

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

Decision notice

Date: 05 December 2016

Public Authority: Carmarthenshire County Council
Address: County Hall
Carmarthen
SA31 1JP

Decision (including any steps ordered)

1. The complainant requested information relating to legal advice about the status of a particular bridge/unclassified road. The Council withheld the information under regulation 12(5)(b) as it considered it to be subject to legal professional privilege ('LPP'). The Commissioner's decision is that the Council has correctly withheld the information on the basis of regulation 12(5)(b). The Commissioner does not require any steps to be taken.

Request and response

2. On 8 November 2015 the complainants wrote to the Council and requested information in the following terms:
 - "1. To what point exactly has Counsel advised that [unclassified road number redacted] is maintainable at public expense? And if that is in alignment to the map you allege is now up to date on 4th November :-
 2. What is the basis for your Counsel dismissing all of the evidence proving the highway does and always has traversed the river for at least a span of 188 unbroken years and so incorporating the bridge as the highway , and
 3. Upon what evidence other than maintenance and unsubstantiated council plan does he determine it stops at the bridge?

4. If Counsel advises the highway stops across the river Llechach then does he determine the bridge thereon to be the highway or part of it, if not why not?
5. Did Counsel advise there were more than one options as to where the highway ends and if so, on what basis did the council senior officers select the one you now state is up to date namely at the bridge itself"
3. The Council responded on 4 December 2015 and stated that "The information you have requested is contained entirely within advices received by the Council from a barrister". As such, the Council stated that the information requested was covered by Legal Professional Privilege and exempt under regulation 12(5)(b) of the EIR and the public interest favoured maintaining the exception.
4. The complainants wrote to the Council on 17 December 2015 and requested an internal review of the Council's handling of the request.
5. The Council provided the outcome of its internal review on 7 January 2016 and upheld its decision that the information requested was exempt under regulation 12(5)(b).

Scope of the case

6. The complainant contacted the Commissioner on 21 January 2016 to complain about the way their request for information had been handled.
7. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly withheld information under regulation 12(5)(b),

Reasons for decision

Background

8. The request in this case relates to the status of a bridge to a farm in Carmarthenshire, which is near to the complainants' property. The complainants contend that the unclassified road crosses the bridge and forms part of the highway. As such the Council is responsible for its maintenance and liable for any flooding which has been caused by the bridge. The complainants in this case are in a legal dispute with the Council regarding the matter and the damage which has been caused to their property through flooding.

Regulation 12(5)(b) – Legal professional privilege

9. 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 (‘LPP’).
10. The success, or not, of an application of regulation 12(5)(b) in terms of LPP will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

11. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Legal advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
12. In order to attract LPP, the information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
13. The withheld information in this case consists of two items of legal advice which the Council received from Counsel relating to the status of the unclassified road in question. The Council considers the information attracts legal advice privilege and litigation privilege. The Council

considers that litigation privilege applies as the complainants have submitted a claim for compensation to the Council in respect of flooding which they believe has been caused by the bridge to which the legal advice relates. The claim contains a threat of legal action should the claim not be accepted.

14. The Commissioner is satisfied that the withheld information consists of communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice. Therefore, the Commissioner is satisfied that the withheld information is subject to legal professional privilege.
15. Information will only be privileged so long as it is held confidentially. The Council confirmed that the withheld information had not been disclosed, in their entirety or in part in an unrestricted manner to the public or any third party. Based on the Council's representations the Commissioner is satisfied that the information was not publicly known at the time of the request, and there is therefore no suggestion that privilege has been lost.

Would disclosure have an adverse effect on the course of justice?

16. 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 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.
17. The Council asserts that disclosure would undermine its position in the litigation that has been threatened by the complainants as it would reveal the strengths and weaknesses of the Council's case. This would put the Council in a disadvantageous position in any such proceedings, which is contrary to the rules of natural justice.
18. The Commissioner is satisfied that there is real potential for disclosure to result in adverse effect to the Council's ability to defend its decision in a litigation context. It follows that, in future, the Council would be discouraged from seeking legal advice, particularly in the context of complex, contentious matters which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would adversely affect the course

of justice and she is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information. She has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

19. The Council acknowledges that there is an inherent presumption in favour of disclosure under the EIR. The Council also accepts that there is a public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability.
20. The complainants submitted detailed representations to the Commissioner regarding the subject matter of the status of the unclassified road/bridge. The Commissioner has not repeated all the representations within this notice however she has considered the evidence available to her.
21. The complainants contend that all the evidence they have obtained and gathered clearly shows that the access route in question is, and has been a public highway maintainable at public expense since before 1835, in accordance with section 5 of the Highways Act 1835. As such, the complainants' consider that the Council is responsible for the maintenance of the bridge across the river and, in turn, liable for any flooding caused by the bridge.
22. The complainants are of the view that the actions of the Council and certain officers demonstrate mal/misfeasance at best and at worst conspiracy to defraud contrary to common law.
23. The complainants consider that, if briefed accurately on the facts of the case, no competent Counsel could have reached the view that the highway in question ends at any place other than across the river, and thus incorporating the bridge as part of the highway. The complainants believe that the Council provided misrepresentations to Counsel about the subject matter, including information relating to a crucial measurement of 1036m and/or misrepresented the legal advice it received. The complainants consider that there are numerous "special and unusual circumstances" and a lack of transparency in the Council's actions in this case which add weight to the public interest in disclosure of the legal advice. The complainants argue that disclosure of the legal brief and legal advice is in the public interest as it will reveal whether or not the Council has lied/misrepresented the facts of the case to its legal advisors.
24. The complainants accept that they have been personally affected by the subject matter in question due to the damage caused to their property as a result of flooding. The situation has made their property

uninsurable, un-mortgage able and unsaleable as a result. The situation has also caused them considerable stress and anxiety. However, as well as causing considerable damage to their own property, the complainants allege that the subject matter of the request ie whether a particular section of highway is maintainable at public expense and the associated risk of flooding is a matter of public safety. They have indicated that they have witnessed hikers behaving recklessly on the bridge during times when the bridge has been blocked and water pouring across the road.

Public interest arguments in favour of maintaining the exception

25. In this case, the Council considers that there is a significant public interest in the fundamental importance of the general principle of upholding the administration of justice. The Council stated that, in considering the public interest test in this case, it had

"...paid particular regard to the decision of the Upper Tribunal in DCLG v Information Commissioner & WR [2012] UKUT 103 (AAC) where it was held that;

1. The risk of disclosure of legally privileged information leading to a weakening of public confidence in the general principle of LPP was a public interest factor of very considerable weight in favour of maintaining the exception.
2. There would have to be special or unusual factors in a particular case to justify not giving it this weight.
3. Disclosure would be unfair as legal proceedings were possible unless the local authority was given corresponding access to the other party's legal advice".

26. The Council confirmed that it did not consider there are any special or unusual factors in this case which would justify not giving LPP the weight suggested by the Upper Tribunal.

27. The Council explained that the legal advice is considered to be very much 'live' in that matters relating to the status of the unclassified road/bridge had not been concluded at the time of the request or the complaint to the Commissioner. The complainants had an ongoing claim lodged with the Council's insurers and there was a real possibility that legal action against the Council will be pursued. The legal advice will be likely to have an effect on any future litigation.

28. The Council also asserts that disclosure could expose the legal position of the Council in any future proceedings or litigation which would adversely affect its ability to protect and defend its legal interest. This,

in turn, has potentially significant financial implications for the Council and local tax payers as the claim for compensation is substantial.

Balance of the public interest

29. In the Commissioner's previous decisions, she 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.
30. 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."
31. Where a public authority is engaged in any form of legal action of its own initiation or 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.
32. 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..."
33. This 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. The Commissioner has

considered the decision notices and tribunal decisions referred to in the complainant's submissions and provided in support of their argument in favour of disclosure.

34. In relation to the First Tier Tribunal case of McCullough V ICO and Northern Ireland Water¹ the Tribunal overturned the Commissioner's decision notices and ordered disclosure of the withheld information. The Tribunal found no evidence that disclosure would adversely affect its ability to defend itself in legal proceedings. The Tribunal stated that it is "...not persuaded that purely factual information such as this could ever adversely affect the course of justice" (para 19). The Tribunal in the case concluded that regulation 12(5)(b) was not engaged, and in the alternative that the public interest favoured disclosure. However, the Commissioner notes that in that case, the information requested was technical information about vibrations measurements relating to sewer upgrade works in Belfast. The information requested was contained in a report prepared by external experts for the public authority. Both the Commissioner and the Tribunal accepted that the information was not subject to LPP and consisted of factual/technical information. The Commissioner does not consider that either the facts of this specific decision or the conclusion reached contribute to the argument in favour of disclosure in this case.
35. The complainants also cited the decision in the Upper Tribunal case of GW v IC, Local Government Ombudsman ('LGO') and Sandwell MBC [2014] UKUT 0130 (AAC), where the Tribunal concluded that just because information is subject to LPP it did not follow that regulation 12(5)(b) applied. The Commissioner notes that, in that case, the request had been made to the LGO for legal advice that Sandwell MBC had obtained about a particular matter which it had later voluntarily provided (in confidence) to the LGO for the purpose of the LGO investigation. Again, the Commissioner does not consider the facts of the case are transposable here as the request in this case has been made to the authority that actually obtained the legal advice.
36. The complainants believe that the Council provided misrepresentations to Counsel about the subject matter and/or misrepresented the legal advice it received. The Commissioner asked the Council to comment on these allegations. The Council refutes these allegations and contend that all the facts were presented to Counsel in an open and balanced way.

1

<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i877/20121106%20Decision%20FINAL%20EA20120082.pdf>

Counsel was also provided with a substantial amount of supporting documentation with the legal instructions, including a bundle of over 100 pages of correspondence/representations from the complainants setting out their views and position in the matter. The Council provided the Commissioner with evidence to demonstrate this point.

37. The Council advised the Commissioner that there is a considerable amount of conflicting evidence regarding the status of the bridge in question. Ultimately it is only the courts that can decide whether the unclassified road crosses over it. The Council also pointed out that, at the time of the request, it had not given any indication as to the legal advice received nor come to any firm conclusion as to the status of the bridge in question. The Commissioner understands that following the complaint to her, further exchanges have taken place about the matter in question between the complainants and the Council.
38. Whilst the legislation is applicant and purpose-blind, where the purpose behind a request identifies a broader public interest, such factors may, at times be relevant. In this case, the Commissioner has not presumed to ascribe any motivation to the requester but assessed the public interest on the available facts, including the arguments provided by the complainants.
39. The Commissioner notes that there are other legal remedies available to parties with grievances against public authorities, for example, allegations of maladministration can be referred to the Public Services Ombudsman for Wales. In this case, the legal advice was prompted by a complaint about flooding associated with the bridge due to a lack of maintenance. The complainants have also given notice of their intention to seek financial compensation from the Council in respect of damage to their property caused through flooding. The Commissioner does not consider that the purpose of the EIR is to provide a remedy for disputes between individuals and public authorities or, where they are available, to bypass other channels, such as courts disclosure rules, which might be more appropriate.
40. The Commissioner notes that the public interest in maintaining this exception 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 inspection of the withheld information, the Commissioner could see no sign of unlawful activity, evidence that the legal advice received has been misrepresented or evidence of a significant lack of transparency.

41. 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. She 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.

Right of appeal

42. 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

43. 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.
44. 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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