

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

**Date:** 19 February 2013

**Public Authority:** The Planning Inspectorate (an executive agency of the Department for Communities and Local Government)

**Address:** 2 The Square  
Temple Quay  
Bristol  
BS1 6PN

**Decision (including any steps ordered)**

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1. The complainant requested legal advice from the Planning Inspectorate, an executive agency of the Department for Communities and Local Government ("the authority") on the subject of the suitability of the Householder Appeal Service ("HAS") for the consideration of applications for vehicle access. The authority refused to supply the information, citing the exception under regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the authority correctly withheld the information using regulation 12(5)(b).
3. The Commissioner does not require any steps to be taken.

**Request and response**

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4. On 15 June 2012, following correspondence with the authority about HAS, the complainant requested information in the following terms:  
  
*"As per our telephone conversation, I obviously would like to see the legal advice".*

5. The authority responded on 4 July 2012. It said that the information had been withheld using regulation 12(5)(b) of the EIR.
6. The complainant requested an internal review on the same day.
7. The authority completed its internal review on 29 August 2012. It said that it wished to maintain its position.

### **Scope of the case**

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8. On 6 September 2012, the complainant complained to the Commissioner about the way in which the authority had handled his request. He specifically asked the Commissioner to consider whether the authority had correctly refused to supply the information using the exception under regulation 12(5)(b).

### **Reasons for decision**

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

9. Under this 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”. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
10. The authority provided a copy of the withheld legal advice to the Commissioner. The Commissioner was satisfied that it represents legal advice from a legally qualified person. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice had lost its confidential character. Therefore he was satisfied that the information is covered by legal professional privilege.
11. 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. 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”.

12. 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". The Commissioner accepts that disclosure of the legal advice would undermine the important common law principle of legal professional privilege. 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 legal advice would adversely affect the authority's ability to defend itself if it ever faced a legal challenge in connection with this issue in the future. The authority 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. This situation would be unfair.
13. 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 relevant legal advice.

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

14. 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. The complainant has alleged in this case that the authority may not be complying with the law. Disclosure of the legal advice may help the public to understand more about the decision-making process in the authority relating to this matter and consider the quality of the legal advice relied upon. There is also a strong public interest in ensuring that the planning process is operating fairly and correctly.

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

15. As already indicated, the Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. 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".*

16. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
17. In 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..."*

18. 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**

19. To provide some background to this matter, the authority explained to the Commissioner that the legal advice in question was sought following a query from a local planning authority as to whether a vehicular access application met the definition of a householder application as set out in section 2 of the Town and County Planning (Appeals) (Written Representations Procedure)(England) Regulations 2009. Appeals against householder applications follow the procedures set out in part 1 of the regulations. The procedures for other appeals are set out in part 2 of the regulations which provide additional opportunities for the appellant and local planning authority to provide representations, as well as providing opportunity for third parties to comment. A householder application is defined in the 2009 regulations in the following way:

*"(a) an application for planning permission for development of an existing dwellinghouse, or development within the curtilage of such a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse, or*

*(b) an application for any consent, agreement or approval required by or under a planning permission, development order or local development order in relation to such development,*

*But does not include –*

- (i) An application for change of use*
- (ii) An application to change the number of dwellings in a building”*

20. The authority explained that the particular request forming the subject of this complaint followed on from the complainant's complaint about the authority's consideration of an appeal under the HAS procedure. The application in that appeal also involved a vehicular access proposal and was considered by the authority to be a householder application. The complainant, as a third party, sought to provide representations, but as these are not permitted under part 1 of the regulations, his representations were returned to him. The complainant disagreed that the application was a householder application, but his complaint was not upheld by the authority nor otherwise pursued by the complainant either through judicial review or a complaint to the Parliamentary Ombudsman.

21. The complainant considers that the authority is not complying with the relevant legislation. He has provided the Commissioner with a copy of a letter from an MP who has ministerial responsibilities for planning. The MP expresses the following view within the letter:

*“I can confirm that a vehicle crossover to a classified road would not normally be considered to be within the curtilage of a dwellinghouse. On that basis you [sic] constituent is correct to state that the householder planning application and appeal procedure is not appropriate procedures [sic] for planning applications which include vehicle crossovers. Applications for crossover roads on classified roads will need to be submitted to the highways authority”.*

22. The authority provided the Commissioner with a copy of a letter it had written to the complainant on 30 March 2012 to address his concerns. Within this letter, the authority made the following statement:

*“I confirm that vehicle crossovers can be considered under the Householder Appeals Service (HAS) despite the need to cross a public highway. Whilst the public highway is not within the curtilage of the dwellinghouse, in our view a vehicle crossover can be considered as a householder appeal according to SI 452 as part of a use incidental to the enjoyment of the dwelling. The owner of the crossover land is notified of the appeal and if they do not raise any objections, the HAS procedure can be followed”.*

23. The authority also explained to the Commissioner that it had provided the complainant with an internal "advice note" that explained its procedure for handling vehicular access and crossover issues under HAS. The guidance note basically outlines that if the crossover land is in the ownership of the local planning authority, there will not be any issues about notification and the appeal can therefore proceed under HAS. If it not clear whether the owner has been notified at application or appeal stage or if the owner of the land objects, the appeal must not proceed under HAS.
24. 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 not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the authority's right to obtain legal advice in confidence.
25. The Commissioner observes that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information and consideration of all the circumstances, the Commissioner did not consider that there were any factors that would equal or outweigh the particularly strong public interest inherent in this exception.
26. The Commissioner appreciates that the complainant believes that the authority is not complying with the legislation and the Commissioner appreciates that the approach taken by the authority limits representations that can be made on the subject of vehicular crossovers. However, as indicated by the authority, any legal advice it receives on the subject is simply advice, which the authority may choose to follow or not follow. It is not a definite statement of the legal position. It is not the Commissioner's role to form a view on whether or not the authority is acting legally in these circumstances. The authority has pointed out that the only way to receive a definite statement of the legal position is for the complainant to pursue the issue through other legal avenues such as judicial review in the courts. Other independent bodies may also be able to provide some assistance such as the Parliamentary Ombudsman.
27. The complainant argued that the public interest remains strong in disclosure because the legal advice has resulted in a definitive position being taken by the authority, regardless of what the correct legal position may be. The Commissioner appreciates this however the

authority is entitled to make decisions about how to implement its own procedures. The fact that members of the public may disagree with those decisions does not mean either that they are legally incorrect or that the disagreement warrants the disclosure of any legal advice received on the subject. There are, as mentioned, appropriate mechanisms in place to allow individuals to challenge decisions taken by public authorities and seek their own legal advice, which would be similarly privileged.

28. The Commissioner notes that the legal advice in question dates from 16 November 2009. However, the authority said that the issue remains "live" and therefore the prejudice caused by any disclosure would still be sufficient to warrant the continued maintenance of the exception. The authority also said that this issue could potentially become contentious in the future. The complainant said that he does not accept these arguments because the particular cases referred to have now been determined and are not open for review. Furthermore, he pointed to previous responses from the authority indicating that there were no records to prove that there had been discussion about this issue at senior management level. The Commissioner agrees with the authority on this occasion. The fact that these particular cases have been determined does not mean that the issue may not arise again in the future and that it may not in fact prove contentious in other cases even if it was not contentious in these particular cases. In that way, the legal advice still remains relevant to the authority's on-going procedures.
29. The complainant also highlighted that the authority had indicated that the legal advice was not written for an external audience. The complainant does not consider that this is a relevant point. However, one of the issues at the heart of this exception is protecting the ability of the authority to engage with its lawyers in a free and frank manner and to that extent, the authority's expectations about the information remaining internal are relevant.
30. Clearly the authority, the complainant and the minister disagree about how the HAS procedure should be used however the authority has in the Commissioner's view, been reasonably transparent about the view it has taken and why, and it has not misrepresented the legal advice. As already indicated, it is not for the Commissioner to determine whether or not the actions taken by the authority are legally correct. Having considered the nature of the withheld legal advice the Commissioner does not consider that it would add to the public's understanding of the reasons for the authority's point of view to the extent that it would outweigh the very strong public interest in protecting the authority's rights to consult with its lawyers in confidence. In view of this, the Commissioner has decided that in all the circumstances of the case, the

public interest in maintaining the exception outweighs the public interest in disclosing it.



## Right of appeal

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31. 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)

32. 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.
33. 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**  
**Group Manager**  
**Information Commissioner's Office**  
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**SK9 5AF**