

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

Decision notice

Date: 3 December 2012

Public Authority: Blackpool Council

Address: PO Box 77
Town Hall
Blackpool
FY1 1AD

Decision (including any steps ordered)

1. The complainant has requested information about the purchase of a named residential property by the council and was concerned that the council might not have achieved value for money in its purchases.
2. The Commissioner's decision is that the request for a survey report should have been handled under the Environmental Information Regulations 2004 (Statutory Instrument 2004 No. 3391) (EIRs). He found that the information was excepted under regulation 12(5)(b) and that the public interest favoured maintaining the exception. He decided that a further document, an accountants' report, had been correctly withheld under the section 42(1) FOIA exemption and that the public interest favoured maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. Between March 2009 and December 2010 the council embarked on a scheme to purchase some 22 properties at a total cost to the council of over £4m. The complaint to the Information Commissioner arose in connection with the purchase of one of these properties ("the property"). The council subsequently sold the property at a considerable loss to the public purse. Following expressions of concern by members of the public in July 2011, the council asked a named firm of

accountants to carry out a forensic investigation and establish the relevant facts.

5. On 19 and 30 January 2012, the complainant wrote to the council and requested information in the following terms:
 - *Any structural surveys which have been done on [the property]*
 - *A copy of the [accountants'] report in its full entirety.*
6. On 27 January 2012 the council offered to arrange a meeting of the complainant with representatives from the accountants. The council responded formally to the information request on 7 March 2012 to say that it held copies of the report and the survey and apologised for the delay in responding to the information request.
7. On 9 March 2012 the council refused the request to provide the survey and the report citing the legal professional privilege exemption at section 42 FOIA, and saying that the information requested formed part of an ongoing legal conversation between its legal advisers and their client department within the council. The council added, without explaining its reasons, that the public interest in disclosure did not outweigh the need to maintain the exemption which it was doing in order to enable to council to fully consider its legal position.
8. On 17 April 2012 the complainant wrote to the council saying, without supporting evidence, that the survey and the report had been released to council members with no confidentiality clauses or requirements for the members to withhold the documents. He asserted that the documents were therefore in the public domain.
9. On 6 August 2012 the complainant repeated this assertion to the Commissioner, again without supporting evidence; he added, to the Commissioner, that he did not think any members of the public had seen the requested information despite assurances from the council that the information would be made public.
10. Following an internal review the council wrote to the complainant on 9 May 2012 confirming its decision not to disclose the information and relying on the section 42 FOIA exemption; the council did not say whether it had reviewed the public interest test.

Scope of the case

11. On 25 May 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that the property had been purchased by the council for

£180,000 in the face of evidence that it could be structurally unsound. The complainant was concerned that the property had, he said, been purchased by the council from former members of the council. The complainant said that he was concerned that the council and its advisers had, in his view, not shown due diligence when purchasing this and some other related properties.

12. The Commissioner obtained copies of the survey which is dated July 2011 and the report which is dated 24 January 2012. He considered whether or not the council had been correct to rely on the section 42 FOIA exemption in withholding them. He also considered if FOIA was the correct legislation for the council to have used or whether it should have applied the EIRs and considered relevant exceptions. Under the EIRs there is a presumption in favour of disclosure which the Commissioner has taken into account in reaching his decision.
13. The key date in determining this matter is the date of the 30 January 2012 information request. The Commissioner has determined whether the council was right to refuse the information request in the light of the circumstances that existed at that time.

Reasons for decision

Information request for the survey

Should the request have been handled under the EIRs?

14. Environmental information cannot be considered under the terms of the FOIA. It must instead be considered under the terms of the EIRs. Regulation 2 of the EIR provides a definition of environmental information. Regulation 2(1)(f) says that information on the state of human health and safety (including, where relevant, the conditions of human life and built structures inasmuch as they are or may be affected by the state of the elements of the environment) will be environmental information. The Commissioner saw that the information requested in the survey related to the state of human health and safety within a built structure and ways in which the built structure was being affected by the environment; he therefore decided that the information was environmental.

Exception regulation 12(5)(b) – Legal Professional Privilege

15. Under the regulation 12(5)(b) 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".

16. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege and, even though the council originally relied on section 42(1) of the FOIA, the Commissioner considers that it is appropriate to consider the equivalent exception under regulation 12(5)(b) of the EIR. He had regard for the differences between the application of the section 42 FOIA exemption and regulation 12(5)(b).
17. Regulation 12(5)(b) is not limited to excepting only information that is subject to legal professional privilege. The exception is broad and encompasses any adverse effect on the course of justice generally; this allows for documents to still be covered by the exception, as long as 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 inquiries.
18. The Tribunal has 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 legal professional privilege (paragraph 57).
19. In the decision of *Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)* the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
20. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030)*, the interpretation of the word "would" is "more probable than not".
21. 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"*.
22. In deciding that the exception was engaged, the Commissioner has seen a copy of the withheld survey information and considered whether disclosure would adversely affect the council's ability to review the matter with its legal advisers. He considered that in this matter the timing of the information request was an important factor in the application of the exception. He considered the council's position at the time of the information request in January 2012 and also received confidential representations from the council about that. He also

received assurances from the council that there had been a reasonable prospect of litigation at the time of the creation of the document in July 2011 and that remained the position at the time of the information request in January 2012. He noted that the position was still not materially different at the time of the council's review of the request in May 2012.

23. The Commissioner decided that disclosure of the survey, while it was being discussed by the council and its legal advisers, would risk undermining the legal advisers' capacity to give full and frank legal advice and could adversely affect the council's options and ability to act appropriately. He decided that it would be unfair for the council not to be able to consider the information with its legal advisers in private for a reasonable period of time without having to reveal its position in advance.
24. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the survey.
25. The regulation 12(5)(b) exception, in common with all other EIR exceptions, is subject to a public interest test.

Public interest arguments in favour of disclosing the requested information

26. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
27. In this case, significant public concern has been expressed arising out of the size of the sums of public money paid by the council for the property and in other connected property transactions and the intrinsic value of the properties acquired. This public concern, in turn, gave rise to the information request.
28. In this case, the Commissioner appreciates that disclosure of the survey would help the public to understand more about the way in which the council handled the situation.

Public interest arguments in favour of maintaining the exemption

29. As already indicated, the Commissioner and the Information Tribunal have decided in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an

adverse effect on the course of justice. 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".

30. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. 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. It is also important that if an authority is faced with a legal issue it can consider its position properly and fairly without other parties being put at an advantage by premature disclosure of relevant information.
32. In the light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...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. The above 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 as described above.

Balance of the public interest arguments

34. The public interest in maintaining this exception is particularly strong. Therefore, to equal or outweigh that inherently strong public interest usually involves factors such as: substantial amounts of public money, decisions affecting a large amount of people, evidence of misrepresentation or unlawful activity, or a significant lack of appropriate transparency. Following his inspection of the information,

the Commissioner saw that, while the sum of money in respect of the property was significant, it was not so large as to negate the inherent strength of the exemption. Furthermore, he saw no evidence of unlawful activity, or that the council had misrepresented any legal advice it had received, or of a lack of transparency. He therefore decided that the balance of the public interest lay in maintaining the exemption.

35. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is the Commissioner's view that the public interest in disclosure does not equal or outweigh the strong inherent public interest in maintaining the council's right to obtain appropriate legal advice in confidence.

Information request for the report

36. The Commissioner saw from his inspection of a copy of the report which the council had provided to him in confidence that, while a draft of it had existed some weeks earlier, the final version of the report was dated 24 January 2012, ie just a few days before the information request.
37. The contents page of the report listed a set of appendices and exhibits. These were not provided to the Commissioner and the council explained to him that it was unable to locate a copy of the report that contained these. The Commissioner's decision therefore relates only to the main text of the report; he has taken no view about the appendices and exhibits listed as belonging with it and which he has not seen.
38. The Commissioner considered whether the report should be considered under the EIRs, like the survey, or under FOIA. As the main focus of the contents of the report was forensic accounting, rather than environmental, information he decided that the council had correctly determined the request for the report under FOIA. The council had relied on the exemption at section 42(1) FOIA and the accompanying public interest balancing test.
39. Section 42(1) FOIA says that:
- "Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*
40. The council told the complainant in March 2012 and confirmed in May 2012, and later told the Commissioner, that in January 2012 the information requested formed part of an ongoing legal conversation between its legal advisers and their client department within the council. The council told the Commissioner additionally, with supporting evidence provided to the Commissioner in confidence, that disclosure would

preempt the legal process and inhibit its ability for free and frank internal communication when considering any potential litigation in the future and its ability to conduct in an appropriate manner any proceedings that might arise.

41. The Commissioner considered the contents of the withheld documents and the representations he had received from both the complainant and the council. He also had regard to how matters stood in January 2012 and again in May 2012. He was satisfied that litigation had been contemplated and that there was a reasonable prospect of it arising in January 2012 when the final version of the report had only just been prepared. Accordingly, the Commissioner decided that the legal professional privilege exemption at section 42(1) FOIA was engaged.

Balance of the public interest arguments

42. The section 42(1) FOIA exemption is qualified and is therefore subject to a public interest balancing test. The Commissioner considered carefully the public interest factors, which he had considered in connection with the application of the regulation 12(5)(b) exception. He again noted that the public interest in disclosure must be strong to justify not maintaining the strong inherent public interest in maintaining an exemption which allows public authorities to take legal advice in private. Having carefully weighed the public interest factors for disclosure, he decided that they did not outweigh the likely prejudice that disclosure would have caused to the council in January 2012. He also decided that, as at May 2012, the position was not so materially different as to lead to a different conclusion. Accordingly he decided that the public interest in maintaining the exemption outweighed that in disclosure.

Other matters

43. The council did not determine the complainant's information request of 30 January 2012 until 9 March 2012; this was more than the statutory 20 working days specified in section 10(1) FOIA and a breach of section 17(1) FOIA.
44. On 10 September 2012 the council told the Commissioner that it had worked with the named firm of accountants, who had been the authors of the report, to prepare a redacted edition of the report which the council planned to disclose both to the complainant and more generally, once the section 42(1) exemption no longer applied. The Commissioner welcomes the council's plan to disclose the report as soon as its circumstances allow it to do so.

Right of appeal

45. 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

46. 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.
47. 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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