

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

Decision notice

Date: 3 June 2013

Public Authority: Rhondda Cynon Taf County Borough Council
Address: The Pavilions
Cambrian Park
Clydach Vale
Tonypandy
CF40 2XX

Decision (including any steps ordered)

1. The complainant requested information about an obstruction on two particular highways. Rhondda Cynon Taf County Borough Council ('the Council') provided information relevant to the request but the complainant was not satisfied that all information had been provided in relation to one part of the request. During the course of the Commissioner's investigation, the Council located additional information which it provided to the complainant, with the exception of one email which it withheld under regulation 12(5)(b) of the EIR. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold any additional information relevant to the request and that it correctly withheld the one email under regulation 12(5)(b). The Commissioner does not require any steps to be taken.

Request and response

2. On 19 April 2012, the complainant wrote to the Council and requested information in the following terms:

"1. Regarding the obstruction of the highway at [address of property], whereby it was stated by the Customer Feedback Co-ordinator that the 'current position remains unchanged in this respect' and that a number of issues are till [sic] in abeyance, I would like to be

informed of the following in accordance with the Freedom of Information Act 2002, sect 1(1)(b).

2. Obstruction to Highway, [address of property]: Highways Act 1980 section 143 & 149

2.1 Please provide up-to-date details of records relating the failure to implement section 143 & 149 of the Highways Act 1980. These would include the true (or claimed) identity of owner – made known to Legal and Democratic Services – and the precise 'issues' that have been put to the Council by that owner.

2.2 In view of the fact that the highway in question has never been subjected to a closure or stopping up order and according to previous Council information was destined for development including the re-establishment of a river bridge crossing, please provide the legal provision, if any, that could override section 143 & 149 of the Highways Act 1980.

2.3 Please provide and state the reason or policy in this instance for not complying with the Highways Act 1980, section 130 (3) (b) which states that the duty of the highway authority, if in its opinion is to prevent obstruction if prejudicial to the interests of this area – which was the case as evidenced from Council information regarding Council strategy.

2.4 Please provide the identity of the officials responsible for dealing with this issue.

3. Obstruction to Highway, Abercynon, No. 30 and 31

3.1 Please provide details relating to planning application No. 10/1005/10 specifically regarding the authorisation by the Development Control Committee of the obstruction to right-of-way, Abercynon No. 30, in contravention of the Highways Act 1960, section 130 (3). Given that the Council was alerted to the presence of this r-o-w, what was the reason for overriding or ignoring the requirement and duty to safeguard this highway? Was the Development Control Committee informed of this requirement? This information should be obtainable from that recorded. If not, who was the official or officials who omitted or withheld this information from the Committee on the advisory report and recommendation to that Committee?

3.2 In similar vein to the preceding paragraph, who was or were the official or officials who failed to observe and act on the information about right-of-way, Abercynon No. 30, given and recorded on the same notification associated with the preceding paragraph relating to Planning Application No. 10/1005/10?"

3. The Council responded on 26 June 2012 and provided some information relevant to the request and stated that other information was not held.
4. On 9 August 2012, the complainant requested an internal review of the Council's handling of the request. In this communication he also made a number of new requests for information to the Council
5. The Council provided the outcome of its internal review on 9 October 2012. In relation to the original request of 9 February 2012, the Council provided details as to who it understood the owner of the land in question to be (part 2.1 of request), but confirmed that it did not hold any recorded information in relation to the owner of the land. The Council provided a copy of the notice dated 20 July 2010 which was served under the Highways Act 1980, and confirmed that it did not hold any recorded information in relation to the outcome of the notice served (part 2.1 of the request). The Council also provided responses to the new requests for information contained within the internal review request.

Scope of the case

6. The complainant initially contacted the Commissioner on 30 April 2012 to complain that he had not received a response to his request of 19 February 2012. Following correspondence from the Commissioner, the Council issued a response on 26 June 2012. The Commissioner advised the complainant that if he was unhappy with the Council's response, he would need to ask for an internal review and make a new complaint if he was dissatisfied with the outcome of the internal review.
7. The complainant contacted the Commissioner on 14 December 2012 advising that he was dissatisfied with the Council's internal review response.
8. Due to the correspondence exchanges between the complainant and the Council and the number of requests made, the Commissioner wrote to the complainant to ascertain the nature of his complaint. The Commissioner also explained that he considers every request on its own merits and his investigation focusses on the position at the time of the request. It was agreed that the scope of the Commissioner's investigation would be to establish whether the Council held any additional information relevant to part 2.1 of the request of 19 February 2012. This part of the request relates to the obstruction on one particular highway and was for:

"2.1 Please provide up-to-date details of records relating the failure to implement section 143 & 149 of the Highways Act 1980. These would

include the true (or claimed) identity of owner – made known to Legal and Democratic Services – and the precise 'issues' that have been put to the Council by that owner".

9. During the course of the Commissioner's investigation, the Council located additional information relevant to the request, which it disclosed with the exception of one email, which it withheld under regulation 12(5)(b).
10. In view of the above, the Commissioner considers this complaint to relate to whether the Council holds any additional information relevant to part 2.1 of the request of 19 February 2012 (other than that disclosed prior to and during his investigation) and the one email it has withheld, and whether the Council has correctly withheld this email under regulation 12(5)(b) of the EIR.

Reasons for decision

Regulation 5(1) – What recorded information was held?

11. Regulation 5(1) provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to ascertain information falling within the scope of the request and he will consider whether the authority is able to explain why further information is not held. For clarity, the Commissioner is not expected to prove categorically whether additional information is held. He is only required to make a judgement on whether information is held "on the balance of probabilities"¹. Therefore, the Commissioner will consider both:
 - the scope, quality, thoroughness and results of the searches and
 - other explanations offered as to why further information is not held.
12. The complainant was unable to identify exactly what additional information (if any) he believed was held by the Council. However, the

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

correspondence exchanges he had with the Council outlined a number of actions taken regarding the obstruction to the highway in question (a gate). In a letter to the complainant dated 11 August 2010 the Council confirmed that a notice issued under section 143 of the Highways Act 1980 was served on the landowner in question on 22 July 2010, which gave the landowner until 22 August 2010 to remove the gate in question. The Council also confirmed that if the landowner failed to remove the obstruction, the Council would be able to remove the obstruction itself and recover the cost of doing so. Given the fact that the request was submitted around 18 months after this "deadline" had passed, the complainant was concerned that the Council did not hold any information about any actions taken during this period.

13. In terms of the searches carried out in order to identify information relevant to the request, the Council confirmed that it had conducted searches of all manual and electronic records held within the following relevant departments who would be the only departments that would possibly hold any relevant information:
 - Environmental Services – Rights of Way section
 - Highways & Transportation including the Adoption Section
 - Planning & Regeneration
 - Legal & Democratic Services
14. The Council also advised that searches were carried out on its Planweb Mapping Software, which is an internet based mapping system. This involved searching the location and entering details into the menu which then displayed a map of the area in question. The Council also confirmed that no information relevant to the request had been destroyed or deleted.
15. Some of the additional correspondence located by the Council during the Commissioner's investigation made reference to a number of site visits undertaken between 2008 and 2010. The Commissioner asked the Council to confirm what records (if any) were held in relation to these site visits, for example any forms or notes made of the site visits. The Council advised that details of site visits were logged onto its Customer Relationship Management System (CRM) and updated accordingly eg site visited, confirmed gate across highway etc. The Council provided the Commissioner with a sample of information held on the CRM system relating to the site visits in question. The Commissioner advised the Council that he considered the information held on the CRM system to fall within the scope of the request and as a result, the Council disclosed copies to the complainant.

16. Further, in a letter which the Council disclosed to the complainant in response to his request, reference was made to a meeting which took place to discuss the matter on 6 June 2010. The Commissioner asked the Council whether it held any notes or minutes of the meeting and it confirmed that no notes or minutes were recorded in relation to the meeting.
17. As outlined earlier in this notice, during the course of Commissioner's investigation the Council disclosed additional information to the complainant which comprised:
 - Copies of correspondence between the Council and the landowner dated 14 June 2010 and 20 July 2010.
 - Copies of correspondence between the Council and an Assembly Member dated 20 July 2010 and 18 October 2010.
 - File notes from a site meeting held on 12 October 2010.
 - Copies of photographs of the site
 - Copies of printouts from the Council's Customer Relationship Management (CRM) System
 - Internal email exchanges about further action required following the issue of a notice under section 143 of the Highways Act 1980 served on the landowner in question on 22 July 2010, with the exception of one email which has been withheld under regulation 12(5)(b).
18. The most recent information which the Council held about actions taken in respect of the obstruction on the highway is an email dated February 2011. The Commissioner asked the Council to explain why no additional information was held between this date and the complainant's request of 19 February 2012. The Council advised that its legal department first became involved in the matter on 6 July 2010 when advice was sought about the notice issued to the landowner on 22 July 2010 and what further action was necessary/appropriate. The Council confirmed that investigations into the obstruction on the highway were still on-going and explained that the lack of action since February 2011 was due to an oversight on its part.
19. In this case the Commissioner is satisfied that the Council has carried out adequate searches of all locations and records where the information might be held and has explained the reason for the lack of any recent information held about the subject matter. He does not consider there is any evidence of an inadequate search or grounds for believing there is a motive to withhold information. The Commissioner is therefore satisfied

in this case that, on the balance of probabilities, the Council does not hold any further recorded information relating to the request.

Regulation 12(5)(b) – Legal professional privilege

20. 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 (‘LPP’).
21. The success, or not, of an application of regulation 12(5)(b) will turn on 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?

Is the information covered by LPP?

22. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential 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.
23. The Council has withheld one email exchange between its Highways and Legal Departments under regulation 12(5)(b) as it considers the information attracts legal advice privilege and disclosure would adversely affect the course of justice.
24. Having considered the withheld information the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential, were made between a client and professional legal advisers acting in their professional capacity, and were made for the sole or dominant purpose of obtaining legal advice. The Commissioner is therefore satisfied that the withheld information is subject to LPP.

25. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request and there is therefore no suggestion that privilege has been lost.

Would disclosure have an adverse effect on the course of justice?

26. The Council argues that disclosure would have an adverse effect on the course of justice because the principle of LPP would be weakened if information subject to LPP were to be disclosed on a regular basis. Whilst the email is dated 8 July 2010, the Council has confirmed that investigations about the highways obstruction are still on-going and the legal advice is therefore still consider to be "live". Until the Council has been able to fully determine its position as regards the obstruction, it considers that disclosure of the legal advice could compromise its legal position. It also considers that disclosure would inhibit the Council from seeking legal advice in the future and its legal advisors from providing open and frank legal advice.
27. It is the Commissioner's view that any disclosure of information subject to LPP will have an adverse effect 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 have the effect of discouraging parties from seeking legal advice.
28. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a prejudicial effect and that, as a result, regulation 12(5)(b) is engaged. He has therefore gone on to consider the public interest test.

The public interest test

29. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the information

30. The Council accepts that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability.
31. The Council also acknowledges that there is a public interest in individuals being able to exercise their rights under the FOIA to enhance

their understanding of the reasons for decision or actions taken by a public body. The Council considers that it has taken all reasonable steps to assist the complainant as far as possible in this matter.

Public interest arguments in favour of maintaining the exemption

32. In this case, in relation to the public interest in favour of maintaining the exception, the Council put forward the following arguments:

- It is in the public interest that decisions taken by the Council are made in a fully informed legal context. As such, it requires high quality, comprehensive legal advice for the effective conduct of its business.
- Legal advice needs to be given in context, with a full appreciation of all the relevant facts and a legal advisor needs to be able to present the full picture to his client. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained will often set out the perceived weaknesses of the client's position.
- Disclosure of legal advice has a significant potential to prejudice the Council's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. This could result in serious consequential loss or a waste of resources in defending unnecessary challenges.
- Disclosure could lead to reluctance in the future to make a permanent record of legal advice. It is in the public interest that provision of legal advice is fully recorded in writing and the process of decision making is described accurately and fully; the legal advice must be part of that record.
- Disclosure could deter officials from seeking legal advice at all. This could lead to decisions being made that could be legally flawed. In addition to undermining the quality of decision making, this could also lead to legal challenges which would otherwise have been avoided. Even in areas where a legal challenge is unlikely the need for provision of frank legal advice is essential in upholding the rule of the law.
- There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.

Balance of the public interest arguments

33. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, he has taken account of the presumption in

favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.

34. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to planning matters, particularly developments affecting a significant amount of people. The Commissioner also believes there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are reached. He believes that this is especially the case where the public authority's actions have a direct effect on the environment. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance in relation to the Council's decisions and actions regarding the obstruction on the highway and may assist the public in understanding the legal basis for such.
35. The Commissioner considers that another factor to consider is the number of people affected by the subject matter. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. In this case, the Commissioner understands that the subject of this request (the highway obstruction) does not have the potential to affect a significant number of people.
36. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner believes it is important that the Council should be able to consult freely and frankly with its legal advisors and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
37. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all

the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.

38. The Commissioner is satisfied that, in this case, the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Right of appeal

39. 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

40. 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.
41. 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

Anne Jones
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SK9 5AF