

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

**Decision notice**

**Date:** 16 September 2015

**Public Authority:** South Downs National Park Authority  
**Address:** South Downs Centre  
North Street  
Midhurst  
West Sussex  
GU29 9DH

**Decision (including any steps ordered)**

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1. The complainant has made a request to the South Downs National Park Authority (SDNPA) for a copy of the legal advice produced in connection with the upgrade of the Meon Valley Trail. The SDNPA considered that this information engaged the 'course of justice' (regulation 12(5)(b)) exception to disclosure in the EIR and argued that the balance of the public interest favoured withholding the information. The Commissioner's decision is that regulation 12(5)(b) of the EIR does apply and that in all the circumstances the public interest in favour of maintaining the exception outweighs the public interest in disclosure. He does not therefore require any steps to be taken by the SDNPA as a result of this notice.

**Request and response**

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2. On 27 April 2015 the complainant contacted the SDNPA and made a two part request for information relating to the Meon Valley Trail.
  - 1) *I would like a copy of the legal advice provided by HCC [Hampshire County Council] solicitors to the South Downs National Park regarding the current work being carried out on the Meon Valley Trail. For the avoidance of doubt, this is likely to have been done in 2014 or 2015. The MVT is a joint project by HCC and SDNP.*

- 2) *Please also provide copies of any relevant emails to and from the relevant SDNP solicitors or others to their counterparts at HCC or Winchester City Council.*
3. The SDNPA responded on 28 April 2015 and advised the complainant that the requested information attracted legal professional privilege (LPP) and was therefore exempt information under section 42 of FOIA. Section 42 of FOIA is qualified by the public interest test and the SDNPA asserted that on balance the public interest favoured withholding the information.
  4. The complainant wrote to the SDNPA the same day and asked it to reconsider the decision to withhold the requested information, arguing that there was a clear public interest in disclosure. This was completed and the outcome of the review was provided by the SDNPA to the complainant on 3 June 2015. The reviewer found that the SDNPA had not actually received any legal advice in relation to the Meon Valley Trail from HCC and therefore the application of section 42 had been made in error. For the avoidance of doubt, the reviewer confirmed that the SDNPA did not hold any information that met the parameters of the request.
  5. The complainant returned to the SDNPA on 3 June 2015 and explained that the request had been prompted by an email sent from a Planning Officer at Winchester City Council (WCC), which directly referenced legal advice provided by Hampshire County Council (HCC) to the SDNPA. The complainant advised that he had contacted the Planning Officer following receipt of the internal review, who had confirmed that the legal advice had been copied in to the SDNPA. The SDNPA replied by stating that it intended making further enquiries regarding the requested information in light of the evidence provided by the complainant.
  6. The SDNPA wrote to the complainant on 5 June 2015 and confirmed that the information referred to by the Planning Officer was held. The SDNPA carried out another review upon the discovery of this information and found that the request should have been dealt with under the EIR as the legal advice constituted environmental information. It further decided that the requested information was covered by the 'course of justice' (regulation 12(5)(b)) exception in the EIR. The regulation is also subject to the public interest test and the SDNPA was satisfied that the public interest favoured maintaining the exception.

## Scope of the case

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7. The complainant contacted the Commissioner on 22 June 2015 to complain about the SDNPA's decision to withhold information captured by his request.

## Reasons for decision

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8. In response to the Commissioner's investigation, the SDNPA has confirmed that it only holds information in relation to the first part of the request. Regarding the second part of the request, the SDNPA has explained that it does not hold any relevant emails sent to or received from SDNP solicitors or others, as the SDNPA does not employ solicitors and legal advice with respect to this matter was provided by HCC.
9. The SDNPA has continued to argue that the requested information it does hold is subject to regulation 12(5)(b) of the EIR. The Commissioner's analysis of the SDNPA's reliance on the exception is set out in the remainder of this notice. In this regard, the Commissioner notes that the complainant has not registered an objection to the SDNPA's decision to process the request under the EIR. The Commissioner is also content that the requested information would fall within the broad definition of environmental information set out in the EIR, particularly regulation 2(1)(c).

## Background

10. The HCC's website<sup>1</sup> explains that the Meon Valley Trail stretches for 10 miles from Knowle to West Meon, along a disused railway line. It is open to walkers, cyclists and equestrians. The website also includes a description of the recent work on the Trail, which was reported to cost £380,000.

*Between 2014 and 2015 Hampshire County Council, in partnership with the South Downs National Park Authority, carried out improvement works to the Trail.*

*Access for people using the Trail has been improved by the removal of mud and debris and the restoration of the track's surface. Better access points on the Trail have been created.*

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<sup>1</sup> <http://www3.hants.gov.uk/meonvalleytrail>

*Some trees have been removed or coppiced to improve public safety, to open up views and to create a diverse habitat more in keeping with the South Downs. The legal rights for people to use the Trail will be formalised to protect future public access.*

11. The work has attracted some controversy. On 7 April 2015 the BBC<sup>2</sup> quoted a user of the Trail as saying that the work was 'insensitive to the environment' and the report referred to an e-petition that campaigners had set up against what was described as the 'urbanisation of a beauty spot'. Furthermore, it has been suggested that the type of surface put down has made the use of the Trail more difficult and even dangerous.

### **Regulation 12(5)(b) – course of justice**

12. The SDNPA has argued that the requested information engages regulation 12(5)(b) of the EIR on the principal basis that the information is subject to legal professional privilege.
13. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that is disclosure would adversely affect –

*the course of justice, 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.*

14. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met; (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on one or more of the factors cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure. When considering the balance of the public interest, a public authority must take account of the express presumption in favour which exists in the EIR (regulation 12(2)).
15. Regulation 12(5)(b) of the EIR, specifically the reference to the 'course of justice', and section 42 of FOIA share common ground in that both may cover information that attracts LPP. However, in contrast to section 42 of FOIA, a public authority seeking to apply regulation 12(5)(b) of the EIR is required to take the additional step of demonstrating that disclosure would adversely affect the course of justice.

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<sup>2</sup> <http://www.bbc.co.uk/news/uk-england-hampshire-32200869>

16. With regard to the 'course of justice' component of the exception, the Commissioner's guidance on regulation 12(5)(b)<sup>3</sup> of the EIR explains that LPP protects advice given by a lawyer to a client and confidential communications between them about that advice and exists to ensure complete fairness in legal proceedings. There are two types of privilege within the concept of LPP; litigation privilege and advice privilege. In this case, the SDNPA considers that advice privilege applies to the withheld information.
17. Advice privilege will apply where there was no litigation in progress or contemplated at the time or where the advice does not directly refer to the litigation. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The SDNPA has explained that the withheld information was produced by the HCC as internal advice to a client (HCC) department and there was no intention at the time it was written of disclosing the full content of the advice. Based on this explanation, the Commissioner accepts that the information did attract advice privilege. The Commissioner must next consider whether the privilege was still intact at the time the request was made.
18. Information may no longer be protected by LPP where its quality of confidence is lost owing to an unrestricted disclosure. This will occur where a disclosure is made to the world at large or without any restriction on the future use of the information. The Commissioner considers that the fact that an authority or one of its staff did not intend to relinquish its right to claim LPP is irrelevant.
19. As stated, the withheld information was provided to the SDNPA by a third party, HCC. The Commissioner has therefore asked the SDNPA to explain why it considered that the sharing of this information represented a restricted, rather than an unrestricted disclosure. In response, the SDNPA said the following:

*The project to resurface the Meon Valley Trail was carried out in partnership between SDNPA and HCC. The legal advice was shared with an officer at SDNPA as a partner organisation and it is contended that in sharing in this way there was no intention to waive privilege or that information should be made public. It is considered that the advice was shared in a context of implied confidentiality between partners in in the project.*

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<sup>3</sup>[https://ico.org.uk/media/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

20. The Commissioner is satisfied that the relationship between HCC and the SDNPA, and the circumstances in which the information was shared between the partners, connotes that the sharing of the information was on a restricted basis. The Commissioner is also not aware of any evidence that an unrestricted disclosure may have occurred in another situation. He therefore considers that the withheld information falls within the 'course of justice' component of the exception on the basis that it attracts LPP. The Commissioner must therefore next consider whether disclosure would adversely affect the course of justice.
21. 'Adversely affect' means that there must be an identifiable harm to the course of justice and the probability of this harm occurring is more likely than not. It may be the case that disclosure will have an adverse effect on the course of justice simply through the weakening of the vital concept of LPP. However, the Upper Tribunal in *GW v Information Commissioner & Local Government Ombudsman & Sandwell MBC* [2014] UKUT 0130 (AAC)<sup>4</sup> considered this should not be an automatic assumption. Instead, Judge Turnbull confirmed that testing whether there would be an adverse effect "requires attention to be focused on all the circumstances of the particular case, and there is no room for an absolute rule that disclosure of legal privilege information will necessarily affect the course of justice" (paragraph 43).
22. The SDNPA has argued that, from a wider perspective, disclosure would have the effect of undermining confidence in the protection afforded by the LPP. On a narrower view, the SDNP considers it is important to take into account the timing of the request when considering whether disclosure would have an adverse effect. It considers that there was a substantial risk that the partnership's decisions in respect of the work carried out on the Trail might be challenged, with the prospect that this could lead to legal action. The SDNPA asserts there is a real possibility that placing the information in the public domain would disadvantage the SDNPA and the HCC when responding to any challenges by exposing the legal position of the authorities.
23. The Commissioner has found that the SDNPA has identified a significant adverse effect to the course of justice and, furthermore, accepts that the risk of the adverse effect occurring is more likely than not. Allowing that regulation 12(5)(b) of the EIR is therefore engaged, the Commissioner has gone on to consider the public interest test.

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<sup>4</sup> <http://www.osspsc.gov.uk/judgmentfiles/j4159/GIA%204279%202012-01.doc>

### **Public interest arguments in favour of disclosure**

24. The recognised importance of transparency and the benefits that this brings means that the case for disclosure will always carry some weight. In the complainant's view, this weight is greatly increased here because of the importance of the information and the circumstances in which the request was made.
25. The complainant has explained that neither the SDNPA nor the HCC, acting jointly or separately, have applied for planning permission for the work undertaken on the Meon Valley Trail. This is because the view was taken that the works could be classed as permitted development or similar and therefore planning permission was not required. Drawing on this explanation, the complainant considers that the importance of the information to the public is two-fold.
26. Firstly, it is clear that the Trail is widely used and is enjoyed as a local beauty spot. Any work that might impair this enjoyment would therefore naturally become the subject of intense scrutiny, particular with regard to the justification for carrying out the work. Secondly, the complainant has claimed that the apparent inconsistency of the SDNPA and the legal position it has adopted risks bringing the whole planning system into disrepute. In particular, the complainant refers to the SDNPA's wide-ranging administrative powers over businesses and homeowners in its area of jurisdiction, and states that comparable upgrade work would unlikely to have been allowed by the SDNPA if it has been done by a resident or business. It is argued that the lack of transparency is unhelpful when placed against this backdrop.
27. To support the case for disclosure, the complainant has provided evidence of what he considers shows; a lack of real consultation about the upgrade, concerns from users of the Trail about the decision-making process in respect of the work, and the apparent weakness of the SDNPA's legal position. This information has been taken into account by the Commissioner when reaching his decision.

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

28. The SDNPA has argued that the public interest in protecting the principle of confidentiality in communications between lawyers and their clients is well established, and considers there is a strong element of public interest inbuilt into the privilege itself. In the SDNPA's view, it is vital that LPP applies equally to all parties, so that they are on a level footing. This, the SDNPA has reflected, is particularly important where a decision is likely to be challenged.



29. The SDNPA has also stated that it has responded positively to a number of other requests for information received from the complainant, including the outcomes of a consultation that was undertaken before the project commenced and for correspondence in relation to the Trail. The SDNPA considers that this additional disclosure would not significantly support or enhance public understanding of the relevant issues.

### **Balance of the public interest**

30. Previous decisions of the Commissioner and both the First-tier and Upper Information Tribunals have emphasised the importance of LPP. A theme linking each of these decisions is that LPP is fundamental to the administration of the course of justice and therefore any decision that could weaken the confidence in the protection that LPP provides should not be taken lightly. Instead, following the approach of the First-tier Tribunal in *Calland v The Information Commissioner and the Financial Services* (EA/2007/0136, 8 August 2008)<sup>5</sup>, it must be shown that there is a clear, compelling and specific justification for breaching the confidentiality (paragraph 37).
31. Additional weight may be added to the argument for maintaining the course of justice exception where the legal advice is recent and, or live. In this case the Commissioner understands the withheld legal advice was only produced a short time before the request was made and in all likelihood would continue to inform the management decisions of the organisations responsible for the Trail. In no sense, therefore, could the legal advice be described as 'stale', which might have strengthened the position for disclosure.
32. There is no doubt, however, that the public interest in disclosure is considerable. The Commissioner understands that the Trail is enjoyed by a significant number of users and various sources attest to the commitment of the users to preserving the quality of the Trail, demonstrated for example by the setting up of the online Save Our Bridleway campaign. While LPP is prized generally as a concept, the Commissioner is reminded that there is an express presumption in favour of disclosure in the EIR and the public interest test demands the full consideration of the particular facts of a case. In this regard, the incorporation of the EIR was designed to facilitate and encourage greater public participation in decisions that affect them.

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<sup>5</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>



33. In the Commissioner's view, the combination of these factors provides a cogent and persuasive defence for disclosure. Yet, to refer to the recent decision of the First-tier Tribunal in *Evans v The Information Commissioner* (EA/2015/0033, 26 June 2015)<sup>6</sup>, any consideration of the public interest test must not lose sight of the fact that the '*right of any person or organisation to seek and receive legal advice and assistance is a fundamental right at common law*' (paragraph 30). It is clear that the complainant considers there are strong grounds for challenging the SDNPA's legal position. Yet, just as this may enhance the case for disclosure, it also reinforces the position that in the interests of fairness the SDNPA should not be forced to reveal the substance of legal advice which could potentially be exploited by others.
34. Ultimately, while the public interest arguments for disclosure are strong, the Commissioner has not been able to identify a specific justification for breaching the confidentiality of what the Tribunal has noted is a fundamental right. Consequently, the Commissioner has decided that in all the circumstances the public interest in favour of maintaining the exception outweighs the public interest in favour of disclosure.

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<sup>6</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1578/Evans%20Clive%20EA.2015.0033%20\(26062015\).PDF](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1578/Evans%20Clive%20EA.2015.0033%20(26062015).PDF)

## Right of appeal

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**