

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

Date: 12 December 2011

Public Authority: Surrey County Council
Address: County Hall
Penrhyn Road
Kingston upon Thames
Surrey KT1 2DN

Decision (including any steps ordered)

1. The complainant requested a copy of the notes from a meeting in which Surrey County Council sought and was given legal advice about its Waste Management Plan.
2. The Information Commissioner's decision is that Surrey County Council correctly withheld the handwritten notes summarising the verbal advice received, under the exception at regulation 12(5)(b).
3. The Information Commissioner does not require the public authority to take any further action.

Request and response

4. Prior to the request under consideration in this case, the complainant had requested information from Surrey County Council (the Council) about its Waste Management Plan (the Plan) and the legal opinion (the Opinion) the complainant understood the Council to have obtained. The Council had advised that it took advice from leading counsel in March 2009 on the effect that a particular judgement would have on the Plan.
5. On 4 January 2011, the complainant wrote to the Council about that advice it had received:

"Would you let me have a copy of that document please?"

6. The Council responded on 12 January 2011. It stated that it did not hold the requested information – a copy of the document containing the Legal Opinion obtained by the Council as to the validity of the remaining parts of the Surrey Waste Plan. It explained that the advice was given in conference and therefore no such written document exists. However, it advised that it held relevant information, namely handwritten notes taken by the Council's solicitor who attended the conference in which the Council was given advice. It told the complainant that that information was exempt from disclosure under regulation 12(5)(b).
7. The complainant responded on 21 February 2011. He confirmed his intention to continue with his request explaining that, as there is no written Opinion, he would be seeking:

"all notes taken at the time of the meeting with Counsel/Leading Counsel".
8. The complainant sought clarification from the Council on a number of matters before making further submissions with respect to his request. He made those submissions to the Council on 10 May 2011, confirming:

"My request is for the notes to be disclosed".
9. Following an internal review the Council wrote to the complainant on 1 June 2011. It upheld its view that regulation 12(5)(b) was engaged and that the public interest favoured withholding the requested information.

Scope of the case

10. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
11. The complainant told the Information Commissioner:

"You will form your own view of whether the notes which support the validity of the Waste Plan are themselves privileged. I cannot accept that a document [the Surrey Waste Plan] which is in the public domain, and is so reliant on support from another source, that the source itself should not also be subject to scrutiny".
12. The Information Commissioner considers the scope of his investigation to be with respect to the Council's citing of regulation 12(5)(b) as its reason for withholding the handwritten notes.

Reasons for decision

13. The Surrey Waste Plan, which was adopted in 2008, sets out the planning framework for the development of waste management facilities in Surrey. The requested information in this case relates to the legal opinion obtained by Surrey County Council about the validity of parts of the Plan. The Information Commissioner is satisfied that information regarding waste falls within the definition of environmental information for the purposes of the regulations as provided in regulation 2(1)(c).
14. The Council has argued that the requested information is legal advice which is subject to legal professional privilege and is therefore exempt from disclosure under regulation 12(5)(b) of the EIR.
15. The exceptions listed under regulation 12(5) are based on the consequences of disclosure. A public authority may refuse to disclose information *"to the extent that its disclosure would adversely affect"* one of the areas listed in this regulation. In this case, the Council is withholding the information on the basis that disclosure would adversely affect the course of justice.
16. In the Information Commissioner's view, regulation 12(5)(b) is a broad exception and the meaning of *"the course of justice"* would include the concept of legal professional privilege.
17. The Information Commissioner must assess whether the information in this case is subject to legal professional privilege. He must also decide whether a disclosure of that information would have an adverse effect on the course of justice.

Is the information legally privileged?

18. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. There are two types of privilege: legal advice privilege and litigation privilege.
19. The Council has argued that the withheld information:

"relates to communications between the client (ie Surrey County Council) and its legal advisor for the purpose of obtaining legal advice and therefore the information is covered by legal advice privilege".
20. In correspondence with the Council, the complainant questioned:

"Was this even advice?... Counsel's comments may have been throwaway in nature... Has there been full and frank legal advice? Subsequent questions to Surrey have shown Counsel has neither seen nor endorsed the notes taken in any way".

21. When considering the matter of legal advice privilege, the Information Commissioner's view is that it covers confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice. This will include written correspondence (letters, emails or faxes) and oral communications, or documents setting out the content of those communications. He considers that any recorded information documenting communications – for example, notes of conversations or minutes of meetings, research notes, drafts or summaries of advice – can therefore fall within the exception.
22. Having viewed the withheld information, the Information Commissioner is satisfied that it records the seeking and giving of legal advice and is therefore subject to legal professional privilege.

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

23. LPP is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments.
24. It is an established principle which allows parties to take advice and discuss legal interpretation freely and frankly in the knowledge that such information will be retained in confidence.
25. The Council told the complainant that the adverse effect of disclosure in this case:

"would be met by the general harm to the principle of Legal Professional Privilege and the course of justice".

26. In correspondence with the Information Commissioner, the Council argued that the predominant purpose of the conference with Counsel was to seek and receive legal advice in relation to the Surrey Waste Plan following a successful statutory challenge. During the course of the Information Commissioner's investigation, the Council explained why, in its view, the advice "is still live". It further explained that disclosure:

"may prejudice the council's position in any litigation where the policies in the Surrey Waste Plan are challenged".

27. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Information Commissioner accepts that disclosure of the legally privileged information would undermine the important common law principle of LPP. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legally privileged information would adversely affect the council's ability to defend itself if it ever faced a legal challenge. In view of this, the Information Commissioner is satisfied that disclosure of the information would adversely affect the course of justice. He is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information.

The public interest test

28. Having concluded that the exemption in Regulation 12(5)(b) is engaged, the Information Commissioner has applied the public interest balancing test set out in regulation 12(1)(b) of the EIR. This requires him to decide in all the circumstances of the case whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

29. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities.
30. The Council acknowledged the legitimate public interest in the public understanding decisions made by public authorities in relation to matters that affect them and in those decisions being transparent.
31. In favour of disclosure, the complainant argued:
- "There were over 1.1 million people in Surrey – in the 2009 mid year population estimate. All those people produce recyclable material and waste. Many businesses and the local authorities in Surrey are involved in the collection and disposal of waste. All these have a vested interest in ensuring that waste is collected efficiently, effectively and in a manner which is without risk to health".*
32. In correspondence with the Council, the complainant said:

"It is not just being able to understand the decision, it is about being able to verify the accuracy of the information that led to its being made and to ensure that the standards to be applied to the project are real, valid and enforceable".

Public interest arguments in favour of maintaining the exception

33. The Council acknowledges that there is generally *"a very substantial public interest"* in maintaining the confidentiality of legal professionally privileged material. It told the complainant:

"Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so... The public authority needs high quality, comprehensive advice for the effective conduct of their business. Without such comprehensive advice, the public authority's decision making process would be reduced because it would not be fully informed and this would be contrary to the public interest".

34. The Council argued that legal advice may include arguments in support of the final conclusion as well as counter arguments and that ensuring access to full and frank legal advice is fundamental to the administration of justice.

35. Addressing the issue of the age of the advice, the Council argued that:

"the plan is still extant and planning decisions are made based upon its policies. Those planning decisions are open to challenge (through judicial review or to the Planning Inspectorate). So it is in this latter sense that the issue is still 'live'".

36. It therefore considered that to disclose the advice would disadvantage the Council in any legal proceedings.

Balance of the public interest arguments

37. In balancing the opposing factors in this case, the Information Commissioner has taken into account the argument that a number of people are likely to be affected by the Council's waste management plans. He considers that it is generally in the public interest for people to be well informed about decisions which affect their lives.
38. However, the Information Commissioner is also mindful of the in-built public interest in withholding information to which legal professional privilege applies. He considers that the preservation of the Council's general ability to seek and obtain legal advice, and the protection of the

Council's ability to communicate freely with its legal advisors, are relevant in this case. The Information Commissioner also notes the strong element of public interest inbuilt in legal professional privilege, which has long been recognised by the courts.

39. In reaching a decision, whilst the Information Commissioner considers that the arguments in favour of disclosure have significant weight he 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).

Right of appeal

40. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. 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

Jon Manners
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