

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 September 2012

Public Authority: Borough Council of King's Lynn and West Norfolk

Address: King's Court
Chapel Street
King's Lynn
Norfolk
PE30 1EX

Decision

1. The complainant has requested information regarding legal advice obtained by the Borough Council of King's Lynn and West Norfolk (the "council") in relation to a prospective judicial review. The proceedings in question were brought by the Hunstanton Pier Company and related to the council's decision not to release it from certain obligations as tenant of the pier.
2. The council withheld the information because it considered that disclosure would adversely affect the course of justice.
3. The Commissioner's decision is that the council failed to conduct a proper internal review of its handling of the request within the time for compliance but that it has correctly applied the course of justice exception to the requested information and that the public interest favours maintaining the exception.
4. The Commissioner does not require the public authority to take any steps.

Background

5. As part of the wave of pier building in the Victorian era, on 25 June 1868, a private Act, shortly cited as the Pier and Harbours Orders Confirmation Act 1868 (no.2) confirmed an earlier Order providing for the construction, maintenance and regulation of a Pier at Hunstanton and for the constitution of the Hunstanton Pier Company ('the Company').
6. The Company subsequently entered into a lease with Le Strange Estate for 999 years at an annual rent of £1. This lease contained a number of covenants one of which was "to maintain the pier and its associated works in good repair and condition". By a conveyance dated 1955 the Le Strange Estate conveyed the freehold of land at Hunstanton which included the 'Green' to the council subject to the aforementioned leasehold interest¹.
7. In 1978, much of the pier structure was destroyed by the storms which affected much of the east coast. Following demolition of the remaining parts of the seaward structure there remained a building which had been used for amusements since at least the early 1950s. In 2002, most of this remaining structure was destroyed by a fire².
8. In 2008 the council made a decision to refuse to enter into a Deed of Variation with the Company which would release it from its obligation to maintain and repair the pier. In April 2009 the High Court refused the Company permission for a judicial review of this decision. In July 2009 the complainant was joined to a renewed application for judicial review as an interested party.
9. The council subsequently reached an agreement with the Company in relation to the Deed of Variation and judicial review did not progress. The complainant disagrees with the council's decision and is aggrieved that they were not given the opportunity to present their views in judicial review proceedings. It is within this context that the request was made.

¹ See: <http://www.west-norfolk.gov.uk/pdf/Agenda050208nogrey..pdf>

² See: <http://www.west-norfolk.gov.uk/pdf/PhilipKratzPublicVersionofReport.pdf>

Request and response

10. On 18 October 2011 the complainant wrote to the council and requested information in the following terms:

- "(i) I want to know if your Legal Services Manager, Mrs Nicola Leader, obtained an independent legal opinion, after 15 July 2009, on which she based her instructions to Knights Solicitors.*
- (ii) A copy of the instructions and other correspondence which must have passed between Mrs Leader and Knights Solicitors, after the Honourable Mr Justice Nicol had refused the application for permission to apply for judicial review on 3 April 2009."*

11. The council responded on 13 January 2012 and refused to provide the requested information, stating that it was subject to legal professional privilege.

12. On 17 January 2012 the complainant asked the council to reconsider its handling of the request. The council reiterated its original response and declined to conduct an internal review.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

14. During the course of the investigation the council agreed to disclose the information identified in part (i) of the request. The Commissioner has, therefore, confined his investigation to a consideration of the council's decision to withhold the information requested in (ii).

Reasons for decision

Is it Environmental Information?

15. The Commissioner has considered whether the council correctly handled the request under the FOIA or whether the requested information constitutes environmental information as defined by the EIR.

16. The Commissioner notes that the withheld information relates to decisions regarding the disposal of land at Hunstanton Pier. He has considered whether this information can be classed as environmental

information, as defined in Regulation 2(1)(a)–(f), and he has concluded that it can for the reasons given below.

17. In this case the subject matter of the withheld information relates to land/landscape and any advice could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
18. 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”).
19. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA.
20. During the course of his investigation the Commissioner invited the council to reconsider the request under the EIR. The council agreed to do this and confirmed that it considered that the requested information should be withheld because disclosure would adversely affect the course of justice. The Commissioner has gone on to consider whether the council has correctly applied the relevant exception.

Regulation 12(5)(b) – The course of justice

21. Regulation 12(5)(b) provides that the disclosure of information can be refused if 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 inquiry of a criminal or disciplinary nature.”
22. In the Information Tribunal hearing of *Kirkaldie*, the Tribunal stated that the purpose of this exception was reasonably clear and that:

“...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”.

In this hearing the Tribunal decided that legal professional privilege (LPP) is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

23. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test of “would adversely affect” for this exception would be met by the

general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

24. Having viewed the information, the Commissioner is satisfied that some of it covers confidential communications between a client and a lawyer made for the dominant purpose of seeking or giving legal advice in relation to litigation, namely judicial review proceedings. He is, therefore, satisfied that it records the seeking and giving of legal advice and is therefore subject to LPP.
25. The council has stated to the Commissioner that it does not consider that the privilege attached to the information has been lost or waived.
26. By way of context, the Commissioner notes that the request appears as part of a sequence of other requests made by the complainant for similar information. The council's handling of these previous requests and an associated Information Tribunal decision, which feature the concepts of waiver and restricted or unrestricted disclosures, are considered below under the public interest test. However, as the concepts are also relevant to the question of the exception's engagement, they are introduced here.
27. The Commissioner's guidance clarifies that "waiver" is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. It goes on to recommend that:

*"...public authorities avoid referring to or thinking about whether privilege has previously been waived, and instead focus on the key question of whether privilege has been lost because previous disclosures to the world at large mean the information can no longer be considered to be confidential."*³

28. The Commissioner's guidance goes on to make the distinction between restricted and unrestricted disclosures. An unrestricted disclosure is

³ Published on the ICO website here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx

akin to an unconditional disclosure made under the FOIA or the EIR, namely, a disclosure which is, effectively, to the world.

29. Restricted disclosure describes the disclosure of information to a limited audience, with restrictions on the further use of the information. Making a disclosure only to a party's opponent and to the court is an example of a restricted disclosure in the litigation context. In litigation, the parties have to disclose the information they intend to rely on in court to their opponent and to the court. Disclosures made only to the court and to an opponent are 'restricted disclosures', which remain confidential from the rest of the world, unless the information is later disclosed in open court. Since these disclosures do not enter the public domain, they may continue to be protected by LPP for the purposes of FOIA or EIR.
30. The council confirmed to the Commissioner that, as an interested party to the judicial review claim, the complainant would have access to limited information via restricted disclosure of court documents. However, they confirmed that the complainant would not have had sight, in whole or part, of the withheld advice and correspondence. In light of this, the Commissioner has concluded that the requested information has not been subject to unrestricted disclosure and that it retains its privileged status.
31. The remainder of the withheld information consists of various supporting documents and correspondence which discusses and sets out the relevant legal considerations and clarifies and develops the council's legal position.
32. The Commissioner considers that regulation 12(5)(b) is not limited to excepting only information that is subject to LPP. The wording of the exception has a broad remit encompassing any adverse affect on the course of justice generally; this allows for documents that are not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect on 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 Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.
33. In *Rudd v IC & Verderers of the New Forest (EA/2008/0020)* the Tribunal clarified that 'the course of justice' does not refer to a specific course of action but "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'" (paragraph 29).
34. In view of the above, the Commissioner is satisfied that all the withheld information falls within the scope of the exception. He has gone on to

consider whether disclosure of the information would result in adverse effect to the course of justice.

35. The council has confirmed that the withheld information relates to the council's approach to the litigation which was underway, namely the judicial review claim brought by the Company.
36. The council has explained that the dispute to which the information relates is current and the threat of judicial review remains a possibility. Disclosure of the information would provide third parties with access to the council's position in this matter, putting the council at a disadvantage. As a result, the council's ability to prepare for any proceedings would be prejudiced.
37. 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 result in adverse effect to the course of justice.
38. As the Commissioner has concluded that regulation 12(5)(b) applies in this case, he has gone on to consider the relevant public interest arguments.

Public interest in disclosure

39. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
40. In considering the public interest in favour of disclosure, the council has referred to the following generic arguments: The general public interest inherent in the legislation; the importance of transparency and accountability in relation to the council's decision-making and the public interest in being assured that decisions are made on the basis of good quality legal advice.
41. In their internal review submissions the complainant advised the council that it should know that their arguments for refusing to disclose the information would not be accepted by the ICO. The complainant directed the council to a previous decision notice issued by the

Commissioner and to an associated Information Tribunal decision, part of which overturned the Commissioner's decision.

42. In considering the facts of the case the Commissioner has referred to this previously issued decision notice and the associated Tribunal decision which relate to a prior request made by the complainant for legal advice and instructions held by the council regarding Hunstanton Pier⁴. The Commissioner notes the parallels with the subject matter of the current complaint and he has considered whether the context and any of the conclusions reached in this previous decision notice and the associated Tribunal decision are relevant.
43. In EA/2008/0013, in considering the specific public interest arguments in favour of disclosure, the Tribunal found that the request for legal advice and instructions appeared within a context where the council had previously disclosed 4 legal advices and 2 associated legal instructions relating to Hunstanton Pier and Green to the complainant.
44. The Tribunal noted that, in view of the multiple disclosures made in relation to the same broad topic, failure to disclose further related information is inconsistent and undermines public confidence
45. The Tribunal also found that there was significant local public interest in the issue of Hunstanton Pier and Green. It also noted that the dual roles of the council (as custodians of public property but also having planning and developmental responsibilities) adds to the importance of the council being seen to fulfil all its public duties. The Commissioner considers that these two findings remain applicable in the current case.
46. The Tribunal noted that, in his consideration of the public interest arguments, the Commissioner's decision notice had decided that the council had correctly concluded that this favoured maintaining the use of the exception. However, the council had, subsequent to an appeal being lodged, disclosed the information to the complainant. The Tribunal found that the absence of any material change in circumstances

⁴ ICO decision notice reference: FER0120148; published on the ICO website here: http://www.ico.gov.uk/~media/documents/decisionnotices/2008/FER_0120148.ashx;
Tribunal decision EA/2008/0013 published here: [http://www.informationtribunal.gov.uk/DBFiles/Decision/i278/Maiden%20v%20IC%20&%20BCKL&WN%20\(0013\)%20Decision%2015-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i278/Maiden%20v%20IC%20&%20BCKL&WN%20(0013)%20Decision%2015-12-08.pdf)

between the decision to refuse the request and this disclosure meant that the council had wrongly weighed the public interest in favour of maintaining the exception.

47. The Commissioner understands that the complainant considers that the findings of the Tribunal in this previous case are capable of being transposed to the current complaint and that it should, therefore, be concluded that the public interest favours disclosure of the information.

Public interest in maintaining the exception

48. The council has argued that the withheld information was created in the context of active litigation, namely judicial review proceedings in relation to the council's decision about Hunstanton Pier. The council has argued that the public interest favours maintaining the established principle of confidentiality in communications between lawyers and their clients. Without the certainty of such of such confidentiality the quality of legal advice may not be as full and frank as it ought to be.
49. The council considers that disclosure of the withheld information would expose the strengths and weaknesses of the council's position, reducing its strategic options and providing potential litigants with the advantage of foreknowledge not available to the council.
50. At the time of the request the information was still current. Although litigation proceedings had been averted, the council has argued that the matter remains live and disclosure of the information has the potential to prejudice the council's ability to defend its legal interest. It has stated to the Commissioner that the complainant has threatened to challenge the council's decisions in respect of Hunstanton Pier.

Balance of the public interest arguments and conclusion

51. In relation to the complainant's position that the Tribunal's decision in EA/2008/0013 is transferable to the current complaint, the Commissioner has noted that the Tribunal qualified its conclusions in the following manner:

"In concluding that at the date of the request the public interest in disclosure substantially outweighed the public interest in upholding the exemption the Tribunal has considered the facts and the law as apply to this case and is not setting a precedent for the inevitable disclosure of

*legal advice if previous advices on a similar topic have already been disclosed.*⁵

52. Whilst the request which is the subject of this notice identifies information which relates to the same broad subject matter as these previous requests, the Commissioner notes that there are significant material differences in both the specific function of the information and the context within which the request was received.
53. The Commissioner has not been provided with any arguments or evidence which suggests that, as per the context identified in the Tribunal decision, there was an intention by the council to make the advice or the broader withheld information public. Similarly, there is no evidence in this case that any of the privilege ascribed to the information has been lost or that the council has "cherry picked" the information it has made available with the result that an incomplete picture has been painted.
54. The Commissioner notes that the withheld information was generated within the context of active litigation. In addition to this divergence from the scenario present in the Tribunal case, there was also no stated intention to disclose or existing presumption that the information would be disclosed. The Commissioner has, therefore, concluded that the Tribunal decision is not transposable to the current complaint.
55. In the hearing of *Calland v Financial Services Authority (EA/2007/0136)* the Information Tribunal stated:

"What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential".
56. Following the Tribunal in *EA/2008/0013*, the Commissioner notes that there is a general public interest in transparency and accountability in relation to authorities' decision-making. In this instance there is also specific public interest and significant concern, evinced by the presence of local groups such as Friends of Hunstanton Pier & Green and The Hunstanton Civic Society, regarding decisions taken by the council in relation to Hunstanton Pier.
57. In weighing the balance of the public interest arguments in this case, the Commissioner has given due consideration to these specific local

⁵ *EA/2008/0013*, paragraph 47.

interests. Whilst he accepts that the extent to which these interest groups are affected by these matters is not trivial, he is not convinced that the weighting in favour of disclosure of the information counterbalances the public interest in preventing adverse effect to the course of justice.

58. The Commissioner considers that the weighting is further shifted towards maintaining the exception by the fact that the requested information is still 'live'. The disclosure of information relating to the council's legal position ahead of any prospective challenge would clearly provide those opposed with an advantage not available to the council.
59. Having considered the relevant arguments the Commissioner does not consider that there is a clear, compelling and specific justification for disclosing the information. The remaining public interest arguments for disclosing the information are generic and in the specific circumstances of the case are not strong enough to create a compelling case.
60. 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. Although the genuine interest of local groups in the council's decision in this regard and disagreement with the approach taken is relevant, the Commissioner does not consider it to be decisive. 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.
61. In this instance, the litigious context within which the information was created and the ongoing threat of litigation provides a powerful argument for maintaining the exception because of the obvious impact on the course of justice. 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 this impact 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.
62. The Commissioner has, therefore, concluded that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 11 – representations and reconsideration

63. Regulation 11 provides applicants with a statutory right to require an authority to conduct a review – an “internal review”, of its handling of a request for information.
64. Regulation 11(4) requires that any public authority in receipt of a request for internal review should consider the grounds of the review and notify the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
65. Paragraph 61 of the code of practice issued under regulation 16 of the EIR (the “EIR code”) recommends that internal review procedures should:

“...be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR, including decisions taken about where the public interest lies. It should be possible to reverse or otherwise amend decisions previously taken.”⁶
66. In this instance the Commissioner considers that the response to the complainant’s representations fail to demonstrate that the grounds for review were properly considered or that the council otherwise reconsidered its original decision.
67. The Commissioner has concluded that the council failed to conduct an internal review within the time limit required by the EIR.

⁶ The EIR code is published here:
http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

Right of appeal

68. 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

69. 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.
70. 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

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