

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 October 2013

Public Authority: Mole Valley District Council
Address: Pippbrook
Dorking
Surrey
RH4 1SJ

Decision (including any steps ordered)

1. The complainant requested legal advice obtained by Mole Valley District Council ("the council"). The council withheld the information on the basis that it had been provided under legal professional privilege, and was therefore exempt under regulation 12(5)(b) of the Environment Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the council correctly identified the information as legally privileged, and was therefore correct to rely upon the exception provided by regulation 12(5)(b) of the EIR.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 8 April 2013, the complainant wrote to the council and requested the following information pertaining to land title SY761956:

"Copies of all instructions to and opinions from any Solicitors, Barristers, Surveyors or other professional advisors or experts, whether employees of the Council or outsiders, relating to the registration of the land; the legal status relating to possible ownership of the land; with regard to any gifts and/or covenants; or any other advice pertaining to the land title numbered above."
5. The council responded on 7 May 2013. It refused the request under section 42 of the Freedom of Information Act 2000 ("the FOIA").

6. On 14 May 2013 the complainant requested an internal review.
7. Following an internal review the council wrote to the complainant on 14 May 2013. It confirmed that it was correct to withhold the information on the basis that it is subject to legal professional privilege, but advised that it should have refused the request under regulation 12(5)(b) of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 3 June 2013. He asked the Commissioner to consider whether the council had correctly refused his request under regulation 12(5)(b) of the EIR.

Reasons for decision

Is the information environmental?

9. 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. One of the elements listed is landscape. The requested information relates to the legal advice taken by a public authority in their consideration of whether an allotment site can be disposed of for the purposes of development. This issue can be identified as affecting the landscape, in addition to a range of other elements. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(5)(b) – The course of justice

10. Under this exception, a public authority can refuse to disclose information on the basis 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.
11. The council provided a copy of the withheld information to the Commissioner. The Commissioner was satisfied that it represents advice

from two legally qualified persons to specific council officers, and is therefore subject to legal professional privilege.

12. 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 the Tribunal decision of *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".
13. 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 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. In the circumstances of this case, the Commissioner considers that disclosure of the requested information would adversely affect the council's ability to defend itself if it faced a legal challenge in connection with this matter. The council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.
14. 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 is therefore satisfied that regulation 12(5)(b) was engaged.

Public interest arguments in favour of disclosing the requested information

15. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. In the circumstances of this case, the complainant has explained to the Commissioner that the legal advice obtained by the council underlies its decision to start the process of disposing of an allotment site for development.
16. The complainant has explained in his correspondence with the Commissioner that the formation of the allotment site itself originates in the Leatherhead Common Inclosure Award of 1865, when the site itself

was granted to the Churchwardens of Leatherhead "*in trust for the labouring poor of the said Parish*", before being successively transferred to the Leatherhead Urban District Council, and later, Mole Valley District Council. While the complainant has not explicitly stated as such, the Commissioner has assumed that there is public concern about the council's legal right to dispose of the land for development.

17. Disclosure of the legal advice would therefore help the public to understand more about the legal basis of the council's actions, and the wider decision-making process in the council relating to such a matter, which the Commissioner considers is likely to be a matter of public interest to local residents. The need for such transparency has been indicated by the council itself, who referred to this factor its own internal review, as part of which it provided the complainant with the public interest reasoning that it had undertaken. In his submissions to the Commissioner and to the council itself, the complainant has strongly argued in a similar manner, and has explained that he considers the public have a right to know the content of the legal advice, as the council itself is ultimately acting on behalf of the public.

Public interest arguments in favour of maintaining the exception

18. 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.
19. 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, and may deter public authorities from seeking legal advice. The Commissioner's published guidance on 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."

1

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

20. 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 needing to disclose their legal advice in advance. This would provide an unfair advantage to opposing parties, who would not be likewise constrained by having their legal arguments known in advance.
21. 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..."

22. 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.
23. The council, in their submission to the Commissioner, has confirmed their view that the relationship between legal adviser 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 matters that involve the disposal and development of council land, the matter itself is still live, and therefore any disclosure of its legal advice would have the potential to adversely affect the its position in the event of future legal challenges.

The Commissioner's assessment

24. 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.
25. 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 appraised the withheld information itself, and the wider circumstances of the matter, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the council's right to obtain legal advice in confidence.

26. 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 strong opposing factors, such as circumstances where substantial amounts of public 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.
27. The Commissioner appreciates that the matter which the legal advice relates to is the subject of significant local interest, and has received opposition in the form of a petition signed by nearly 2800 people². Having undertaken research into the wider matter, it is apparent to the Commissioner that it has the potential to affect not only those who use the public allotments, but also those who live in the surrounding area and might consequently be affected by any alteration of the landscape and changes to local infrastructure³.
28. While the local concern of residents and allotment users is an important public interest factor that must be considered, it is not an automatic reason for disclosure. In this case, the Commissioner can clearly perceive that the legal advice in question relates to a live matter, and the release of this legal advice would have the potential to publically disclose any strengths and weaknesses within the council's position. Should the council then be legally challenged, it would provide unfair advantage to any opposing party, and prevent a fair and reasoned legal debate. It is apparent that the matter itself has already been widely publicised by the council, with a high degree of public engagement and transparency having been displayed. Having viewed publically available documents that define the council's timescale for managing the disposal and potential development of the site⁴, it is clear to the Commissioner that any formal challenge to the council's actions could still be undertaken through the proper courses, particularly in that a development proposal has yet to reach a planning application stage.

² <http://www.bbc.co.uk/news/uk-england-surrey-23751750>

³ <http://www.getsurrey.co.uk/news/local-news/leatherhead-cannot-afford-lose-allotments-4720900>

⁴ <http://www.molevalley.gov.uk/media.cfm?mediaid=16121>

29. While the Commissioner appreciates the council's actions in this matter have received some public opposition; he does not consider that the public interest arguments for disclosure are equal or greater than the public interest inherent in maintaining the exception.

Right of appeal

30. 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

31. 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.
32. 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
Wilmslow
Cheshire
SK9 5AF