

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

**Date:** 20 March 2012

**Public Authority:** Local Government Ombudsman  
**Address:** The Oaks No 2  
Westwood Way  
Westwood Business Park  
Coventry  
CV4 8JB

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of the legal advice provided to the Local Government Ombudsman (the "Ombudsman") by Sandwell Metropolitan Borough Council (the "Council") during the course of an investigation of a complaint made about the Council.
2. The Commissioner's decision is that the requested information is subject to the exception provided by regulation 12(5)(b) (course of justice) of the EIR. He does not therefore require the Ombudsman to take any steps as a result of this notice.

**Request and response**

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3. On 12 September 2011, the complainant wrote to the Ombudsman and requested information in the following terms:
  1. *In your letter to Sandwell Council dated 29 June, under 'point 3', you asked the Council to send you 'copies of the relevant correspondence' concerning wrong advice given about appropriate fuel. Did the Council send you copies of this correspondence? If they did, we ask that you send copies of this correspondence to us.*
  2. *Under 'point 4' of your letter of June 29 you asked the Council to send you 'copies of any relevant information' concerning 'legal advice on the approach it is adopting'. Item 10 of your*

*'Provisional view' suggests that the Council has sent you a copy of legal advice it received in April 2011. You write: "The Council has asked that the advice is kept confidential so I have not shared it with the complainants." We ask you to reverse that decision and send us a copy of the 'independent legal advice' obtained by the Council...*

4. The Ombudsman responded on 30 September 2011. She clarified that the request was for the contents of a complaints file, the disclosure of which was prohibited under section 44 (statutory prohibition) of FOIA by virtue of section 32(2) of the Local Government Act 1974 (LGA '74). Section 32(2) of the LGA '74 provides that the Ombudsman is not permitted to disclose any information obtained in the course of, or for the purposes of, the investigation of a complaint unless it is necessary for the purposes of the investigation.
5. The Ombudsman did, however, consider whether to comply with the requests on the basis that it would assist her investigation. Taking the requests in turn, the Ombudsman said that; (1) she did not hold the requested information, and (2) the legal advice was exempt from disclosure under section 42 (legal professional privilege) of FOIA.
6. The Ombudsman did, though, provide a copy of a letter received from the Council in response to a separate request that does not feature as part of this notice. The Ombudsman noted that the complainant was now in possession of all the information she held which constituted the complainant's own personal data as defined by the Data Protection Act 1998.
7. For the sake of completeness, the Ombudsman further advised that she had taken into account the access rights afforded to applicants by the EIR when considering what information should be disclosed.
8. The Ombudsman wrote to the complainant again on 3 November 2011 with the outcome of her internal review. This upheld the original response to the request.

### **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the Ombudsman's decision to refuse to disclose the legal advice (the "disputed information") described at request 2.

## Reasons for decision

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10. Upon receipt of the complaint, the Commissioner wrote to the Ombudsman asking her to, among other things, confirm; the access-regime under which the request had been processed, the relevant exception or exemption being relied upon to withhold the disputed information, and the arguments supporting the application of the cited exception or exemption.
11. In her response, the Ombudsman noted that the request for information had been considered under both FOIA and the EIR. However, she continued by arguing that the requested information would be subject to the exception provided by regulation 12(5)(d) of the EIR.
12. The Commissioner has initially considered whether the relevant access-regime for the request should be the EIR or FOIA.

### **Is the disputed information “environmental”?**

13. “Environmental Information” is defined at regulation 2 of the EIR. In order for it to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) to (f) of the EIR – constituting “information on” any of the subjects covered by those six sub-sections.
14. The disputed information relates to the independent legal advice obtained by the Council on the question of whether it should seek to control emissions from a chimney of a private dwelling in a smoke control area through either the use of a statutory nuisance regime, namely the Environmental Protection Act 1990, or under the Clean Air Act 1993.
15. Defra describes a smoke control area as follows –

*“Under the Clean Air Act local authorities may declare the whole or part of the district of the authority to be a smoke control area. It is an offence to emit smoke from a chimney of a building, from a furnace or from any fixed boiler if located in a designated smoke control area. It is also an offence to acquire an “unauthorised fuel” for use within a smoke control area unless it is used in an “exempt” appliance (“exempted” from the controls which generally apply in the smoke control area).”<sup>1</sup>*

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<sup>1</sup> <http://smokecontrol.defra.gov.uk/background.php#smoke>

16. The Commissioner is satisfied that the disputed information is on a measure likely to affect the elements and factors cited in regulations 2(1)(a) and 2(1)(b) of the EIR. This is because it is on a measure, namely the application of environmental legislation, which will ultimately affect the state of the environment, most notably the air and atmosphere.
17. As a result, the Commissioner has concluded that the disputed information falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR. He has therefore gone to consider the Ombudsman's application of the exception provided by regulation 12(5)(d).

### **Regulation 12(5)(d) – confidentiality of proceedings**

18. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of proceedings of that or any other public authority where such confidentiality is provided by law.
19. A public authority's ability to apply regulation 12(5)(d) is, however, restricted by regulation 12(9) of the EIR. This states that –  
  
*“To the extent that the environmental information to be disclosed relates to **information on emissions** [the Commissioner's emphasis], a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”*
20. Taking together this qualification of the exception with the fact that the disputed information is clearly on emissions, the Commissioner has no choice but to find that the exception was misapplied in this case.
21. Where the Commissioner has determined that an exception has not been correctly relied upon by a public authority, he is under no positive duty to pro-actively consider other exceptions. However, the Commissioner may do so if it seems appropriate to him in the particular circumstances of a case and after taking into account his responsibilities as the regulator of the EIR.
22. In this case the Commissioner has borne in mind both the nature of the disputed information itself and the contention made in the Ombudsman's earlier responses to the complainant that the disputed information attracted legal professional privilege (LPP) and was therefore exempt information under section 42 of FOIA. He has therefore gone on to consider the disputed information in this light.
23. The equivalent, although not identical, exception in the EIR to the exemption provided by section 42 in FOIA is regulation 12(5)(b).

24. Regulation 12(5)(b) is a broad exception which encompasses any adverse affect on the course of justice, the ability to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. It is now a well-rehearsed convention that information subject to LPP will be covered by regulation 12(5)(b) and that, furthermore, the exception may legitimately be claimed where information is considered to be subject to section 42 of FOIA but the information is later found to be environmental.

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

25. The success, or not, of an application of regulation 12(5)(b) will turn on the consideration of 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?
26. The Commissioner has addressed questions (i) – (iii) below. Should he find that any of the questions are not answered in the affirmative, the Commissioner must necessarily conclude that the exception does not apply.

### **Is the information covered by LPP?**

27. Broadly speaking, LPP protects the confidentiality of communications between a lawyer and client; with the description of LPP provided by the Tribunal in *Bellamy v Information Commissioner & DTI* (EA/2005/0023)<sup>2</sup> at paragraph 9 being particularly helpful in clarifying the scope of the principle.
28. The Commissioner has had sight of the disputed information and has determined that the advice given to the Council was sought from and provided by a qualified legal adviser, in his professional legal capacity.
29. Even where information was found to be privileged, however, LPP may have been lost if the client has shared it with third parties and it has lost its confidential character. On this point, the complainant has argued that the disputed information has lost its privilege as a result of the

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<sup>2</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

disclosure of the information which occurred in the following circumstances –

- The provision of a summary of the disputed information that was provided by the Ombudsman to the complainant during the course of her investigation.
  - The agreement of the Council to share the disputed information with the Ombudsman in the first place.
30. The Commissioner, however, respectfully disagrees with this analysis. Regarding the first point, information will only lose its legal privilege where a disclosure reveals the content or substance of the legal advice. The Commissioner is satisfied here that the summary provided by the Ombudsman in this case did not reveal the full advice, or anything approaching that.
31. Concerning the second of the complainant's arguments, the Commissioner observes that the disputed information was shared with the Ombudsman on the expressed condition that it was kept confidential. He has therefore decided that the disputed information has not lost its quality of confidence as a result of the restricted disclosure. This is because the disputed information was only shared with a limited audience and not to the wider world.
32. For these reasons, the Commissioner has decided that the disputed information attracts LPP.

**Would disclosure of the information adversely affect the course of justice?**

33. To the extent that the disputed information attracts LPP, the Commissioner must then adjudge whether disclosure would adversely affect the course of justice. If not, the exception will not apply.
34. The importance of LPP has been well documented, allowing the free and frank discussion of legal matters in the knowledge that such exchanges will be retained in confidence.
35. The Commissioner recognises that a disclosure of information that is subject to LPP will have an adverse affect on the course of justice simply through the weakening of the doctrine. This would, in turn, undermine a legal adviser's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

36. The Commissioner also considers that his observations made in his decision involving Fenland District Council (FS50415455)<sup>3</sup> have resonance here when he remarked that –

*"21...disclosure of the legal advice would adversely affect the Council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The Council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. The situation would be unfair."*

37. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a real and significant effect on the course of justice and that, as a consequence, regulation 12(5)(b) is engaged. Accordingly, the Commissioner has gone on to consider the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

38. The Commissioner will always attach some weight to the general principle of transparency. Ultimately, transparency should equate to accountability and may help the public to trust and participate in the decisions taken by a public authority.
39. The contents of the disputed information, though, mean that there is a particular public interest in the information which goes beyond this general principle of transparency.
40. As noted, the disputed information sets out the advice received by the Council on the powers it has in respect of controlling emissions from the chimneys of private dwellings. Although the advice was obtained in response to a localised situation in which complaints were made about emissions, the Commissioner considers that it addresses the broader issue of how relevant legislation should be applied by the Council.
41. The Commissioner therefore considers that the public interest arguments in favour of disclosure are two-fold. Firstly, the monitoring of emissions by the Council will have a direct impact on the wellbeing of some of the population it serves. Secondly, and arising from the first point, it is likely that the legal advice will shape, in part, the Council's approach to controlling emissions from private dwellings in the future.

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<sup>3</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs\\_50415455.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50415455.ashx)

42. As a consequence, there exists a significant level of local interest in knowing more about how the Council intended to tackle issues that could have an influence on them.
43. The complainant has also raised the possibility that the legal advice has been misrepresented by both the Council and the Ombudsman. This issue was addressed by the Tribunal in *Foreign and Commonwealth Office v Information Commissioner* (EA/2007/0092)<sup>4</sup>.
44. In its ruling, the Tribunal considered occasions when the public interest would be likely to 'trump' the preservation of LPP, with the Tribunal finding that –

*"29...The most obvious cases would be those that there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful for where there are clear indications that it has ignored unequivocal advice which it obtained."*

45. The Commissioner has not seen any evidence to fortify the complainant's suspicions, nor is he aware of any evidence which indicates that the Ombudsman or the Council have acted in such a way that would imply that the right to claim LPP has been forfeited – for example, that the actions of either party have been shown to be unlawful.

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

46. The Commissioner considers there will always be an initial weighting in favour of maintaining LPP due to its importance as a concept. Further, he considers that a public authority should have the space to seek advice about the extent of its powers and obligations.
47. A critical part of this process will involve the authority weighing up the potential strength and weaknesses in its position and then taking a firm line, free from the fear that a third party could exploit the advice to its own purposes. As the Tribunal deciding on the *Foreign and Commonwealth* appeal remarked –

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<sup>4</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i153/FCO%20v%20IC%20\(EA-2007-0092\)%20Decision%2029-04-08%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i153/FCO%20v%20IC%20(EA-2007-0092)%20Decision%2029-04-08%20(w).pdf)



*"22...Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned."*

48. Buttrressing the more general arguments in favour of maintaining the exception, the Commissioner has also observed that the disputed information was only produced a few months before the request to the Ombudsman was made.
49. In general, the Commissioner considers that the older the advice the more likely it is to have served its purpose and the less likely that it is to be used as part of a decision making process. Commensurately, the harm to the privilege holder is likely to diminish with the passage of time, which could give weight to arguments in favour of disclosure.
50. The Commissioner recognises that the definition of "recent" will vary according to the reasons for a public authority seeking legal advice and the context in which a request was made. For example, it is possible to imagine a scenario where legal advice is classified as 'recent' despite being produced a number of years ago because the prevailing case law had not significantly developed in the interim, if at all.
51. Given the proximity of the date of the legal advice with the request in this case, the Commissioner is satisfied that the age of the disputed information in this case falls squarely within the definition of "recent". This, he considers, strengthens the case for finding that the public interest favours upholding the exception.

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

52. When weighing up the public interest arguments, the Commissioner has found it helpful to refer to the findings of the Information Tribunal in *Calland v Information Commissioner & Financial Services Authority* (EA/2007/0136)<sup>5</sup>, which set out a prelude to the public interest test in the context of LPP. In particular, the Tribunal perceived at paragraph 37 of its decision that there must be some "clear, compelling and specific justification for disclosure...so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

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

53. The Commissioner understands that the complainant has particular, and entirely reasonable, reasons for wanting the disputed information disclosed. He is also prepared to accept that, bearing in mind the subject of the legal advice, there is a wider argument that says that transparency in the way that the Council proposes dealing with emissions could serve to benefit the people directly affected by this issue in the future.
54. However, the Commissioner is conscious of the weight invested in LPP, particularly the breaching of a trust between a legal adviser and their client that may go on to undermine the possibility of a frank discussion between the parties. Taking this into account, the Commissioner feels that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
55. To return to the test set out by the Tribunal in *Calland*, the Commissioner has concluded that there is an absence of clear, compelling and specific justification for disclosure.

## Right of appeal

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56. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

57. 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.
58. 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**  
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