this matter careful consideration and he considers there are arguments in favour of disclosure in this case. He considers disclosure would promote the overall transparency and accountability of the council and provide the public with more in depth information on how this particular planning application has been handled. Disclosure would highlight the council's concerns with this application and why it made the decisions it did.
30. Disclosure would also assist public debate and enable members of the public to challenge the decisions made by the council from a more informed position.
31. In favour of maintaining this exception, the council confirmed that disclosure would hinder the council in preparing properly for inquiries of this nature or major legal cases, which would not be in the public

interest. It stated that disclosure would inhibit a full and frank discussion of such issues amongst officers at preparation stage. The council argued that disclosure would place it at an unfair disadvantage. It explained that the majority of its opponents in the vast majority of planning inquiries are not public authorities and are therefore not subject to the provisions of the FOIA or EIR.

32. The Commissioner has carefully considered the arguments for and against disclosure in this case. While he accepts that disclosure would promote the transparency and accountability of the council and provide members of the public with more in depth information on how this application has been handled and why, the Commissioner is of the view that there are more compelling arguments in favour of maintaining this exception in this case.

33. The Commissioner considers the council needs to be able to obtain free and frank legal advice. If disclosure were ordered this would undermine the council's ability to obtain such advice in a timely fashion in future and have the confidence that advice given is done so freely without the consideration of disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered.

34. It is also the Commissioner's view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR or the Act. This view was supported by the Information Tribunal in the hearing of *Creekside Forum v Department of Culture, Media and Sport (EA/2008/0065)*. The Tribunal stated that:

"Disclosure under [the Act or Regulations] puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis."

There must be a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.

35. The Commissioner also considers the requested information is still 'live'. Although the first planning inquiry and judicial proceedings had ended

by the time of the request, the council envisaged further action being taken in the near future and anticipated further legal action may be required. The council also confirmed that the requested information is considered 'live' in a broader context too. It stated that the requested information discussed issues which are relevant and will impact on future applications of this nature. If disclosure were ordered at the time of the complainant's request, the Commissioner accepts that this would have hindered the council's ability to further defend its position as and when this became necessary not only where this planning application is concerned but in respect of future applications that may be submitted raising similar concerns. It is the Commissioner's view that this would not be in the public interest.

36. In the hearing of *Calland v Financial Services Authority (EA/2007/0136)* the Information Tribunal stated:

"What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential".

37. In this particular case, it is the Commissioner's view that no compelling arguments have been presented by either party to justify the disclosure of privileged information. He has therefore concluded that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
38. As the Commissioner is satisfied that regulation 12(5)(b) applies in this case to all remaining withheld information and that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception, there is no need for him to go on to consider regulation 12(4)(d) to the two documents this exception was applied to.

Right of appeal

39. 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

40. 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.
41. 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

Rachael Cragg
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