

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 September 2014

Public Authority: Christchurch Borough Council

Address: Civic Offices
Bridge Street
Christchurch
Dorset
BH23 1AZ

Decision (including any steps ordered)

1. The complainant has requested a copy of the legal opinion provided by the public authority's Counsel, which is referenced on page 9 of a document entitled, 'Investigation into the Cornfactor Development Planning Issues'.
2. The Commissioner's decision is that Christchurch Borough Council is entitled to rely on Regulation 12(5)(b) of the EIR to withhold the information sought by the complainant.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 23 March 2014, the complainant wrote to Christchurch Borough Council ("the Council") and requested information in the following terms:

"May I please request a copy of the Counsel's legal opinion, as referenced on page 9, section 4.6 of the document entitled 'Investigation into the Cornfactor Development Planning Issues'."

5. On 25 March the Council advised the complainant that the documentation he seeks will not be made available to be placed into the public domain and therefore his request, 'will therefore be declined'. The Council informed the complainant that it was relying on section 42 of the

FOIA to withhold the information he seeks on the grounds that the documentation is covered by legal professional privilege.

6. On 10 April 2014 the complainant sent the Council an email concerning its refusal to supply the legal opinion. In his email the complainant asked the Council four questions concerning the legal advice which the Council sought from Counsel.
7. The Council responded to the complainant's questions on 25 April and confirmed that his request for the legal opinions provided by Counsel had been declined. The Council advised the complainant that he could ask for an internal review of its decision to withhold the information he seeks.
8. On 13 May the complainant asked the Council to review its decision.
9. The Council concluded its review and wrote to the complainant on 21 May 2014. The Council's reviewer advised the complainant that he upheld the earlier decision not to disclose the legal opinions. The Council's reviewer informed the complainant that the Council had weighed the public interest test in determining not to disclose the information, but he did not inform the complainant of the details of the public interest test which had been applied.

Scope of the case

10. The complainant contacted the Commissioner 1 June 2014 to complain about the way his request for information had been handled. He specifically complained about the Council's continued withholding of the legal opinions referred to in the 'Investigation into the Cornfactor Development Planning Issues' document.
11. The Commissioner understands that the document relates to two planning permissions – one concerning the development of the Cornfactor site and the second relating to the felling of trees at that site, which are subject to Tree Preservation Orders (TPOs).
12. In this case the Commissioner has to consider whether the Council is correct to rely on section 42 of the FOIA to withhold the information sought by the complainant.

Reasons for decision

Section 42 – Legal professional privilege

13. Section 42 provides that information is exempt from disclosure if the information is protected by legal professional privilege and where the claim to privilege could be maintained in legal proceedings.
14. There are two categories of legal professional privilege: advice privilege and litigation privilege.
15. In this case the Council was initially relying on legal advice privilege however due to a subsequent judicial review it now believes that litigation privilege is also relevant.
16. Legal advice privilege is attached to confidential communications between a client and its legal advisers. It may attach to any part of a communication which evidences the substance of a request for legal advice or the provision of that advice.
17. Legal advice privilege can exist in circumstances where there is no litigation pending or even contemplated.
18. In order for a communication to attract legal advice privilege the communication in question must be to a legal adviser or from a legal adviser and must be made in the legal adviser's professional capacity. Furthermore the communication in question needs to have been made for the principle or dominant purpose of seeking or giving legal advice.
19. Here, the advice was provided by the Council's Legal Services Manager to officers of the Council who were dealing with the matter. In order to confirm the advice given, the Legal Services Manager instructed Counsel to provide an opinion. The advice given by Counsel was given solely to the Legal Services Manager and was only shared with senior officers.
20. The determination of whether the dominant purpose of the communication is a question of fact which can usually be adduced from an examination of the communication itself.
21. The Commissioner has examined the withheld documents. He is satisfied that the documents meet the necessary criteria to be properly considered as legal advice.
22. Having examined the legal advice the Commissioner noted that it relates to the mixed used development of the Cornfactor Site and Druitt Gardens, and to the felling of trees at those locations. For this reason the Commissioner finds that the Council should have dealt with this information request under the Environmental Information Regulations 2004, rather than under the provisions of the Freedom of Information Act.

23. The Commissioner considers that the legal advice falls for consideration under the EIR as it satisfies the definition of environmental information provided by Regulation 2 – the information relates to the state of the environment and to activities which are likely to affect elements of the environment.
24. In the Commissioner's view, the Council should have relied on the exception to disclosure provided by Regulation 12(5)(b) rather than section 42 of the FOIA and it is on this basis that the Commissioner has based this decision notice.

Regulation 12(5)(b) – the course of justice

25. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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.
26. The Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost. He is assured by the Council that the withheld information remains privileged even though the matter to which it relates has been the subject of a judicial review.
27. 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 explained that there must be an "adverse" effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word "would" as being "more probable than not".
28. 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". The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

29. In this case, the Commissioner considers that disclosure of the legal advice would adversely affect the council's ability to defend itself should it be faced with any further legal challenge in connection with this issue.
30. The Commissioner considers that the council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as further challenges may be made by parties who are themselves not required to disclose their positions. That situation would be unfair.
31. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest

Arguments in favour of disclosing the requested information

32. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
33. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the council in respect of the development. It would also allow the public to consider the quality of the legal advice which was sought and received by the council.

Arguments in favour of maintaining the exception

34. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
35. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the

public interest for it to do so. 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."

36. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
37. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:
"...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..."
38. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

39. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
40. However, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure. He is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.
41. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there

are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority. The Commissioner finds none of these circumstances is present in this case. He considers that the judicial review which had already taken place reinforces this position and is likely to have placed a significant amount of information into the public domain about the Cornfactor Site and Druitt Gardens development.

42. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
43. The Commissioner has decided that the council has properly applied regulation 12(5)(b) to the information sought by the complainant.

Right of appeal

44. 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

45. 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.
46. 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
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