

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

**Decision notice**

**Date:** 16 February 2012

**Public Authority:** Fenland District Council  
**Address:** Fenland Hall  
County Road  
March  
PE15 8NQ

**Decision (including any steps ordered)**

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1. The complainant requested information in connection with a speech given by a councillor concerning planning policy. Fenland District Council ("the council") provided some information and said that no other information was held apart from legal advice which had been withheld under section 42(1) of the Freedom of Information Act 2000 ("the FOIA") because it was covered by legal professional privilege.
2. The Commissioner's decision is that the request should have been handled under the Environmental Information Regulations 2004 ("the EIR"). He found that the legal advice was excepted under regulation 12(5)(b) and the public interest favoured maintaining the exception. He also found that no further information was held.
3. The Commissioner does not require any steps to be taken.

**Request and response**

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4. On 24 June 2011, the complainant requested information in the following terms:

*"After the recent comments by [name] regarding the relaxation of conservation rules and archaeological commitments during planning/construction I am concerned at what this statement*

*represents and where it may originate.*

*Please provide details of any lobbying that has been undertaken either in favour or against the newly relaxed regulations.*

*Please also describe any legal ramifications that have been considered in relation to the legality of this position within the framework of current British and European law. Including the PPS5 and local plan.*

*I would like to view any correspondence electronic or otherwise from either [names] (who I note is himself a developer) that contain the words archaeology/archaeological/ heritage or bunny huggers over the past year".*

5. On 6 July 2011, the council supplied a copy of a statement of response made by the councillor. It asked the complainant to contact it again if he required any further information.
6. The complainant replied on the same day and said that although the statement was interesting, he still wanted the council to process his original request for information formally.
7. The council replied on 22 July 2011. In relation to the request about lobbying, the council said that no information was held. In relation to the request about any legal ramifications that had been considered, the council said that it held some legal advice but considered that it was exempt under section 42(1) of the FOIA. It said that the public interest favoured withholding that information. In relation to the request about correspondence from the named councillors, the council said that it did not hold this information.
8. The complainant requested an internal review. He said that he believed that the withheld legal advice should be disclosed. He also said that he did not accept that the council held no information relating to his request about the councillors' correspondence.
9. The council completed an internal review. The council said that it wished to maintain its position that the legal advice should not be disclosed. It also said that the councillor's speech referred to was a political speech which had not been discussed with the council or other members prior to its delivery. It said that it would conduct further searches to check that it did not hold relevant information. It said that councillors are not required to use council systems for all communication and there may therefore be communications which fall outside the scope of the FOIA.
10. The complainant wrote to reiterate his view that the legal advice should not be withheld. He also said that the council was wrong to suggest

that communications made on behalf of the council would fall outside the scope of the FOIA, regardless of what email address was used to make the communication.

11. The council replied on 24 August 2011. It maintained its position that the legal advice had been correctly withheld. In relation to councillor's correspondence, the council clarified that information would fall within the scope of the FOIA if it was held by or on behalf of the council. It said that there was no obligation upon councillors to use a council supplied email account. It said that having undertaken a search, it was able to disclose some information that had been found in the relevant council-provided accounts using the search terms in the request.

### **Scope of the case**

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12. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had correctly relied on section 42(1) to withhold the legal advice and he also asked the Commissioner to consider whether any further information was held concerning the last part of his request relating to correspondence from the two councillors containing the relevant key words. For clarity, the complainant did not ask the Commissioner to consider the council's position that no further information was held in relation to lobbying and that issue is not therefore addressed in this notice.
13. The complainant also expressed concern about councillors using their personal email accounts, even for council business. The Commissioner has commented on these concerns in the "Other Matters" section of this notice.

### **Reasons for decision**

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#### **Should the request have been handled under the EIR?**

14. Environmental information cannot be considered under the terms of the FOIA. It must instead be considered under the terms of the EIR. Regulation 2 of the EIR provides a definition of environmental information. Regulation 2(1)(c) states that any information on plans affecting or likely to affect the environment will be environmental information. The Commissioner notes that the information concerns a speech made by a councillor about planning policy at the council. Planning policy clearly impacts upon the environment, in particular the land.

### **Exception regulation 12(5)(b) – Legal Professional Privilege**

15. For clarity, the Commissioner has seen a copy of the relevant information. It comprises of an email sent by the council's solicitor to the councillor following the speech in question. The Commissioner was satisfied that it represents legal advice from a legally qualified person. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice had lost its confidential character.
16. 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".
17. 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 section 42(1) of the FOIA, the Commissioner considers that it is appropriate to consider the equivalent exception under regulation 12(5)(b) of the EIR.
18. 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.
19. 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".
20. 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".
21. The Commissioner accepts that disclosure of the 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. He also considers that disclosure of the legal advice would adversely affect the Council's ability to defend itself if it ever faced a legal challenge in connection with this issue. 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.

22. 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 legal advice.

### **Public interest arguments in favour of disclosing the requested information**

23. 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.
24. In this case, the speech made concerned political aspirations for planning policy and it was not at the time made explicitly clear that the comments made had not been approved by the council and were not representative of the council's position. This had understandably generated some public concern, which had in turn given rise to this particular information request.
25. In this case, the Commissioner appreciates that disclosure of the legal advice would help the public to understand more about the way in which the council handled the situation.

### **Public interest arguments in favour of maintaining the exemption**

26. 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 advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. 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".
27. 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”.*

28. 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.

29. 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...”*

30. 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**

31. 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 provide legal advice in confidence.

32. 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, the Commissioner could see no obvious sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. The council has made it clear that the speech was not representative of its own position.

### **Regulation 5(1) - Was more information held?**

33. The complainant asked the Commissioner to consider whether any more information was held regarding his request about correspondence from the councillors involving the key words.
34. Regulation 5(1) of the EIR provides a general right of access to environmental information held by a public authority.
35. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held in appropriate cases. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".<sup>1</sup>
36. The council maintained throughout the Commissioner's investigation that no further information was held falling within the scope of the request. It said that it had searched the relevant council email accounts of the two councillors mentioned in the request even though only one of them has a council role for which he could be deemed to have been acting on the council's behalf. This had produced the information that had already been provided to the complainant. As one of the councillors has a council role for which he uses his personal email account, it also asked this councillor to search his personal email account. In addition, the council said it had searched other internal accounts which it considered could have contained relevant information. A search of the councillor's personal email account identified some information with the key words but this information largely fell outside the scope of the request because it was correspondence sent to the councillor rather than correspondence from him. The only exception was one email which the council said was sent by the councillor acting otherwise than on behalf of the council. Having considered the circumstances and the nature of the email, the Commissioner agrees that the information was not held on the council's behalf. There was therefore no obligation to disclose it under regulation 5(1). The council said that it was not aware that any relevant information falling within the scope of the request had been deleted, destroyed or mislaid.

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<sup>1</sup> This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

37. On the basis of the above, the Commissioner was satisfied that no further information was held by the council on the balance of probabilities.

### **Other matters**

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38. During the course of the Commissioner's investigation, the complainant expressed concern to the Commissioner that councillors may use their personal email accounts even when acting on council business. The Commissioner has discussed the situation with the council and it is clear that the council fully understands that information in private email accounts can be covered by the scope of the FOIA or the EIR if it is deemed to have been held on behalf of the council. The council also appreciated the practical difficulties caused by councillors using private email accounts for such purposes. The Commissioner trusts that the council will carefully consider his recently published guidance on this issue and consider his recommendations for best practice. For ease of reference, the guidance is shown at the following link:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/official\\_information\\_held\\_in\\_private\\_email\\_accounts.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx)



## Right of appeal

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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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://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** .....

**Andrew White**  
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