

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 August 2013

Public Authority: Staffordshire County Council
Address: Number 1 Staffordshire Place
Stafford
Staffordshire
ST16 2LP

Decision (including any steps ordered)

1. The complainant requested internal legal advice obtained by Staffordshire County Council ("the council"). The council withheld the information on the basis that it was covered by legal professional privilege and was therefore exempt under section 42(1) of the Freedom of Information Act 2000 ("the FOIA").
2. The Commissioner's decision is that the council correctly identified the information as legally privileged but should have refused the request by citing regulation 12(5)(b) of the Environmental Information Regulations ("the EIR").
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted a request for information on 15 March 2013. The request was worded as such:

"I would like to request a copy of the internal legal advice which the Council received during the determination period of planning application ES.12/16/524 MW Uttoxeter Wind Turbine in relation to Policy 35 of The Staffordshire and Stoke-on-Trent Minerals Local Plan. This legal advice was referred to by Planning Officer [name] at planning committee on 7th February 2013 in support

of the Council's justification for using Policy 35 as a reason to refuse the planning application."

5. The council responded on 22 March 2013. It refused the request under section 42 of the FOIA. The complainant emailed the council to query its decision on 27 March 2013.
6. The council responded on 8 April 2013 stating that it considered that as a solicitor-client relationship had been established and the advice was a confidential communication, it considered that the privilege should be maintained.

Scope of the case

7. The complainant contacted the Commissioner on 5 April 2013. He asked the Commissioner to consider whether the council had correctly refused his request. He subsequently provided a copy of the council's email of 8 April 2013.
8. The Commissioner identified that the requested information should have been considered under the EIR. The council subsequently confirmed that they would therefore rely upon the exception provided for information where disclosure would adversely affect the course of justice by regulation 12(5)(b) of the EIR.

Reasons for decision

Is the information environmental?

9. The council's response to the complainant relied upon the FOIA to refuse the request, but the Commissioner has identified that the information requested related to the environment and should therefore have been considered under the EIR.
10. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. Two of the elements listed are land and landscape. The requested information relates to the legal advice taken by a public authority in their consideration of a planning application for a wind turbine. This issue can be identified as affecting

the land and landscape. The Commissioner therefore considers that the request should be dealt with under the EIR.

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

11. 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.
12. The council 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 as the advice was obtained by a planning officer at the council from a senior solicitor in the council’s legal services unit.
13. The Commissioner acknowledges the complainant’s position that as the council had communicated the outcome of the legal advice in a planning committee meeting; he believes it has lost the necessary quality of confidence. However, the Commissioner does not consider that this indicates that the legal advice has lost its confidential quality. This is because under the EIR we are concerned with disclosures to the world at large rather than disclosures to a limited audience. The Commissioner, in response to the complainant’s perceived disclosure of the legal advice during the planning committee of the 7 January 2013, has received further information from the council about the information that was disclosed on that date. The Commissioner is satisfied that while the outcome of the legal advice would have been directly referred to in the council’s stating of its position, this does not amount to the public disclosure of all legal advice between the council and its solicitor. The Commissioner is therefore satisfied that the legal advice has not been shared with third parties to the extent that it had lost its confidential character.
14. Therefore the Commissioner is satisfied that the information is covered by legal professional privilege.
15. 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".

16. 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 council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The council 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.
17. 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.

Public interest arguments in favour of disclosing the requested information

18. 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 explained to the Commissioner that the legal advice obtained by the council may have had significant influence on the council's decision to refuse a planning application. Disclosure of the legal advice would help the public to understand more about the decision-making process in the council relating to such matters, which may be the subject of considerable cost to individuals and subject to wide public interest.
19. The complainant has requested the legal advice that led to the council's refusal of a planning application for the construction of a wind turbine at Uttoxeter Quarry in Staffordshire. The legal advice that the complainant has requested is that which was specifically referred to by a council officer in their presentation at a planning committee on 7 February 2013.
20. The complainant has emphasised in his correspondence with the council that a large amount of money that has been spent on preparing the planning application. In addition to this, the application has attracted a

high level of public interest with an excess of 1000 people becoming involved with the consultation exercise that was undertaken as part of its preparation. The complainant has proposed to the council that, that in light of these factors, it should therefore attempt to ensure that its decision making process is fully transparent.

21. The complainant has also explained that he considered that the requested legal advice was different from legal advice obtained from another source. He therefore considers that there is a strong public interest in disclosure to assure the public that the advice was not misinterpreted. As referred to in paragraph 13, the complainant has indicated that as the council has stated in a planning committee meeting that the advice supported its position that Policy 35 applied, he considers that this represents a selective disclosure and that this therefore increases the public interest in disclosure of the full advice.

Public interest arguments in favour of maintaining the exemption

22. 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.
23. 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 LPP The course of justice and inquiries exception (12(5)(b))¹ states the following:

"In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice."

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

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.ashx

other side being put at an advantage by not having to disclose its own legal advice in advance.

24. 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..."

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.

25. The council, in their submission to the Commissioner, has confirmed their view that the relationship between solicitor and client was established and that resulting communications were legally privileged. The council has further explained that while it had considered the importance of ensuring transparency in decisions made regarding wind turbines, the matter itself is still on-going and is the subject on an appeal to the Secretary of State for Communities and Local Government. The council has therefore stressed to the Commissioner that disclosure may adversely affect the course of justice.
26. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the council.
27. 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, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to obtain legal advice in confidence.
28. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. To equal or outweigh that public interest, the Commissioner would expect there to be an opposing strong public interest, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will

affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the withheld 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.

29. The Commissioner appreciates that the complainant considers that the matter is the subject of considerable cost to a third party, and is the matter of public interest. However, while such issues can be used in public interest considerations, they are not automatic reasons for disclosure. The Commissioner has identified that the legal advice in question relates to an on-going case which is yet to be fully resolved by appeal, and that the disclosure of the council's legal advice would have the potential to damage the course of justice. This is because it would have the potential to disclose the strengths and weaknesses of the council's position in advance of expected proceedings. This would therefore unfairly disadvantage the council. The amount of money involved in the matter, and the known public interest, may therefore be perceived as compelling reasons why the requested legal advice should indeed not be disclosed, as to do so would damage the ability to resolve the case fairly and publically through a proper course of justice.
30. The Commissioner has ultimately concluded that the arguments for disclosure are not equal or greater than the arguments for maintaining the exception, and that the council's refusal of the request was therefore correct.

Right of appeal

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

Website: 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
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