

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

**Date:** 6 November 2013

**Public Authority:** Mid Suffolk Council  
**Address:** 131 High Street  
Needham Market  
Ipswich  
Suffolk  
IP6 8DL

**Decision (including any steps ordered)**

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1. The complainant requested legal advice which the council sought following complaints to it from residents about the activities of a church. Residents consider that the activities being carried out by the church are in breach of planning restrictions placed on its planning approval. The council confirmed that it had sought legal advice and that it had previously provided the complainant with a summary of that advice but said that the full advice was covered by legal professional privilege and applied Regulation 12(5)(b)(course of justice).
2. The Commissioner's decision is that the council was not correct to apply Regulation 12(5)(b). The summary of the advice initially provided to the complainant effectively meant that the advice could no longer be considered to be confidential and therefore privilege could no longer be applied and a disclosure of the information could not have had an adverse effect. The council was therefore not correct to apply the exception.
3. The Commissioner has also decided that the council breached Regulation 11(4) in that it did not carry out a review of its decision and provide its response to the complainant within 40 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- To disclose the withheld information to the complainant.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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6. On 11 February 2013, following previous correspondence between the parties, the complainant wrote to the council and requested information in the following terms:

*"I would like to ask for a further file update on 2700/10. This will need to include, planning, [officer's names redacted], landscaping, PE, [name redacted], environmental health who have produced a report apparently and your consultant drainage engineer who has also been involved, and landscaping who have reported too apparently, your legal team who have been consulted and produced a report. Please be sure to include any and all pieces of information whether emails sent or received, minutes, notes, agendas, handwritten or electronic or if they are in the formal file obviously. Please make sure that [officer's name redacted] is included in the search list as well."*

The council responded on 7 March 2013 providing some of the information requested however it refused part of the request on the basis that Regulation 12(5)(d) applied, (confidentiality of proceedings). This included the legal advice. It withheld the legal advice but stated "As you note [officer's name redacted] has provided the essence of the report".

7. The complainant wrote the council on the same day saying that he did not believe that the exception in Regulation 12(5)(d) was applicable and providing reasons why he believed that to be the case. He asked the council to confirm its decision by the next day and said that if the council upheld its position he would make a complaint to the Commissioner. The council wrote to the complainant on 8 March 2013 stating that it upheld its decision.
8. During the course of the Commissioner's investigation the council wrote to the Commissioner stating that it had not carried out a full review of the request and asked for the opportunity to do so. The Commissioner allowed this request, and the council then wrote to the complainant on 30 September 2013 confirming its decision to apply Regulation 12(5)(d).

However the council referred to this exception as relating to the course of justice. This is not correct as Regulation 12(5)(d) actually relates to the confidentiality of proceedings.

9. The Commissioner therefore wrote to the council and asked it to clarify which exception it was actually seeking to rely upon. The council responded saying that the application of Regulation 12(5)(d) was an error and the council intended to apply Regulation 12(5)(b) (course of justice).

### **Scope of the case**

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10. The complainant contacted the Commissioner 4 April 2013 to complain about the way his request for information had been handled.
11. The Commissioner considers that the complainant's complaint is that he considers that the legal advice should have been provided to him. He has not complained about any of the wider aspects of his initial complaint. This was clarified in the complainant's complaint to the Commissioner.

### **Reasons for decision**

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#### Regulation 12(5)(b)

12. The council considers that the information is subject to legal professional privilege and that Regulation 12(5)(b) applies.
13. Regulation 12(5)(b) of the Regulations states that a public authority can refuse to disclose information where 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 inquiry of a criminal or disciplinary nature.*
14. The Commissioner notes that the information is not in fact a report as was initially reported. It is correspondence between qualified lawyer acting in their professional capacity and an officer in the enforcement department of the council. The Commissioner is satisfied that the correspondence was created with the sole or dominant purpose of providing legal advice.
15. However in order for legal professional privilege to apply the information must also be held in confidence. The basis of legal professional privilege

is to protect the confidentiality of correspondence between a client and his legal adviser. In this way the parties can discuss the legal aspects of the client's case in a full and frank manner without fear that a subsequent disclosure of the information will weaken the client's legal position. If the advice can no longer be considered to be confidential then the underlying purpose behind the application of legal professional privilege becomes redundant and it will therefore no longer be applicable. For the purposes of the exception if the information is already known then it becomes impossible to argue that a further disclosure would have an adverse effect upon the course of justice etc in any way.

16. In this case the council has admitted that the 'essence' of the legal advice was provided to the complainant prior to the FOI request being made. The council's review decision dated 30 September 2013 also acknowledged that 'in essence' the effect of the advice had been relayed to him by the Corporate Manager for Planning Enforcement. The review decision stated:

*"Our decision is to uphold the decision not to disclose the legal advice that was in the public interest. This has been disclosed to the requestor in a subsequent email. Therefore whilst the legal advice could be challenged under the public interest test, **that information had separately been available**\*." (\*ICO highlighting)*

Clearly therefore the council considers that the legal advice has been disclosed to the extent that its findings and the reasons for its findings have already been disclosed.

17. The response from the council planning officer quoted substantially from a letter to the church. It set out the council's position as regards whether the church's ancillary activities fitted within the scope of its planning permission. The initial sentence of that letter stated:

*"I have sought a view from our legal team regarding the use of the site, with particular regard to the activities being carried out and the requirements of the conditions imposed upon the planning permission. I can now set out our position."*

The email then went on to provide a detailed analysis of the legal position of the council as regards the church's ancillary activities. This information was therefore provided to the complainant.

18. The Commissioner notes that a limited or restricted disclosure of the information will not necessarily mean that it can no longer be considered to be confidential. The council provided the complainant with details of

the advice in response to a query from him dated 31 January 2013 asking for an update of the situation. Clearly he had a personal interest in the case being an individual who had presumably made a complaint about the activities of the church in the first instance.

19. The first question is therefore whether this might be a disclosure in a limited or restricted fashion to the extent that the disclosure did not compromise the overall confidentiality of the information.
20. Having considered the email in which the officer disclosed the essence of the advice to the complainant the Commissioner notes that the officer did not state that the information was being provided to the complainant in confidence and did not restrict him from further disclosing that information in any way. The complainant could therefore have published or further disseminated that information to any number of further parties without fear of legal action being taken by the council against him for breach of confidence. The information was therefore disclosed to him in an unrestricted way.
21. This being the case the Commissioner is satisfied that the information disclosed to the complainant in the email would not retain its confidentiality and therefore could not retain its privileged status. It had been freely provided to the complainant without restrictions as to its further usage or dissemination.
22. The Commissioner has therefore considered the information which was disclosed to the complainant against the withheld information to determine whether there are any substantial areas of the advice which were not disclosed. If there are none then the information will not have the necessary quality of confidence and the exception would not be applicable. In essence the entirety of the advice would already be known and could therefore no longer be subject to legal professional privilege. It would also negate arguments that the exception applied as the withheld information would already be known and a disclosure of the actual advice would not disclose any further information into the public domain which could have an adverse effect upon the course of justice.
23. The Commissioner compared the advice to the information which was disclosed to the complainant. Again it is noted that the council's decision in its review was that the information had already been disclosed to him. It is clear therefore that it considered that the all of the advice had been disclosed to the complainant, albeit that this was not through a direct disclosure of a copy of the advice itself.
24. The Commissioner considers that the legal advice differs from the information provided to the complainant in only a superficial fashion.

The differences in this respect are not significant or substantial and there is no additional information or advice which would require protection under legal professional privilege or under the exception.

25. The Commissioner's view is therefore that the council was correct to state that all of the advice had previously been disclosed to the complainant. However that being the case, the Commissioner considers that the argument for withholding a copy of the actual advice itself fails in that the council can no longer claim that it is confidential, that it is subject to legal professional privilege and consequently that its disclosure would have an adverse effect upon the course of justice etc.
26. The Commissioner's decision is therefore that the council was not correct to apply Regulation 12(5)(b) in this instance.
27. The Commissioner acknowledges the councils argument that the information has been made available to the complainant. In theory the council could therefore argue that it need not take any further action as the complainant was provided with the information he requested. The Regulations provide a right to information not to documents themselves.
28. Although this is the case the council cannot argue that the information has all been disclosed. The Commissioner considers that the context of the advice, the manner in which it has been worded etc does differ from the information provided to the complainant, albeit that this is only in a superficial fashion. The Commissioner therefore considers that the council has not disclosed all of the information to the complainant. The most pragmatic solution to this would be to disclose a copy of the advice itself.
29. As the exception has not been engaged there is no requirement on the Commissioner to consider the public interest test.

#### Regulation 11(4)

30. The Commissioner is satisfied that the councils request to review its decision could, and should have been carried out properly prior to the complainant having to submit his complaint to the Commissioner.
31. Under the Regulations public authorities are required to carry out a review under Regulation 11. They are required to respond to the complainant within 40 working days under Regulation 11(4). The council did reconsider its position but subsequently wrote to the Commissioner stating that it had not carried out a review of the request. The result was that the outcome of the case was delayed further whilst the council reconsidered its position.

32. The Commissioner notes that the complainant, when making his request for the council to review its decision, did place an unsustainable deadline on the council to review its decision. He asked for confirmation of its decision by the next working day. The council then simply stated that it upheld its decision. Whilst there is no requirement under the Regulations for the council to react to the request this quickly, the council could have outlined to the complainant the deadlines set within the Regulations for it to reconsider his complaint.
33. The council should then have carried out an appropriate review at the time that the complainant requested this in January 2013, however it appears that it did not in fact do so. The Council wrote to the Commissioner stating no review had been carried out. In saying that it had not carried out a review the council is effectively admitting that it had breached the requirements of Regulation 11(4).
34. The Commissioner therefore advises the council to ensure that in the future it carries out a review of its position in order that this it is not necessary to do this after a complainant has brought a complaint to the Commissioner.
35. The Commissioner's decision is that the council breached Regulation 11(4) in this instance.

## Right of appeal

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36. 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)

37. 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.
38. 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 .....**

**Lisa Adshead**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**