

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

Date: 30 January 2014

Public Authority: Basingstoke and Deane Borough Council
Address: Civic Offices
London Road
Basingstoke
RG21 4AH

Decision (including any steps ordered)

1. The complainant has requested from Basingstoke and Dean Borough Council ('the council') the advice requested and received from Counsel. The Commissioner's decision is that the council has correctly applied the exception where 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 nature. He does require any steps to be taken.

Request and response

2. On 6 May 2013, the complainant wrote to the council and requested information in the following terms:

"Please could you give me the information and any pictures the Council have taken in relation to the applications listed:

BDB/71560 [named individual] and [named individual] both took pictures whilst on site and I would like copies of these please.

BDB/72044 [named individual] took pictures and I would like copies of these please.

BDB/70380 and BDB/69608 [named individual] took pictures and I would like copies of these please.

Please note none of the above is available online but I am sure you have records of it all.

[Named individual] and [named individual] may have pictures of anything to do with Willow Cottage which includes the dwelling now known as Thimble Cottage and can you please give me copies of these as well.

In relation to Willow Cottage, the outbuilding previously known as the annex which is now called Thimble Cottage, which we obtained a COL under BDB/71560 your planning department have said they have spoken to outside Counsel. Please can you give the name of the person and the company they work for please. Also, in the interests of clarity, please can you supply the question/s and information that Basingstoke Council gave to that outside Counsel.

Although I understand you do not have to give me their reply, it would help to clarify matters so we seek this information also."

3. The council responded on 3 June 2013 and provided some photographs but refused to provide the remainder of the requested information citing the exceptions at regulation 12(5)(b) and 12(3).
4. The complainant requested an internal review by email on 5 June 2013. The scope of the review was clarified by telephone on 9 July 2013 to cover the photographs, the name of Counsel and the questions and information provided to Counsel.
5. The council provided an internal review response on 22 July 2013. It released the remaining photographs but maintained the application of the exception at 12(5)(b) to the questions put to Counsel and the subsequent advice given.

Scope of the case

6. The complainant contacted the Commissioner on 25 August 2013 to complain about the way his request for information had been handled.
7. The Commissioner understands that the council contacted Counsel to seek their opinion on the release of their name and, as consent was

given, the name of Counsel was disclosed during the Commissioner's investigation. He has therefore not considered the application of the exception for third party personal data.

8. The Commissioner has therefore only considered the application of regulation 12(5)(b) to the questions put to Counsel and the subsequent advice given.

Reasons for decision

9. The council claimed that the information is legal advice which is subject to legal professional privilege and that it is therefore exempt from disclosure under regulation 12(5)(b) of the EIR. Under this regulation a public authority can refuse to disclose information to the extent that 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.
10. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Information Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*¹ as;

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph 9)
11. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.

¹ Appeal no. EA/2005/0023

12. In the case of *Kirkaldie v ICO & Thanet District Council*² the Tribunal stated that,

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”. (paragraph 21)

13. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase ‘course of justice’.
14. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse affect on the course of justice.
15. There are two types of privilege, namely; legal advice privilege and litigation privilege. In this case the council has sought to rely on advice privilege.
16. For advice privilege to apply, 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.
17. In response to the Commissioner’s enquiries, the council have confirmed that all the conditions, as stated in the above paragraph, for legal advice privilege to apply are met in this case.
18. The Commissioner has reviewed the withheld information. Based on that review and the council’s submission, the Commissioner and is satisfied that the withheld information is subject to legal professional privilege.
19. Information will only be privileged so long as it is held confidentially. The council has confirmed that the information requested has not been placed into the public domain or disclosed without restriction for its use so the privilege has not been lost.

² Appeal no. EA/2006/0001

20. The Commissioner has therefore gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
21. In *Archer v ICO & Salisbury District Council*³ the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.
22. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*⁴ in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
23. The Commissioner notes that legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
24. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
25. The Commissioner has therefore borne in mind the fact that ordering disclosure of this information is likely to have an indirect adverse effect

³ Appeal no. EA/2006/0037

⁴ Appeal no's. EA/2005/0026 & EA/2005/0030

upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by this request when making his decision in this case.

26. The council explained that the complainants planning case is ongoing and it has recently served an enforcement notice. It submitted that disclosure would adversely affect the course of justice because the legal advice sought and given remains relevant and disclosure would have an adverse affect on the council's ability to maintain its position in relation to enforcement action, particularly as the advice has a bearing on the action taken and the time for appeal against it has not yet expired.
27. The Commissioner has seen the withheld information and considered the council's argument and is satisfied that disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information when the case is still 'live'. Disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.

The public interest test

28. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then 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.
29. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

30. The council recognised that there are arguments in favour of transparency and accountability of a local authority, particularly in relation to planning matters and that disclosing the withheld information may assist the public in understanding the legal basis for decisions taken by the council.
31. The Commissioner agrees with the council's submission in favour of disclosing the information as its release would promote accountability and transparency and allow the public to better understand the basis of

the council's decision and its legal justification for a particular course of action.

32. The complainant has said that he would like this information because he does not believe that the council has asked outside Counsel the correct question and if it doesn't ask the correct question, it wouldn't receive the correct answer. He said that the information relates to work he did at his house which the council confirmed in writing first of all that he did not need permission to do and then after he did the work, said he did require permission, even though he has correspondence from it confirming he does not need permission. He explained that having the information requested would help to clarify issues with the council.
33. The complainant alleges that the requested information will show wrongdoing on behalf of the council, in that it asked Counsel the wrong questions. He specifically said that a Barrister would not say: 1. that a hedge is development; 2. that the existing ancillary buildings can't be converted into ancillary living accommodation; and 3. that residential to residential (i.e. garden to garden) is a material... change of use, and the council has insinuated that the barrister has said that the council is right on these 3 points.
34. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO*⁵ which considered the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..." (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

⁵ Appeal no. EA/2007/0092

35. Having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.
36. Whilst the Commissioner cannot assess whether there has been any wrongdoing, he acknowledges that there can still be a public interest argument for disclosure if this would show that the concerns are unjustified and would help restore confidence in the public authority. However, the concern in this case relates to a private interest, as the complainant believes that the requested information will help him in his planning grievance. It has not been shown that there is public concern and that therefore disclosing the requested information would serve a wider public interest. The Commissioner has noted the Tribunal's comments in *Roger Woodford v the Information Commissioner*⁶, where the request concerned legal advice regarding a right of way over a piece of land which the requester had a long running dispute with the council about;

"...this case is not concerned in any way with the Appellant's own private interests... If it is claimed, as it seems to be, that the disputed information had some form of "vital evidentiary role" in the Appellant's dispute, the same is simply not relevant in addressing the equation to be resolved with regard to the competing public interest."

Public interest arguments in favour of maintaining the exemption

37. The council has said that disclosure of information subject to legal professional privilege would have an adverse effect on the course of justice simply through a weakening of the doctrine which would undermine the important common law principle. It said that forsaking this principle would undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
38. The Commissioner notes that the advice is still 'live' as enforcement action is currently being taken. The Commissioner considers that, if disclosed, the advice could be analysed for weaknesses which could then be exploited in future. The Commissioner has given this argument significant weight as it would effectively cause an imbalance in the level

⁶ Appeal no. EA/2009/0098

playing field which should be present within the adversarial process. As legal professional privilege is one of the guarantees of a fair trial, the Commissioner would not expect privilege to be waived in cases where disclosure might prejudice the rights either of the authority itself or any third party to obtain access to justice.

39. 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. In the Bellamy case, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
40. 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 advice, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".
41. 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..."
42. 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

43. The council said that while the legal advice sought and given in relation to this case is of interest to the complainant, there is no overriding public interest in its disclosure.
44. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. 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 consult with its lawyers in confidence.
45. The Commissioner notes that the public interest in maintaining this exemption 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 large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
46. 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

47. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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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