

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

**Date:** 9 October 2018

**Public Authority:** West Lancs Borough Council  
**Address:** 52 Derby Street  
Ormskirk  
Lancashire  
L39 2DF

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a community infrastructure charge laid on his property, and any information which led to legal proceedings being taken against him for the payment of money which the council considers he owes as a result of this charge. The council provided some information however it withheld other information on the basis that section 42 of the Act was applicable (legal professional privilege). However during the course of the Commissioner's investigation the council changed its decision to rely upon Regulation 12(5)(b) of the EIR (course of justice).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to the information and that the public interests rests in the exemption being maintained.
3. The Commissioner does not therefore require the council to take any steps

## Request and response

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4. On 27 October 2017 the complainant wrote to the council and requested information in the following terms:

*"Please send me:*

- i. Any legal advice or direction received from an internal or external source.*
- ii. Transcripts for any verbal advice.*
- iii. All reports compiled in relation to the above matter.*
- iv. All internal memos and emails.*
- v. All external memos and emails.*
- vi. Advice received from other local authority officers including all connected entries on KHUB and similar sites.*

*I would like the above information to be provided to me as paper or electronic copies."*

5. The complainant then submitted a further email on 7 November 2017 clarifying his request. The council specified this request as:

*"By email dated 7th November 2017, you clarified that your request included:*

- vii. Copies of legal advice.*
- viii. Emails and memos between council officers.*
- ix. Advice provided on any information hubs, including KHUB.*
- x. File notes made at the time of inspection in April 2016 and any subsequent file notes or details of any further visits made by Council officers.*
- xi. Any evidence held in connection with this matter.*
- xii. Transcripts of any verbal information or advice between Council officers.*
- xiii. Any other documents you may consider relevant (the 'Clarification')."*

6. The council responded on 22 November 2017. It clarified that it did not hold some of the requested information, provided information in response to parts ii, ii, and xiii but applied the exemption in section 42 to parts i and parts iv to xii of the request (legal professional privilege).
7. Following an internal review the council wrote to the complainant on 15 February 2018. It maintained its position that the information is exempt under section 42.

## Scope of the case

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8. The complainant contacted the Commissioner 19 February 2018 to complain about the way his request for information had been handled.
9. The complainant considers that the council was not correct to apply section 42 to the information.
10. The Commissioner, however, notes that some of the information is personal data relating to the applicant. She has therefore addressed this further in the 'Other Matters' section of this decision notice.
11. Additionally, during the course of the Commissioner's investigation she also noted that the withheld information falls to be considered under the EIR rather than the FOI Act, for the reasons outlined below. The council agreed with her and decided to rely upon the exception in Regulation 12(5)(b) of the EIR in place of section 42 of FOIA.
12. For that reason the Commissioner considers that the complaint is that the council was not correct to apply Regulation 12(5)(b) (course of justice) to withhold the information.

## Reasons for decision

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### Background information

13. The complainant is in the course of litigation with the council over its application of a community infrastructure levy (CIL) to a house and other facilities which he was in the process of developing. The complainant had initially obtained a CIL exemption for the development of his property, however, the council subsequently revoked this and sought repayment of the full amount.
14. An initial agreement to pay the CIL in instalments was agreed but the complainant then sought to withhold payments following him obtaining legal advice that the CIL exemption should have remained applicable.
15. The complainant therefore disputes that he owes the council money as he considers that the development is exempt from the charge in law. The council however asserts that the exemption was correctly revoked and, subsequent to the request, is in the process of taking legal action to obtain the money which it considers should be paid.

Is the information environmental information for the purposes of the Environmental Information Regulations 2004?

16. The council initially applied section 42 of the FOI Act, however the Commissioner considered that the request may in fact be environmental information for the purposes of the EIR. Given the nature of the CIL charge the Commissioner has therefore considered whether the information should have been considered under the EIR rather than the FOI Act.
17. The information relates to the imposition of a charge under the Community Infrastructure Levy Regulations 2010. Charges under the CIL Regulations are intended to provide funds to provide upgraded infrastructure in light of developments which have, or are to take place. Regulation 59 of the CIL Regulations provides that a charging authority must apply CIL to funding infrastructure to support the development of its area.
18. Effectively therefore, CIL charges are required to be obtained and used for the purposes of the development of the infrastructure of an area. Therefore the funds obtained through this legislation are required by statute to be used for the development of land.
19. As such the Commissioner considers that the information falls within the scope of Regulation 2(c) of the EIR. It is information on a measure *"(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;"*.
20. For the purposes of this decision notice the Commissioner notes that the equivalent exemption with the Regulations is Regulation 12(5)(b)(course of justice). She therefore contacted the council and confirmed that she considered that the request should have been considered under the EIR rather than the FOI Act. She asked it to consider whether it wished to apply Regulation 12(5)(b) in place of section 42 of FOIA.
21. On 27 September 2018 the council confirmed to the Commissioner, by email, that it would rely upon Regulation 12(5)(b) in place of section 42 given the Commissioner's decision that the Regulations applied rather than the FOI Act.
22. The Commissioner has therefore considered the application of this exception to the information by the council.

Regulation 12(5)(b)

23. Regulation 12(5)(b) provides that *"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*

*(b) 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;"*

24. The council claims that the information is subject to legal professional privilege. The First-tier tribunal has accepted that the question of the disclosure of environmental information which is subject to legal professional privilege may fall within the scope of Regulation 12(5)(b) to be considered. In *Kirkaldie v Information Commissioner & Thanet District Council* (EA/2006/0001, 4 July 2006) the Tribunal stated that:

*"The purpose of this exception is reasonably clear. 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".*

25. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'.

26. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse affect on the course of justice.

27. The Commissioner notes however that even where withheld information is not specifically covered by privilege if its disclosure would have an adverse effect upon the course of justice then the exception in Regulation 12(5)(b) may still apply.

28. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the First-tier Tribunal ("the Tribunal") in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) as:

*"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and*

*their parties if such communication or exchanges come into being for the purpose of preparing for litigation."*

29. 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.
30. 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.
31. In this case the Council has confirmed that it considers the withheld information to be subject to litigation privilege. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation.
32. Litigation Privilege applies only where litigation is contemplated or pending. In such circumstances legal professional 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.
33. In determining whether litigation privilege will be available in relation to any specific document the following factors need to present:
  - i. Litigation is pending or in contemplation
  - ii. The communication is made between appropriate parties
  - iii. The dominant purpose for the creation of the documents/information was to assist in the litigation.
34. The Commissioner's guidance on legal professional privilege states at paragraph 8 that:

*"8. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.*

*9. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.”<sup>1</sup>*

35. The council argues that the information was drafted, obtained and/or exchanged for the purpose of obtaining legal advice in relation to contemplated litigation to recover a debt which it considers is owed to it. It said that at the time that the information was drafted, obtained and/or exchanged, there was a real prospect of litigation taking place, and this has subsequently turned out to be the case.
36. The council also argues that the dominant purpose behind drafting, obtaining and/or exchanging the withheld information was to assist the council in making a decision as to whether to instigate proceedings against a party for the recovery of debt.
37. It confirmed that all of the withheld information includes communications between a professional legal adviser, council officers (as clients) and relevant third parties to assist in preparation of its case against the party.
38. Further to this the Council argues that the legal professional privilege remains in place and the requested information has not been shared with any third party without restriction.
39. The complainant argues that the dominant purpose behind the documentation could not have been for litigation purposes given that no litigation was contemplated initially. He argues that *"legal privilege does not extend to either party where legal proceedings are a possibility but not commenced"*.
40. Further to this he argues that during the initial stages of the situation any advice or correspondence which the council had would have been related to whether it was correct to revoke the CIL exemption, and details pertaining to the complainant's initial agreement to pay CIL by instalments. The suggestion is that it would only be at the point to the complainant contested this that litigation may have become contemplated.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)



41. The Commissioner notes that litigation privilege may apply to communications made in the honest belief or under the reasonable apprehension that litigation may ensue. A mere vague apprehension of litigation is not however sufficient for privilege to arise. The appropriate test for deciding on the degree of likelihood of litigation is whether or not there is or was a "reasonable prospect of litigation" at the time of the creation of the document<sup>2</sup>. Therefore, while a formal claim need not have been made, if an incident has occurred which could foreseeably lead to litigation, then litigation may be said to be in contemplation. For example, if an insured individual is under an obligation to notify his insurer if certain events occur (such as his car being involved in an accident); if that event occurs it is likely that litigation may be considered to be in contemplation.
42. In this case the revocation of the CIL charge occurred as a result of the council's belief that work had commenced on the exempted development without it receiving a commencement notice informing the council that that was the case. The CIL Regulations state that if no commencement notice is issued prior to work beginning the exemption is revoked and the developer becomes liable to pay the CIL charge. The complainant, however, initially disputed not issuing a commencement notice to the council prior to starting work and subsequently argued that the CIL payment was not due for various other reasons.
43. Having considered the withheld information and the circumstances of this case, the Commissioner considers that from the moment the complainant began asserting that the application of CIL to his property was not correct there was an additional likelihood of future litigation to recover the debt which the council considered was owed.
44. The evidence demonstrates that the council noted that the complainant had commenced work on the development on 26 April 2016. It wrote to him on the same day with an invoice indicating his liability to pay the charge and asking him to pay this within 14 days.
45. Therefore the Commissioner considers that at the point that the council noted that work had begun without a commencement notice being sent to it, an incident had occurred which could foreseeably lead to litigation, and was at that point contemplated.

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<sup>2</sup> Re Highgrade Traders Ltd [1984] B.C.L.C. 151, CA



46. The Commissioner has also considered the range of documents which the council argues are privileged.
47. The Commissioner is satisfied that the majority of the information is communications between the council lawyers and their client council officers.
48. Some information relates to internal communications between council officers discussing the liability for the claim and the issues surrounding the application of the exemption.
49. Privilege can also encompass information between non-legally qualified parties. This is generally information such as communications between the third parties where they are made in contemplation of the potential for legal proceedings and the communication is made:
  - (i) in answer to inquiries made by the party at the request of the council's lawyers; or
  - (ii) in answer to inquiries made by the party which, whilst not made at the request of the council's lawyer, are made for the purpose of putting the responses before its lawyer in order to obtain advice on the information or to assist the lawyer in the conduct of the litigation.
50. Having considered the withheld information and her guidance on legal professional privilege the Commissioner is satisfied that the withheld information attracts legal professional privilege.
51. The Commissioner therefore considers that a disclosure of the withheld information would be likely to adversely affect the course of justice in this case. It would provide access to privileged and confidential information when that information is still 'live' and a court case is pending which will rely upon that information. A disclosure of the information would provide an indication of the arguments, strengths or weaknesses which the council might have, and as a result unbalance the level playing field under which adversarial proceedings are intended to be carried out.
52. The Commissioner has therefore concluded that the exception in Regulation 12(5)(b) is engaged.

#### The public interest

53. Regulation 12(5)(b) is subject to a public interest test, required by Regulation 12(1)(b). The test is whether in all the circumstances of the

case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

54. When carrying out this test Regulation 12(2) provides a presumption towards the disclosure of the information concerned.

The public interest in the information being disclosed

55. There is an inherent public interest in general openness and transparency with regard to decisions made by public authorities. The central public interest in the information being disclosed in this case is in creating greater transparency and accountability on the council's actions in first agreeing a CIL exemption and then subsequently revoking that.
56. The application of CIL is intended to create funds for local government to spend on developing infrastructure to support growing communities. There is therefore a public interest in providing information which demonstrates how these charges are managed and how the council reaches decisions on the application of CIL liabilities and exemptions. The complainant argues that a disclosure of the information would help to clarify the law in this area and the Commissioner accepts that there is merit to this argument.
57. Nevertheless the Commissioner notes that the issues centrally at stake in this case relate primarily to the private interests of the complainant rather than any wider public interests. They relate primarily to why the CIL exemption he had received was revoked in this instance, and what the council's legal position is in justifying this decision.

The public interest in the exemption being maintained

58. The council argues that it is in the process of legal proceedings against the complainant which are ongoing. It said that the Council paid particular regard to the case of *Szucs v Information Commissioner (EA/2011/0072)* where the Tribunal held that the fact the withheld legal advice was still live carried significant weight.
59. It noted that the ICO guidance also considers, that additional weight should be given in favour of maintaining the exemption where the legal advice is recent and live. It clarified that the Council was considering whether to issue proceedings against the complainant at the time the request was made by him and pointed out that the legal proceedings remain live as the case makes its way through the court process.
60. In addition, the Council also said that it considered the decision of the Commissioner dated 16 May 2016 (reference FER0612248 – Cheshire

East) in which it was noted that public interest "*relates to the wider public interest rather than individual interests*" and, pivotally, that "*there is a broader public interest in the smooth course of justice and the protection of such processes from unwarranted adverse effects*" (see paragraph 22).

61. It is noted that the Commissioner also considered that a disclosure of information linked to an on-going case outside of the judicial process "*would be likely to disadvantage the council's and other parties' position in the overall case*" and "*would weaken the general confidence in the ability to conduct proceedings*" (see paragraph 26).

62. Finally it said that it had taken into account the decision of the First-tier Tribunal in *Calland v Information Commissioner & the Financial Services Authority (EA/2007/0136)*, where the Tribunal commented:

*"The general public interest in disclosure of communications within public authorities has been referred to, usually under the headings of "transparency" and "informing the public debate", in a number of decisions of this Tribunal. What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023, 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."*

63. Applying the above principles, the Council said that it considered that, in the context of live proceedings, disclosure would "*disadvantage the Council's... position*" to the effect that it was not in the public interest to disclose the withheld information.

#### The balance of the public interest

64. The Commissioner considers that some weight must always be given to the principles of accountability and transparency through the disclosure of information held by public authorities. Disclosure of official information can help the public understand how public authorities reach decisions, which in turn can help build trust in public authorities and may also allow greater public participation in the decision making process. Conversely, withholding information can at times fuel distrust and make it harder for members of the public to understand the reasoning behind decisions affecting their lives.

65. The Commissioner accepts that there is public interest in openness and accountability on how decisions are taken in order to ensure that these are proportionate and fair in the particular circumstances of a case. However, legal professional privilege is a fundamental principle of law, and the Courts and Tribunals have found that there is a very strong

public interest in the protection of information subject to legal professional privilege in the past.

66. A disclosure of the information at the time of the request would have had the effect of unbalancing the 'level playing field' between both parties during the adversarial proceedings which are ongoing before the courts. The complainant and his legal advisers would have been able to formulate their arguments with direct reference to the arguments being considered by the council's own legal advisers when they were formulating the complainant's defence to the subsequent legal claim issued by the council.
67. It is the Commissioner's view that that there is a strong inherent public interest in maintaining the integrity of legal professional privilege and therefore in maintaining the application of the exemption in this case. There is a need to protect confidential communications brought together for the purposes of litigation. The withheld information relates to proceedings that were being considered at the time of the request, and were issued shortly thereafter. As such it would not be possible to conduct fair and unbiased legal proceedings if confidential information relating to one party to the case were disclosed into the public domain.
68. The Commissioner is also mindful of the fact that the central interest in this case relates to the private issues of the complainant rather than any wider public interest issues. Whilst she recognises that there is a wider public interest present in creating greater transparency over the council's management and application of CIL charges, she does not consider that this is a compelling and specific justification which outweighs the public interest in protecting legal professional privilege in these circumstances.
69. Finally the Commissioner has seen no evidence suggesting that there may have been any misrepresentation by the council and no suggestion that it has acted improperly in carrying out the actions which it has.
70. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception.
71. The Commissioner's decision is therefore that the council was therefore correct to apply Regulation 12(5)(b) in this case.

## Other matters

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- (a) The Commissioner notes that some of the information falling within the scope of the request is personal data relating to the applicant. As the applicant for the information this would be exempt from disclosure under the Environmental Information Regulations 2004 (EIR) at Regulation 5(3).
- (b) Regulation 5(3) provides that *"To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data"*. Where regulation 5(1) states *"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request"*
- (c) The complainant made an additional request for his personal information in the form of a subject access request to the council on 27 October 2017, on the same date that he made his request under the FOI Act.
- (d) However the complainant's subsequent letters refer to a telephone call with a member of the council who suggested that the subject access request under the DPA would not provide any further information than a response provided to his FOI request, and therefore only the FOI request was taken forward by the complainant.
- (e) The Commissioner notes however that in his letter to the council of 17 January 2018 the complainant did ask the council to review whether it was correct or not that no further information would be available to him under his subject access rights. The council's review response did not specifically address this.
- (f) The complainant requested any personal data held about him be provided under the subject access provisions in section 7 of the Data Protection Act 1998 (the DPA 1998). The DPA 1998 is applicable in this situation given that the request was received prior to the implementation of the DPA 2018 in May 2018.
- (g) The Commissioner has been provided with no evidence suggesting that the council gave specific consideration to the complainant's rights under the DPA separately, nor that it considered how much of the relevant information was in fact personal data relating to the complainant and considered this for disclosure separately.

(h) Whilst that is the case, the Commissioner notes however that there is a separate exemption within the DPA 1998 for information subject to legal professional privilege. This may have acted to exempt the information from disclosure through the DPA also, and is likely to be the reason why the council advised the complainant that no further information would be available to him under the DPA than would be available to him under the FOI Act.

(i) Paragraph 10 of Schedule 10 of the DPA 1998 states:

*"Personal data are exempt from the subject information provisions if the data consist of information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality as between client and professional legal adviser, could be maintained in legal proceedings."*

(j) Nevertheless the Commissioner notes that the information is personal data relating to the complainant and as the council did not provide a written, separate response to him outlining its reasons for stating that no further information would be available under the DPA she will therefore write to the council, separate to this decision notice, to ask it to consider the information for disclosure under the complainant's rights under the DPA 1998 and to provide its response to him in writing.

(k) The council should note for the future that where personal data belonging to the applicant for the information falls within the scope of an information request then this should be considered first under the DPA 2018, separate to the information falling within the scope of the FOIA/EIR. This is due to the different rights and obligations provided within these Acts. Not least it should be noted that disclosure of information under the DPA is to the applicant alone, whereas under the FOI Act disclosures are considered to be to the whole world.

(l) Additionally under the DPA 1998 and the DPA 2018 data subjects have the right to apply directly to a court to have their rights under that Act enforced. There is no equivalent right provided in the FOI Act.

## Right of appeal

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72. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.

74. 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**