

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

Decision notice

Date: 16 August 2012

Public Authority: Bristol City Council
Address: The Council House
College Green
BS1 5TR

Decision (including any steps ordered)

1. The complainant requested legal advice from Bristol City Council ("the council") relating to an application to register land as a town or village green. The council refused to provide the information on the basis that it was either exempt under section 42 of the Freedom of Information Act 2000 ("the FOIA"), the exemption relating to legal professional privilege or the equivalent exception under regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the council correctly applied regulation 12(5)(b) of the EIR to withhold the information.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 17 September 2011, the complainant requested information from the council in the following terms:

"I note from your breakdown of costs that on 18th March 2011 the sums of £4,500 and £5,000 respectively were paid to [name] and [name], on behalf of the CRA (account reference JD5/363).

*Would you please identify what these two payments were for?
If they were for written legal advice(s) supplied to the CRA, please provide me with copies of those advices".*

5. The council responded on 14 October 2011 and confirmed that the payments related to legal advice. The council refused to disclose the legal advice on the basis that it was covered by legal professional privilege under section 42 of the FOIA or regulation 12(5)(b) of the EIR.
6. The complainant replied on 29 October 2011 and asked the council to review its decision.
7. The council responded on 6 January 2012 and said that it wished to maintain its position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether the council had correctly withheld the information.

Reasons for decision

Should the request be considered under the EIR?

9. In its response, the council did not offer a definitive answer to whether the request should be handled under the EIR of the FOIA, and the Commissioner has therefore considered this issue.
10. The request relates to legal advice on the subject of an application to register land as a town or a village green. Town and village greens developed under customary law as areas of land where local people indulged in lawful sports and pastimes. These might include organised or ad-hoc games, picnics, fetes and similar activities. The application to register the land clearly relates to the use to which that land may be put and in the Commissioner's view, this brings the legal advice on the issue within the scope of the EIR. Regulation 2(1)(c) provides that information on activities affecting or likely to affect the elements or factors of the environment, including land, is environmental information.

Background

11. Most town or village greens were registered in the late 1960s under the Commons Registration Act 1965. Today, anyone can apply under section 15 of the Commons Act 2006 to register land as a green if it has been used by local people for lawful sports and pastimes "as of right" (i.e. without permission, force or secrecy) for at least 20 years. The council

received one such application. It sought legal advice on that issue and that legal advice forms the subject of this particular request.

12. The Commissioner notes that the legal advice was sought by the council acting in its capacity as a Commons Registration Authority. The duties involved are to maintain a register of common land and town or village greens, and to administer applications for amendments to those registers. For clarity, against this background, the Commissioner is satisfied that a Commons Registration Authority would meet the definition of a "public authority" as provided by regulation 2(3) of the EIR.

Regulation 12(5)(b) – Course of justice

13. 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege in the same way as the exemption under section 42 of the FOIA.
14. For clarity, the Commissioner has seen a copy of the relevant information. It comprises of a report setting out the legal advice provided by two barristers. The Commissioner was therefore satisfied that the withheld information 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 and it was therefore covered by legal advice privilege.
15. 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.
16. 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".
17. 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.

18. He also considers that disclosure of the legal advice would adversely affect the council's ability to defend its position 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.
19. For clarity, in her submissions to the Commissioner, the complainant argued that there would be no adverse effect resulting from the disclosure because of the responsibility of Commons Registration Authorities to act independently when making their decisions, in the public interest. The Commissioner did not find these arguments convincing. There are many bodies that may be said to operate broadly for those purposes. The Information Commissioner's Office itself is one such organisation. Such bodies are still entitled to a confidential space in which to seek legal advice to help them to make decisions and those decisions may still be challenged through legal processes.
20. 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

21. 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.
22. Disclosure in this case would help the public to understand more about the deliberative process undertaken by the council acting in its capacity as Commons Registration Authority.

Public interest arguments in favour of maintaining the exemption

23. 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".

24. 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".

25. 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.
26. 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..."

27. 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

28. 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 and consider legal advice in confidence.
29. The Commissioner observes that the general 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 relevant to this case.

30. The Commissioner also notes that the matter at issue is still on-going and this means that the public interest in maintaining a confidential space for that decision-making process to be undertaken is an even stronger concern.

Right of Appeal

31. 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

32. 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.
33. 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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