

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

Date: 16 October 2014

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant has requested legal advice and related information regarding a specific planning issue. Northumberland County Council provided some information at internal review and further information during the Commissioner's investigation. The Commissioner's decision is that Northumberland County Council has corrected applied the exception at regulation 12(5)(b) to some of the requested information, and that, on the balance of probabilities, it does not hold any further recorded information within the scope of the requests. He does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 5 December 2013, the complainant wrote to Northumberland County Council ('the council') and requested information in the following terms:

"**Brackenside Wind Turbine** Noise: at the Planning Committee meeting on 5th November last reference was made to legal opinion regarding noise conditioning. Despite two requests I have not been able to access this document, yet am expected to comment on noise conditioning at the site.

Please forward a copy of the legal opinion referred to above, together with any related officer reports / responses / memoranda, etc."

3. The council responded on 18 December 2013 and stated the legal advice is legally privileged and there is not a detailed or specific list of case law to provide.

4. On 20 December 2013 the complainant expressed dissatisfaction with the response and clarified his request for information as follows:

"Please identify 'the relevant case law' and 'relevant planning appeals' and explain why their communication can in any way be denied on the blanket grounds that they constitute 'privileged legal advice'...

In addition to the above I would also formally repeat my request for sight of the legal advice to which Officers referred when advising the Committee, including identification of the 'latest / recent / very recent cases' which were specifically alluded to, along with any related officer reports, briefings, responses, memoranda, etc., including e-mail exchanges relating to it."

5. The council responded on 21 January 2014 and reiterated that the legal advice is legally privileged and there is not a detailed or specific list of case law to provide. It also provided details of its internal review procedure.

6. On the same day, the complainant requested an internal review stating that the council failed to provide the information and ignored the full scope of the request.

7. The council provided its internal review response on 19 March 2014. It said that the legal opinion requested is exempt from disclosure under regulation 12(5)(b) and the public interest favours maintaining the exception. In relation to the request for a copy of case law referred to at the committee meeting held on 5 November 2013, the council said

"...the reference at the committee was to allow for the consideration of relevant case law and appeal decisions with the Council's barrister to ensure that the planning condition was suitable and fit for purpose. There was not a specific case; rather there were a number of cases that officers wanted to review with the Council's barrister. There is therefore not a specific list to provide."

The council also provided a number of appeal decisions that were circulated by the council's Environmental Protection Manager in advance of a conference with the council's barrister.

8. The complainant wrote to the council again on 20 March 2014. He said that the files received do not appear to satisfy his request as the most recent documentation was dated January 2013 with others stretching back to 2005 and these can't be described as recent. He also said that the council appear to have totally ignored the second part of his request made on the 20 December 2013.
9. On 11 April 2014 the council responded. It said that there is nothing further it can add to the response sent on 19 March 2014 and advised him to complain to the Commissioner if he is dissatisfied.

Scope of the case

10. The complainant wrote to the Commissioner on 22 April 2014 to complain about the way his request for information had been handled.
11. During the Commissioner's investigation, the council informed him that it had come to its attention that an email from its legal advisor had already been disclosed as part of another information request and therefore its legal professional privilege may have been lost through that release of information. The council then wrote to the complainant stating that it is not appropriate to withhold some email correspondence from its legal advisor as it had already been disclosed as part of an EIR request and provided a copy of the correspondence in question. The council also said that there are no further documents held by it in respect of the matter.
12. Following the further disclosure referred to above, the complainant wrote to the Commissioner detailing why he believes that further information is held by the council.
13. The Commissioner then made further enquiries of the council which resulted in the council identifying further information within the scope of the request which it is now applying the exception at regulation 12(5)(b) to. The council also provided the complainant with further information in relation to some of his specific queries and stated that further information is not held in relation to other specific queries and for the list of case law.
14. The Commissioner has therefore considered whether the council holds any further information within the scope of the request and whether the exception at regulation 12(5)(b) applies.
15. The council applied the exception at regulation 12(5)(b) to documents 5D, 5E and 6 (in a numbering scheme adopted by the council). However, it drew the Commissioner's attention to the fact that the email

containing legal advice referred to as document 6 is the same as the email containing legal advice referred to as document 5D. Therefore, the Commissioner has only considered whether the exception at regulation 12(5)(b) applies to documents 5D and 5E.

16. The further documents provided to the complainant during the investigation are outside the scope of this decision notice.
17. The complainant's email of 5 December 2013 also contained a request for information relating to 'Whistle Bare'. This has not been complained about and is therefore not included in this decision notice.

Reasons for decision

Regulation 12(5)(b)

18. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on 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.
19. The council applied regulation 12(5)(b) to two email chains which it referred to as documents 5D and 5E. It explained that the correspondence set out in 5D was with the aim of securing legal advice from the council's barrister on noise condition matters and the correspondence set out in 5E was with the aim of securing legal advice from the council's barrister on the content of a committee report and its robustness. It said that the information is subject to legal professional privilege. In particular, advice privilege.
20. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*¹ 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

¹ Appeal no. EA/2005/0023

their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)

21. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.
22. In the case of *Kirkaldie v ICO & Thanet District Council*² 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”. (paragraph 21)
23. 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’.
24. 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 effect on the course of justice.
25. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both 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.
26. Having viewed the two email chains, the Commissioner is satisfied that they constitute communications to and from the council’s barrister made for the dominant purpose of receiving legal advice and are therefore subject to legal professional privilege.

² Appeal no. EA/2006/0001

27. Information will only be privileged so long as it is held confidentially. Although the council did not respond to the Commissioner's enquiry on this particular point, as far as the Commissioner has been able to establish, the information was not publicly known at the time of the request and there is therefore no suggestion that privilege has been lost. The Commissioner has therefore gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
28. In *Archer v ICO & Salisbury District Council*³ the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.
29. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*⁴ in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
30. The Commissioner notes that legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
31. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.

³ Appeal no. EA/2006/0037

⁴ Appeal no's. EA/2005/0026 & EA/2005/0030

32. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by the request when making his decision in this case.
33. The council said that the planning application to which the request relates had been subject to two judicial reviews and is now the subject of a third judicial review and therefore the if the legal advice was disclosed it would be in a potentially weakened position compared to people or organisations not bound by the EIR.
34. The Commissioner has seen the withheld information and considered the council's argument and is satisfied that disclosure would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information and would provide an indication of the arguments, strengths or weaknesses which the council might have had, unbalancing the level playing field under which adversarial proceedings are meant to be carried out. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.
35. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

36. The council said that factors in favour of disclosure include the strong and inherent public interest in releasing environmental information and the public need for access to environmental information to participate in decision making on environmental issues. It also said it is aware of the general public interest in the promotion of transparency, accountability, public understanding and public involvement in public processes.
37. The complainant said that he can see no public interest basis in withholding information specifically referred to in an open committee meeting and reference to which presumably influenced members in their consideration of the planning application. He said that the planning process has to be transparent; claiming legal privilege can render aspects opaque. He also said that he would have assumed that if it was dealing with legally privileged matters the Committee would have gone

into closed session whilst this agenda item was under consideration and that, in any case, the planning process must by its very nature be regarded as completely open to public scrutiny.

38. The Commissioner consider that disclosing the information would promote accountability and transparency and allow the public to better understand the basis of the council's decision and its legal justification for a particular course of action.

Public interest arguments in favour of maintaining the exemption

39. The council said it is mindful of the very strong public interest in upholding the principle of legal professional privilege which is designed to provide confidentiality between a professional legal advisor and their client to ensure openness between them and safeguard access to fully formed legal advice including weaknesses and counter arguments. It said that its view is that it is vital that public authorities are able to obtain full and frank legal advice in confidence. It also said that legal advice highlights both strengths and weaknesses and so if legal advice was to be routinely disclosed, public authorities would be in a potentially weakened position compared to people or organisations not bound by the Environmental Information Regulations. In relation to the information in this particular case, the council said that the protection of legal professional privilege is 'sacrosanct' as the planning application to which the request relates is currently the subject of a judicial review which is due to be heard in the High Court in October.
40. The Commissioner and the 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 Bellamy case, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
41. 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.
42. 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 fundamental principle of English law. The 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..."

43. 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

44. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, particularly the fact that the issue is still live, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its barrister in confidence.
45. The Commissioner notes 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 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.
46. In relation to the complainant's arguments (detailed at paragraph 37 above), he does not necessarily agree that the specific information under consideration would have influenced members in their consideration of the planning application or that for the council to be able to claim that the information under consideration is legally privileged the Committee would have gone into closed session whilst this agenda item was under consideration. He is also mindful of public participation already built into planning processes.
47. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional

privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information in this case.

Is further information held?

48. Regulation 5(1) of the EIR states that:

"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."

49. 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 is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. 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 civil standard of the balance of probabilities.

50. The complainant believes that there must be a list of relevant case law, or that the council must be able to identify the latest/recent/very recent cases alluded to, because at a public meeting of the council's Planning Committee on 5 November 2013, the planning officer stated that;

"our barrister has advised, just today, that there's been some very recent case law in terms of noise conditions. Noise conditions are changing all the time on wind turbine developments, depending on what is the latest Inspector's or Secretary of State's decision."

He said that the appeal decisions provided to him as part of the council's internal review cannot be considered as 'very recent' as they are dated between 2005 and January 2013 and that they were identified by the council's Environmental Health Officer rather than its barrister.

51. The complainant also believes that there are gaps in the correspondence that the council provided during the Commissioner's investigation and that there is likely to be other material which he cannot specifically identify on the basis of the information that he has been provided with.

52. The Commissioner enquired as to whether further information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations. He was aware that the complainant sent the reasons he believes there are gaps in the correspondence to the council at the same time as to the Commissioner and therefore referred the council to that correspondence. He asked the council to explain, if it wished to maintain that no further information is held, why no further information is held bearing in mind the complainant's comments regarding the gaps in the email correspondence. He informed the council that he considers that a request for an email should generally be interpreted as including any documents attached to that email which in this case would include the PDF. In relation to case law, the Commissioner asked the council to bear in mind that the complainant has said that the material divulged was hardly 'very recent' and that he cannot follow the logic of the council's contention that there was to be a "review of relevant Case Law", and the council's comment that "therefore there is not a detailed list or specific Case Law to provide". He also informed the council that his preliminary view is that recorded information could exist in relation to this part of the request, particularly as the council stated in its internal review response that '...there were a number of cases that officers wanted to review with the council's barrister' and these cases could have been identified by the council at the time of the request. He informed the council that information does not have to be held in the form of a list in order for it to be considered as held by the council.
53. The Commissioner will now address each of the points the complainant made in relation to the 'gaps in the correspondence'.
54. In relation to the complainant stating that there was no response an email sent on 4 November 2013 at 9.33, the council said that it discussed the matter with the officer in question who searched his email history, based on names and subject, and confirmed that he had not responded to the email and that therefore the information is not held. It said that if information were held it would likely be electronic but, as the email was never responded to, no information had ever been held which had since been deleted or destroyed or held in other locations. It also said that there is no business purpose or statutory requirement to hold the information.
55. In relation to the complainant stating that the 'attached condition for a 61m turbine', referred to on the email sent on 4 November 2013 at 9.33, has not been provided, the council informed the Commissioner that it would provide this to the complainant on 2 October 2014

(referenced as document 1). The Commissioner has therefore not considered this further.

56. The complainant referred to the following statement in the email sent on 4 November 2013 at 9.33;

"Have you been able to get an explanation, from Geoff, as to why such a complicated noise condition is required..."

querying whether this is the same as the "attached condition". The council explained that the 'attached condition' is contained within the appeal decision referenced as Document 1, a copy of which was sent to the complainant on 2 October. It also explained that if the complainant is asking for the 'explanation from Geoff why such a complicated noise condition is required' then the email from Geoff dated 5 November 2013 and sent at 14:57 (Document 5B) may be relevant. As a copy of this email was sent to the complainant on 2 October, the Commissioner has not considered this further.

57. The complainant said that the given the proximity of the Committee meeting and the importance of the matter, he considers it most unlikely that no communication took place between 4 November 2013 09.33 to 5 November 2013 13.59. In response to this, the council provided the complainant with documents 3A-3H which constitute email correspondence between the above times. The Commissioner has therefore not considered this further.

58. The complainant referred to the following statement in the email sent on 5 November 2013 at 13.59;

"Can I have your comments urgently on this please?"

querying what it 'this', whether it is the PDF attachment or another document. The council explained that the reference is to the appeal decision referenced as Document 1, a copy of which was sent to the complainant on 2 October. The Commissioner has therefore not considered this further.

59. The complainant referred to the following statement in the email sent on 5 November 2013 at 14.52;

"Please can you enter your figures etc and email back to me?"

querying what the figures should be entered on, the PDF attachment or another document, and stating that the email suggests there should have been a response. The council explained that the email dated 5 November sent at 15:10 is the response and was sent to the complainant on 2 October 2014 as document 4. It also said that the PDF

attachment is document 1 which was also sent to the complainant on 2 October 2014. The Commissioner has therefore not considered this further.

60. The complainant said that there is an unexplained gap in communication between 5 November 2013 14.52 to 5 November 2013 16.31 and considers this most unlikely and that the three officers would have been in close touch given that the Committee meeting was only three hours away. The council explained to the Commissioner that the correspondence is documents 5A – 5E. Documents 5A-5C were provided to the complainant during the Commissioner's investigation, documents 5D and 5E have been dealt with above as information covered by legal professional privilege. The Commissioner has therefore not considered this further.

61. The complainant referred to the following statement in the email sent on 5 November 2013 at 16.31;

"I agree with this approach?"

querying what approach, commenting that there is no sign of communication leading up to this statement and asking if there was some kind of meeting were notes kept. The council explained that the author of the email is responding to legal advice provided by the council's barrister. It referred to the email chain as document 6. As stated above, the council drew the Commissioner's attention to the fact that the email containing legal advice referred to as document 6 is that same as the email containing legal advice referred to as document 5D. Documents 5D has been dealt with above as information covered by legal professional privilege. The Commissioner has therefore not considered this further.

62. In relation to the list of case law that the complainant believes must exist, the council did not response to Commissioner's enquiries regarding any searches it had carried out. Instead, it reiterated that a specific list of case law had never been held. The council drew attention to the following passage from an email dated 5 November 2013 at 16.31, disclosed to the complainant during the Commissioner's investigation;

"I suggest in your update you simply state that there has been some recent case law on noise conditions for wind turbine development which we will need to consider with our barrister..."

which it said explains why the comment regarding case law was made at the public meeting of the council's Planning Committee on 5 November 2013.

63. The complainant also believes that further information within the scope of the request may exist which he cannot specifically identify. The Commissioner has considered whether the council had any reason or motive to conceal the requested information but he has not seen any evidence of this.
64. Given the history of this case, the Commissioner appreciates that the complainant may remain sceptical that further information does not exist. However, in the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The council has clearly revisited the request as a result of the Commissioner's investigation and identified and provided further documents. It has also provided an adequate explanation of why the statement regarding case law was made which led to the complainant's belief that a list of case law must be held. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of regulation 5(1) of the EIR.

Other matters

65. The Commissioner found it necessary to seek further information and clarification from the council during this investigation. He is concerned about the piecemeal disclosure of information in this case and the delay in responding to the Commissioner's enquiries. The council should ensure in future that its first step upon receiving an information request is to identify all the relevant information it holds and provide it unless a relevant exemption applies. The council should also ensure that its responses to the Commissioner's enquiries are as thorough and timely as possible.

Right of appeal

66. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.
68. 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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