

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

Decision Notice

Date: 14 March 2013

Public Authority: West Lindsey District Council
Address: Guildhall
Marshall's Yard
Gainsborough
Lincolnshire
DN21 2NA

Decision (including any steps ordered)

1. The complainant requested a copy of legal advice relating to an alleged noise nuisance. West Lindsey District Council (the Council) withheld the requested information in reliance on the exception at regulation 12(5)(b) of the EIR. The Commissioner finds that the Council was entitled to rely on the exception claimed and requires no steps to be taken.

Request and response

2. The complainant has been in correspondence with the Council for a number of years regarding what he considers to be a noise nuisance near his home. The complainant is of the view that the Council ought to have taken action against this noise nuisance.
3. The Council commissioned a report¹ to provide an "independent review of the situation faced by [the Council]", which was published in April 2010. This report found that the matter may need to be tested in court

1

http://uk.sitestat.com/wldc/wldc/s?West_Lindsey.Home.Download.23740&ns_type=pdf&ns_url=http://www.west-lindsey.gov.uk/download/23740

as "...there may be insufficient grounds to sustain enforcement of any Abatement Notice".

4. On 14 January 2012 the complainant requested the following information from the Council:

"[Named individual] has claimed that WLDC [the Council] is in receipt of 'legal advice' showing that any action taken to abate the nuisance from [Named organisation] would 'fail on appeal'.

Please forward a copy of this alleged 'legal advice' (which we the public have presumably paid for) as an FOI matter."

5. The Council responded on 3 February 2012. It stated that the information was exempt under section 42(1) of the FOIA as it was subject to legal professional privilege. The Council advised that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
6. The complainant requested an internal review on 5 April 2012. On 4 May 2012 the Council advised the complainant that it had reviewed his request but remained of the view that it should be refused under section 42(1) of the FOIA.
7. The complainant wrote to the Commissioner on 21 May 2012 to complain about the Council's decision to refuse his request.
8. Having inspected the correspondence the Commissioner was of the view that the requested information was environmental information within the meaning of the EIR. Therefore the Commissioner wrote to the Council on 17 September 2012 and asked that the Council reconsider the request under the EIR. The Council agreed with the Commissioner's finding in this regard.
9. On 17 October 2012 the Council wrote to the complainant to confirm that it had now considered the request under the EIR. The Council advised that it considered the requested information to be exempt under regulation 12(5)(b) of the EIR. The Council upheld this refusal on completion of an internal review.

Scope of the case

10. The complainant wrote to the Commissioner on 27 November 2012 to advise that he remained dissatisfied with the Council's refusal. The complainant suggested that the Council may have misrepresented the

legal advice, and for this reason he argued that it should be disclosed to the public.

Reasons for decision

Regulation 12(5)(b)

11. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information 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 enquiry of a criminal or disciplinary nature.
12. The Council argued that the exception was relevant because the withheld information was subject to legal professional privilege (LPP). The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason the Commissioner has found in previous cases that regulation 12(5)(b) will be relevant to information which attracts LPP.
13. In order to reach a view as to whether or not the exception is engaged, the Commissioner has first considered whether the withheld information is subject to LPP. He must then decide whether the disclosure of that information into the public domain would have an adverse effect on the course of justice as claimed by the Council.

Is the information subject to LPP?

14. There are two types of privilege – litigation privilege and advice privilege. Litigation privilege will apply to communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
15. The Commissioner has inspected the withheld information in this case and is satisfied that it constitutes communications between a client (ie the Council) and its legal adviser (the Council's legal services manager, a qualified barrister). The Commissioner notes that in-house legal advice will still attract LPP if the relevant conditions are met. The document containing the withheld information is marked "confidential legal advice" and "not to be disclosed beyond WLDC client officers". The information

itself relates to the alleged noise nuisance and the options available to the Council. On this basis the Commissioner is satisfied that the withheld information falls within the definition of advice privilege, and also within the definition of litigation privilege.

16. The Commissioner has considered whether or not privilege has been waived in this case, as this would affect the application of the exception. The Council acknowledged that it had provided a summary of the advice received in 2006, to assist the complainant's understanding of the Council's position. The Commissioner is mindful that the Tribunal, in the case of *Foreign Commonwealth Office v Information Commissioner*, held that waiver only applies to cases where privileged material has been relied on in the course of litigation. In this case litigation was not ongoing when the information request was made; therefore the Commissioner finds that the issue of waiver does not arise.

Adverse effect

17. Having established that the withheld information is subject to LPP, the Commissioner has gone on to consider whether its disclosure would have an adverse effect on the course of justice.
18. The Council argued that disclosure of the legal advice would result in Council officers being more reluctant to seek and record legal advice for fear that its disclosure would disadvantage the Council's position. The Council considered that this in turn would have an adverse effect on the course of justice as the Council would be less well equipped to undertake and defend itself in litigation.
19. The Commissioner is generally of the view that disclosure of information which is subject to LPP will necessarily have an adverse effect on the course of justice. This is because the principle of legal privilege would be weakened if information subject to LPP were to be disclosed under the FOIA or the EIR. Confidence that discussions between clients and their advisers will remain private would be weakened and their discussions may therefore become inhibited.
20. The Commissioner notes that the Council has disclosed a brief summary of the advice received in 2006 to the complainant, but he remains of the view that disclosure of the requested information to the public at large would have the effect described above. The Commissioner does not consider that the previous disclosure significantly weakens the Council's ability to rely on the exception. The Commissioner considers the likelihood of such an adverse effect to be more probable than not and therefore finds that the exception at regulation 12(5)(b) is engaged.

Public interest arguments in favour of disclosing the requested information

21. The complainant has argued that the Council previously disclosed legal advice on the same issue in 2006, therefore its refusal to disclose the more recent legal advice now indicated that the advice either did not exist or that the Council had misrepresented its content. The complainant felt that this was a strong argument in favour of disclosure.
22. The Commissioner is mindful of the Information Tribunal's comments in the case of the *Foreign and Commonwealth Office v Information Commissioner*²:

"...what sort of public interest is likely to undermine [LPP]? ...plainly it must amount to more than curiosity as to what advice the Department has received. The most obvious cases would be those where there is a reason to believe that the Department is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."
23. The Tribunal went on to state that such arguments of misrepresentation should be supported by "cogent evidence".
24. The Commissioner has inspected the legal advice which is the subject matter of this complaint, so he is satisfied that it is in fact held by the Council. Obviously the Commissioner may not comment on its content, but he can confirm that he has seen no evidence of the legal advice being misrepresented by the Council. Therefore the Commissioner has not afforded any weight to this argument for disclosure.
25. The Council acknowledged that there is a general public interest in the transparency of decision making. The Commissioner believes that by disclosing information relating to a public authority's decisions, there is a greater sense of accountability in relation to actions or decisions that are taken. This would allow for a more informed debate as to how and why decisions are made. The Commissioner believes that this is particularly important in cases where decisions taken by a public authority have a direct effect on the environment.
26. The Commissioner also understands that Parliament did not intend legal privilege to constitute an absolute reason for non-disclosure. In the

² Appeal no EA/2007/0092

case of *Mersey Tunnel Users Association v Information Commissioner & Mersey Travel*³ the Tribunal confirmed this point and held that it was in the public interest to disclose the legal advice obtained by Mersey Travel. However the Commissioner notes that the Tribunal placed particular weight on the fact that the legal advice related to an issue of public administration which affected a substantial number of people. Therefore its application to this case is limited in value.

Public interest arguments in favour of maintaining the exception

27. The Council was of the view that the public interest clearly lay in protecting the principle of LPP. The Council maintained that protecting the confidentiality of solicitor-client communications was a central tenet of the administration of justice.
28. The complainant did not accept this, and argued that such confidentiality is enjoined on the solicitor, rather than the client. The Commissioner would however clarify that privilege belongs to the client, rather than the legal adviser, and only the client may choose to waive privilege.
29. The Commissioner acknowledges that the concept of LPP is based on the need to ensure that clients receive confidential and candid advice from their legal advisers. This allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence. Therefore LPP is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
30. The Council also argued to the Commissioner that there remains a possibility of litigation, either in terms of a challenge to the Council's decision not to take enforcement action at the time the request was made, or a challenge from the subject of any enforcement action the Council may take in the future. The Council argued that disclosure of the legal advice would harm its ability to litigate successfully, or to defend itself from litigation. This is because disclosure of the legal advice would inform litigants as to the strengths and weaknesses of the Council's position, which would be inequitable. The Council argued that the public interest lay in protecting the Council's ability to present its legal position in the strongest way if litigation occurs.
31. The complainant argued that the Council had no intention of engaging in litigation, therefore it had no need to withhold its legal advice.

³ Appeal no (EA/2007/0052)

32. The Commissioner understands that the complainant is frustrated at what he perceives as a lack of action by the Council. However the Commissioner accepts the Council's argument that litigation is a future possibility, and that the Council should be allowed to protect itself from premature disclosure of its position. The Commissioner has therefore attached significant weight to the Council's argument in this regard.
33. The Commissioner considers that the age of the advice is also relevant. The public interest in maintaining the exception will be diminished if the legal advice is out of date or stale. In *Kitchner v Information Commissioner and Derby County Council*⁴ advice which was six years old was described "still relatively recent" whereas in *Mersey Tunnel Users Association*, advice which was over ten years old was considered "not recent". The Commissioner notes that the withheld information in this case was created in 2010, so it was only two years old at the time of the request and was therefore recent.

Balance of the public interest arguments

34. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure. In doing so he has taken account of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.
35. As indicated above the Commissioner accepts that there is a strong public interest in protecting the confidentiality of communications between a client and their legal adviser. The Commissioner believes it is important that the Council should be able to consult freely and frankly with its legal advisers, and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this is a significant factor to consider when balancing the public interest arguments.
36. The Commissioner also accepts that disclosure of the legal advice would have consequences for the Council if litigation ensued, particularly as the legal advice is relatively recent. If the advice were to be disclosed the Council's opponents in litigation would be able to identify any potential weaknesses in the Council's arguments. Even though no legal proceedings had been initiated as at the date of the request, the Commissioner believes that it is in the public interest to allow parties to

⁴ Appeal no EA/2006/0044

defend themselves against any potential litigation action, without the legal advice upon which they might wish to rely having been put into the public domain at an earlier point.

37. The Commissioner acknowledges the general public interest in transparency of decision making, but considers that in this case there is no reason to overturn the inherent public interest in protecting the principle of LPP. The Commissioner has found no evidence to support the complainant's concern that the Council has misrepresented the legal advice, nor is there any indication that the Council is pursuing an unlawful approach.
38. After considering the above factors the Commissioner is satisfied that in this particular case, there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered in this case by at least equally strong arguments in favour of disclosure. The Commissioner concludes that the public interest in maintaining the exception in this case outweighs the public interest in disclosing the information.

Procedural requirements

39. The Commissioner notes that the Council originally handled this request under the FOIA rather than the EIR. However the Council rectified this during the Commissioner's investigation. Therefore, although the refusal notice technically did not comply with the 20 day timescale required by regulation 14 of the EIR, the Commissioner does not consider that any further action is required.

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

Alexander Ganotis
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