

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

Date: 5 January 2015

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire
SY2 6ND

Decision (including any steps ordered)

1. The complainant submitted a request to Shropshire Council (the Council) seeking a copy of its legal advice regarding roads closures for carnivals and fairs. It sought to withhold this information under regulations 12(4)(e) (internal communications) and 12(5)(b) (course of justice) of the EIR. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of regulation 12(5)(b). However he has concluded that the Council breached regulation 11(4) by failing to complete the internal review within 40 working days.

Request and response

2. The complainant submitted a request to the Council on 12 June 2014 seeking a '*a copy of the latest Shropshire Council Legal Department Briefing Note on the application of legislation for road closures for Carnivals and Fairs.*'
3. The Council responded on 11 July 2014 and confirmed that it held a copy of the requested information but considered it to be exempt from disclosure on the basis of section 42(1) FOIA, the legal professional privilege exemption.

4. The complainant contacted the Council on the same day and asked for an internal review of this decision. On 19 July 2014 he provided the Council with submissions to support his view that the public interest favoured disclosure of the requested information.
5. The Council informed him of the outcome of the internal review on 19 September 2014. The review explained that the briefing note in question quoted elements of the Town and Police Clauses Act 1847 and drew his attention to the particular parts of that legislation. However, the review concluded that the remainder of the document was exempt from disclosure under section 42(1) of FOIA, or if the requested information was considered to be 'environmental information', exempt from disclosure under the EIR on the basis of regulation 12(4)(e), the internal communications exception.

Scope of the case

6. The complainant contacted the Commissioner on 16 September 2014 in order to complain about the Council's decision to withhold the information that he had requested. The complainant argued that disclosure of the information was in the public interest. His submissions to support this view are referred to below. The complainant was also dissatisfied with the time it took the Council to complete the internal review.
7. Upon receipt of this complaint the Commissioner informed the Council that given the subject matter of the requested information he believed that the request should be considered under the EIR rather than under FOIA. In response the Council agreed with this approach and explained that it was therefore seeking to rely primarily on the exception contained at regulation 12(5)(b) of the EIR which provides an exception for information if its disclosure would adversely affect the course of justice. The Council confirmed that it was also still seeking to rely on regulation 12(4)(e) of the EIR, the internal communications exception.
8. Therefore the Commissioner has considered whether the requested information is exempt from disclosure on the basis of either of the regulations contained at 12(5)(b) and 12(4)(e) of the EIR.

Reasons for decision

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

9. Regulation 12(5)(b) of the EIR states that information may be withheld where its 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.
10. The Council argued that the withheld information attracted legal advice privilege. This was on the basis that the information, which comprised a briefing note, was provided by lawyer with the sole or dominant purpose of providing legal advice.
11. The Commissioner is satisfied that the briefing note attracts legal advice privilege for the reasons indicated by the Council.
12. The Commissioner and the First-tier Tribunal have outlined in previous decisions that a disclosure of information which is subject to legal professional privilege might have an adverse effect upon the course of justice.
13. In *Archer v ICO & Salisbury District Council [EA/2006/0037]* 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.
14. In reaching a decision as to whether disclosure would have an adverse effect it is therefore 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 [EA/2005/0026 & EA/2005/0030]* 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” 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.
15. 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. This is simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the

FOIA or EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.

16. The Commissioner has therefore borne in mind the fact that ordering disclosure of this information is likely to have an indirect adverse effect upon the course of justice simply 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.
17. In the circumstances of this case the advice in question is still 'live'; that is to say it is still being relied upon by the Council in respect of road closures made during a particular annual event, namely the May Fair held in Ludlow. Consequently, disclosure of the information at the time of the request would allow those who wanted to challenge the decision to close the roads during the May Fair an insight into the Council's confidential communication with its lawyer.
18. Having seen the withheld information and considered the Council's arguments the Commissioner's is satisfied that disclosure would more likely than not adversely affect the course of justice. This is because it would involve providing the public with a right of access to privileged information and risks unbalancing the Council's ability to confidentially discuss such matters with its own legal advisers. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.

Public interest test

19. 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 withheld information

20. The complainant advanced the following reasons why he believed that the public interest favoured disclosing the withheld information.
21. The complainant explained that he was concerned about the nature of the road closures put in place for the annual May Fair in Ludlow. He explained as a result of the May Fair the roads around his residential building in Castle Square were closed for 6 or 7 days with notices and restrictions put in place to prevent vehicle access. Although there was an arrangement in place where vehicles needing to access the area

could do so by calling a telephone, this was not a practical solution as the telephone number was not publically advertised. Furthermore, the complainant suggested that many drivers were concerned about entering the area given the notices prohibiting entry. He explained that a number of residents of his building were elderly and some infirm; they relied on the visits of carers and food deliveries and the use of taxis to travel. The complainant argued that the road closures, as they are being implemented, seriously impede some of the residents' movements and assistance with their day to day living. He argued that it was unclear whether, in agreeing to these road closures in relation to the May Fair, the Council had taken into account the rights of these residents.

22. The complainant explained that the Council had confirmed that it was relying on section 21 of the Town and Police Clauses Act 1847 to close the roads. The complainant argued that the closing of roads for special events is covered by 1984 Road Traffic legislation. Under this legislation the complainant suggested that the Secretary of State's approval would be required for the closure and the Council was also required to demonstrate why no off-road site is available (which the complainant suggested was not in fact the case).
23. The complainant argued that it was not clear why, and on what basis, the Council had chosen to rely on the older legislation to close the roads for the May Fair. Consequently he argued that it was in the public interest to disclose the information in order to ensure that the Council was more accountable in relation to this decision and furthermore to further the public debate about this decision. In particular the complainant emphasised the large number of people affected by the decision; a lack of apparent transparency by the Council; there had been an apparent misrepresentation of the advice; the Council had been selective in disclosing the advice; and there was a clear need to protect the residents who reside in Castle Square and the surrounding area.

Public interest arguments in favour of maintaining the exception

24. In concluding that the balance of the public interest favoured maintaining the exception the Council emphasised that in its view there was a compelling public interest in allowing legal professionals to provide advice without fear that this would later be disclosed. The Council argued that if it could not rely on such advice then this would undermine its ability to consider and deliberate on sensitive issues before articulating a public position.

Balance of the public interest arguments

25. The Commissioner's view, based on a number of decisions of the courts, the First-tier Tribunal and Upper Tribunal, is that there will always be an initial weighting in favour of maintaining the exception in regulation 12(5)(b) in relation to information covered by legal professional privilege. This is due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. However, if there are equal or weightier countervailing factors, then the public interest in maintaining the exception will not outweigh the public interest in disclosure.
26. In relation to the factors in favour of maintaining the exception, as well as the initial inbuilt weight to be given to legal professional privilege, in the circumstances of this case the Commissioner has given additional weight to the fact that the legal advice falling within the scope of the request is still 'live'.
27. In considering the weight that should be attributed to the public interest in disclosing information, the Commissioner has taken into account the following factors:
 - the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
28. In light of the complainant's submissions the Commissioner accepts that the road closures clearly have a real – and negative – effect on a number of local residents. However, the Commissioner notes that in other cases where legal advice has been disclosed under FOIA or EIR the number of people directly affected by the decisions in question have often amounted to many thousands of people, a scenario which is not the case here. Furthermore, the Commissioner understands that the Council has worked with residents directly affected by these closures in order to attempt to reduce the levels of disruption. With regard to transparency, the Commissioner accepts that the Council has not publically stated why it has sought to rely on the older legislation as a basis to close the roads during the May Fair. However, the Commissioner notes that the Council has confirmed the particular section of the legislation it is relying on to close the roads and confirmed that this decision is based on legal advice. To that extent, in the Commissioner's opinion it could not be argued that the Council demonstrated a complete lack of transparency.

29. In conclusion, the Commissioner is sympathetic to the concerns of the complainant in respect of the practical difficulties these closures cause. However, he finds that the public interest test narrowly favours maintaining the exception given the significant weight that should be attributed to protecting information attracting legal professional privilege, a position which attracts further weight in this case given that the advice is still live. In reaching this conclusion the Commissioner has also had the benefit of examining the legal advice itself. Having done so, he is not persuaded that its disclosure would be particularly informative or helpful to the complainant.
30. In light of his findings in relation to regulation 12(5)(b) the Commissioner has not considered its reliance on 12(4)(e).

Procedural matters

31. Under regulation 11(4) of the EIR a public authority has to respond to a request for an internal review within 40 working days. In this case the Council took 50 working days to complete its internal review considerations. It therefore breached regulation 11(4) of the EIR in its handling this request.

Right of appeal

32. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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

Alexander Ganotis
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