

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

**Date:** 8 July 2013

**Public Authority:** Gloucestershire County Council  
**Address:** Shire Hall  
Westgate Street  
Gloucester  
GL1 2TG

**Decision (including any steps ordered)**

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1. The complainant requested copies of the legal advice received by Gloucestershire County Council ("the council") relating to badger culling. The council refused to provide the information using section 42(1) of the Freedom of Information Act 2000 ("the FOIA"). This exemption concerns Legal Professional Privilege.
2. The Commissioner's decision is that the information should have been considered under the Environmental Information Regulations 2004 ("the EIR"). However, he was satisfied that the information could be withheld under regulation 12(5)(b). This exception also concerns Legal Professional Privilege.
3. The Commissioner does not require any steps to be taken.

**Request and response**

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4. On 12 November 2012, the complainant wrote to the council and requested information in the following terms:

*"I am asking for the release of the full Queens Counsel report which is referred to in report number 9 of the Full Council meeting planned for 21<sup>st</sup> November in the attached link. This refers to the recommendations made to Council from the Budget and Performance Overview and*

*Scrutiny Committee and is concerned with the council's stance on allowing tenants to cull badgers on its land.*

*In the attached link below, the report refers to the 'Opinion of Queen's Counsel' and gives a summary of that opinion. I would like to have access to the full summary, preferably before the planned meeting on the 21<sup>st</sup> November.*

<http://glostext.gloucestershire.gov.uk/ieListDocuments.aspx?Cid=333&MId=7223&Ver=4>"

5. The council replied to the request on 6 December 2012. It said that it would not supply the information requested because it was exempt under section 42(1) of the FOIA.
6. The complainant replied on 19 December 2012 and requested an internal review.
7. The council completed an internal review on 16 January 2013. It said that it wished to maintain its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had correctly refused to provide the legal advice.

### **Reasons for decision**

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#### **Is the information environmental?**

9. Environmental information is defined by regulation 2 of the EIR. Regulation 2(1)(c) of the EIR provides that environmental information is any information on (relating to) measures, plans, activities etc. affecting or likely to affect the matters listed in regulation 2. Regulation 2(1)(a) lists the land and biological diversity. Culling badgers will clearly have an impact on biological diversity and the land, and other factors are also likely to be affected through the culling activity itself.
10. The council told the Commissioner that it had taken the decision to consider the withheld information solely under the FOIA because the sections of the document not already released relate primarily to the council's role as landlord to its tenants and the specific questions and responses on legal matters that the council had. The council said:

*"We have concluded that since the right to undertake a badger cull already exists and has gone ahead in accordance with national legislation, the information about tenancy rights does not have a direct impact on the landscape or biological diversity, but is administrative or legal in nature".*

11. The Commissioner would like to highlight that his approach to the issue of environmental information is a fairly broad one. He will consider whether the information in question *relates to* an activity that affects or is likely to affect the environmental matters listed in regulation 2. In other words, the information does not have to be directly about the activity itself. The Commissioner considers that in this case it is appropriate to consider the legal advice in its complete context. In this case, the particular context is the council's consideration of the options available to it in respect of the proposed badger cull. Including information of this nature within the description of "environmental information" is consistent with the aim of increasing public participation in decisions taken by public authorities relating to the environment.
12. Notwithstanding the above, the council has in any event said that if the information is deemed to be environmental, it would wish to rely on the similar exception provided under the EIR by regulation 12(5)(b). The Commissioner has considered this exception in the analysis below.

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

13. 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.
14. The principle of Legal Professional Privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of Legal Professional Privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, the council sought to rely on advice privilege.
15. 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, in this case, a barrister. It therefore attracts Legal Professional Privilege. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice

had been shared with third parties to the extent that it had lost its confidential character.

16. It is worth mentioning for clarity that in his internal review, the complainant referred to a summary of the legal advice which the council had made publicly available, and he said previous disclosures to the world at large mean that the information can no longer be said to be confidential. The council also said that it had considered whether privilege had been "waived" and concluded that it had not. The council said that only a summary has been available in this case and there is no evidence that the full report has lost its confidential character.
17. The Commissioner would like to explain that the concept of "waiver" is not relevant to disclosures made under the FOIA, which are to the world at large. Waiver is a term which only applies in court proceedings to prevent "cherry picking" where only certain parts of legal advice are disclosed. Of course, parts of the full report will contain the same information as already disclosed by the summary to the public but where that is the case, there is no merit in considering a further disclosure. In respect of the information that is not already publicly available, the Commissioner was satisfied that this information continued to attract privilege.
18. 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".
19. 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.

20. 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**

21. 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. In the particular circumstances of this case, there is a strong public interest in enabling the public to understand the council's position with respect to activities being carried out on its land that could have significant impacts on the environment and potentially pose a risk to public safety. Disclosure of the legal advice would help the public to understand more about the decision-making process of the council relating to this matter and consider the quality of the legal advice relied upon.

**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 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".*

24. 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.
25. 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..."*

26. 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**

27. Some useful background to this matter is provided in the summary document that was made available to the public in this case. This document explains that legal advice was sought from the barrister in relation to the implementation of the government's policy on Bovine TB and badger control in England published by the Department for Environment, Food and Rural Affairs ("DEFRA") in December 2011. For ease of reference, the summary legal advice (see page 37) and government policy can be accessed via the following links:

<http://glostext.gloucestershire.gov.uk/documents/g7223/Public%20reports%20pack%2021st-Nov-2012%2010.00%20County%20Council.pdf?T=10>

<https://www.gov.uk/government/.../pb13691-bovinetb-policy-statement.pdf>

28. In brief, the Commissioner understands that DEFRA selected two pilot areas in which to conduct culls. One of those areas contains land in the ownership of the council. The council is not a direct participant in the implementation of the government's policy. The summary legal advice refers to two distinct situations: where the council has let land to tenant farmers and where it has not let the land. In the former case, the position is governed by the terms of the tenants' respective leases or tenancy agreements and the relevant legal framework. The summary legal advice concludes that the tenants are not compelled to participate in badger culls but neither are they prohibited. It is a matter for their individual discretion and they do not have to gain the council's consent, consult or carry out a risk assessment.
29. In relation to land owned by the council but not let, the council could change its policy position which could thereafter affect future tenancies,

provided that any change was lawful. The summary legal advice states that the authority's purpose in doing something like this must be for "the benefit, improvement or development of their area".

30. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. As mentioned, he also accepts that there is a strong public interest where those decisions concern activities that could have significant impacts on the environment and pose a risk to public safety. 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 council's right to obtain legal advice in confidence.
31. 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 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.
32. The Commissioner notes that the council-owned land represents a minor element within the cull zone identified and the council is not directly involved. Furthermore, there is no evidence of any misrepresentation, unlawful activity or a significant lack of appropriate transparency. On the contrary, the council has provided a comprehensive summary of the legal advice it has received and has accurately and openly reflected the main thrust of that advice to help the public to understand its position on the cull. As mentioned above, the government has also published information explaining its position on the cull.
33. The Commissioner notes that the legal advice in question dates from October 2012 and it is therefore still very recent. In view of this, the prejudice caused by any disclosure would still be sufficient to warrant the continued maintenance of the exception and it has not diminished due to the passage of time.
34. The Commissioner recognises that the government's policy on culling has clearly been controversial and that this issue is likely to have been distressing to some. He can therefore appreciate the strength of feeling about any decisions made by the council in connection with these matters. However, it is not for the Commissioner to debate as part of this public interest test the respective merits of the cull or the nature of

the legal advice received. Some may wish to challenge the council's position, but that should take place through the proper avenues that may be available. It is not for the Commissioner to consider whether or not the legal advice received by the council is correct. The relevant public interest lies in whether there are any reasons that are strong enough to outweigh the particularly strong justification for allowing public authorities the right to consult lawyers in confidence. For the reasons described above, the Commissioner concluded that there were no such factors in this case.

## Right of appeal

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35. 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)

36. 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.
37. 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**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**