

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

Decision notice

Date: 18 October 2016

Public Authority: Cumbria County Council
Address: The Courts
English Street
Carlisle
CA3 8NA

Decision (including any steps ordered)

1. The complainant has requested legal advice relating to planning matters at Hayton Woods. Cumbria County Council withheld the information under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that Cumbria County Council:
 - failed to issue a refusal notice in time and breached regulation 14(2);
 - correctly applied regulation 12(5)(b) to withhold the information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 12 March 2016, the complainant wrote to Cumbria County Council (the "council") and requested information in the following terms:
(in relation to Hayton Woods 117000/320)

"If counsel's opinion is held on this issue then please supply a copy of the full opinion and of counsel's instructions."

5. The council responded on 21 April 2016. It stated that it was withholding the information under the exemption for legal professional privilege – section 42 of the FOIA.
6. Following an internal review the council wrote to the complainant on 1 June 2016. It stated that it had reconsidered the request under the EIR and confirmed that it was withholding the information under the exception for the course of justice - regulation 12(5)(b).

Scope of the case

7. On 17 June 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the EIR was the appropriate legislation for the request, the timeliness of the council's response and whether the council had correctly withheld the requested information.

Reasons for decision

Is it Environmental Information?

9. The council originally handled the request under the FOIA but reconsidered it under the EIR at the internal review stage. The complainant has asked the Commissioner to consider whether EIR is the appropriate legislation in this case.
10. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'

11. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
12. In this case, the requested information relates to the use of land and planning. In view of this and given innumerable previous decision notices which have placed planning matters within the purview of the EIR, the Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
13. In view of this, the Commissioner has concluded that the council correctly revised its position and handled the request under the EIR.

Regulation 14 – refusal to disclose information

14. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
15. In these circumstances the Commissioner believes that it is appropriate for her to find that the council breached regulation 14 of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the council failed to cite any exception contained within the EIR until the time of its internal review.
16. As the council addressed this failing at the time of the internal review the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(b) – Adverse affect to the course of justice

17. Regulation 12(5)(b) of EIR states that:

"(...a public authority may refuse to disclose information to the extent that 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 enquiry of a criminal or disciplinary nature."

Is the exception engaged?

18. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] 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".

19. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

20. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] 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 their parties if such communication or exchanges come into being for the purpose of preparing for litigation¹".

21. There are two types of privilege – legal advice privilege and litigation privilege.
22. The council has confirmed that it considers that the withheld information attracts LPP. It has also suggested that there is a real prospect of a legal challenge to its position and that, therefore, the information is also subject to litigation privilege.
23. Having viewed the withheld information the Commissioner is satisfied that it constitutes a communication between a lawyer and a client, in this case, the council, and that the substance of the advice has not been made public or lost the quality of confidentiality.
24. The council confirmed that, in applying the exception, it was relying on the Upper Tribunal judgement in *DCLG v Information Commissioner & WR* [2012], UKUT 103 (AAC) case number GIA/2545/2011, which finds that the undermining of the general principle of legal professional privilege would result in adverse effects to the course of justice.
25. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to planning, 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 result in adverse effect to the course of justice.
26. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Public Interest Test

27. 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. In carrying out his assessment of the public interest test, the Commissioner has

¹ EA/2005/0023, para 9

applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the information

28. The council has noted the general public interest in openness and transparency and acknowledged that disclosure of the information would serve the public interest in these principles.
29. The council has also acknowledged that disclosure would assist the public interest in furthering understanding of council decisions.
30. The complainant has argued that the council has a duty to act impartially and transparently, particularly in contentious planning matters such as those to which the request relates. The complainant has argued that it is in the public interest to share legal advice with parties taking an interest in the matter to demonstrate that it is conducting the matter fairly. The complainant considers that disclosure of legal advice in this case would also address any concerns that the council might be displaying bias in its handling of the substantive matter.
31. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. Her view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. She considers that this is especially the case where the public authority's actions have a direct effect on the environment.

Public interest in maintaining the exception

32. The council has argued that there is a strong public interest in withholding the information because it would be likely to inhibit the free and frank provision of legal advice for the purposes of decision-making. It has argued that the candour of contributions to this process would be affected by the assessment of whether the content of such discussion and advice would be disclosed in the future which, in turn, would have a negative impact on the quality of the council's decision making.
33. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the

weighting of such arguments, as they have been submitted to him by the council.

34. The council has stated that the matter involves a complicated application to add new routes to a definitive map. It has confirmed that there are disputed legal issues involved involving a third party landowner and there is conflicting evidence. It has argued that the matter is still live and disclosure would reveal its legal position, something which would undermine the principle of LPP and benefit those opposed to the council's position.

Balance of the public interest

35. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
36. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
37. Whilst the Commissioner accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice this general principle does not in itself overturn the public interest in preventing adverse effect to the course of justice.
38. Although the complainant has a genuine interest in and concerns around the council's decision in this regard, the Commissioner does not consider it to be a compelling rationale for disclosure in itself. For this counterbalancing to take place, there would need to be specific arguments or evidence demonstrating that an equivalent or greater public interest would be served by disclosure.
39. The Commissioner considers that there would need to be compelling evidence of, for example, maladministration or misuse of public funds to provide a sufficient counterbalance to the impact of disclosure on LPP rather than simply a contrary view. In the absence of such arguments or evidence the Commissioner considers that there is a stronger weight to the arguments for maintaining the exception. He also acknowledges that there are remedies within planning law and the wider legal context for parties to challenge planning decisions made by public authorities.

The EIR does not provide an automatic route of access to circumvent these channels.

40. The Commissioner considers that, in this instance, the context within which the information was created and the ongoing legal process provides a powerful argument for maintaining the exception because of the obvious impact on the course of justice.
41. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, she has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
42. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Right of appeal

43. 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

44. 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.
45. 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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