

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 14 July 2014

**Public Authority:** Harrow Council

**Address:** PO Box 2  
Civic Centre  
Station Road  
Harrow  
HA1 2UH

#### **Decision (including any steps ordered)**

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1. The complainant has requested legal advice held by Harrow Council about a proposed diversion order in relation to a footpath.
2. The Commissioner's decision is that Harrow Council has applied regulation 12(5)(b) appropriately.
3. The Commissioner does not require Harrow Council to take any further steps.

#### **Request and response**

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4. On 9 July 2012 the complainant wrote to Harrow Council (the council) and requested information in the following terms:

*"May I please see a copy of the letters from [a named person] referred to in the correspondence? If you have a concern, I am happy to make a request under the Freedom of Information Act. It is relevant to the current proposed diversion order as the School has indicated to the Council in legal submissions that no objections were made at the time of the erection of the all weather courts and I should be interested to see what [a named person] said to [a named person], as she left me with the clear impression that [a*

*named person] had indicated the blocked route was only permissive."*

5. In a second email on 9 July 2012 the complainant also requested:

*"I should also be glad to see the Council's legal advice on the points made."*

6. The council provided the information in response to the first email. With regard to the second request of 9 July 2012, the council responded on 10 July 2012. It stated that it was withholding the requested legal advice under section 42(1).
7. Following an internal review the council wrote to the complainant on 12 July 2012. It upheld its decision to rely on section 42(1).

## **Background**

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8. Initially the Council considered the complainant's request under the Freedom of Information Act 2000. However the Commissioner issued a decision notice (FS50461588) on 6 March 2013 explaining that he considered that the request should have been considered under the EIR. The council reconsidered the request under the EIR and cited regulations 12(5)(b) and in addition, regulation 12(4)(e).

## **Scope of the case**

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9. The complainant contacted the Commissioner on 13 September 2013 to complain that the council had not responded to her request under the EIR. The Commissioner contacted the council about this and the council confirmed that it had responded to the complainant in a letter dated 11 April 2013. The council resent this to the complainant.
10. The Commissioner contacted the complainant and explained that the council had responded to her on 11 April 2013. The complainant confirmed that she had received the response initially and apologised for the mix up. The council's response under the EIR explained that it was applying regulations 12(4)(e) (internal communications) in addition to 12(5)(b) (adversely affect the course of justice). Both parties agreed that as there had been an internal review carried out under the FOIA, there was no need for a further review.
11. However, there was some confusion about what the complainant was asking for and the Commissioner contacted her to clarify this. The

complainant explained that she wanted any legal advice provided to the Council between the dates of 2 – 27 January 2004 and pointed to her letter to the Commissioner of 25 August 2013, (which she wrote in response to receiving the Council's original response of 11 April 2013, re-sent to her on 6 August 2013) which read:

*"Unfortunately, it gives rise to the reasonable suspicion that there is some other reason why the Council wishes to suppress the internal legal advice which was given between Mr Grey's letter of 2nd January 2004 and the Council's letter to me of 27th January 2004."*

12. In a letter to the Information Commissioner dated 24 August 2013 the complainant also wrote: *"The legal advice I seek to see was in 2004"*.
13. The Commissioner contacted the council to ascertain whether it held any legal advice between those dates, providing questions for the council to answer. The council responded to the questions, confirming that it did not hold any legal advice between these dates and the Commissioner was satisfied that this was the case. He informed the complainant of this.
14. Subsequently however, the complainant decided that she wanted copies of the 2001 and 2003 legal advice referred to by the council in its letter to her of 11 April 2013.
15. The council confirmed that with regard to the legal advice given in 2001 and 2003, it would rely upon the arguments it had submitted previously. The complainant also confirmed that she wanted to use her previous arguments.

## **Reasons for decision**

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16. As explained in paragraph 8, the Commissioner has already explained in his decision notice FS50461588 why the requested information is environmental information. Therefore, he will go on to consider the council's application of regulations 12(5)(b) and 12(4)(e).

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

17. Regulation 12(5)(b) provides that information is exempt from disclosure if 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.

18. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and a client. It has been described by the First-tier Tribunal (Information Rights) (the Tribunal) in the case of *Bellamy v the Information Commissioner and the DTI EA/2005/0023* 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).

19. 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) applies to such information.

20. In the case of *Kirkaldie v ICO & Thanet District Council EA/2006/001* 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).

21. In order to ascertain whether regulation 12(5)(b) has been applied appropriately, the Commissioner will consider the following two questions:

(i) Is the information covered by LPP?

(ii) In all the circumstances, does the public interest favour maintaining the exception?

### **Is the information covered by LPP?**

22. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege applies where no litigation is in progress or being contemplated but legal advice is needed. In both cases, 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.

23. The council argued that the withheld information is exempt under regulation 12(5)(b) as the information attracts legal advice privilege. It explained that the withheld information consisted of internal memoranda from the council's Law and Administration Department to council officers. The memoranda contained legal advice on a number of legal points in response to specific requests for legal advice. The council also explained that it considered that the information attracted litigation privilege as well.
24. Having considered the requested information, the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential. He is also satisfied that the communications were made between a client and professional legal advisers, in this case the council's own legal services, acting in its professional capacity and made for the sole or dominant purpose of obtaining legal advice.
25. The Commissioner considers that when the legal advice was sought, the council did not request it with the purpose of either litigation in progress or litigation being contemplated. The Commissioner is therefore satisfied that the withheld information is subject to LPP – in this case legal advice privilege.
26. Information will only be privileged as long as it is held confidentially. The Council confirmed that none of the information has been made public or otherwise disclosed without restriction to any third party so there has been no waiver of privilege.
27. 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.
28. In *Archer v ICO & Salisbury District Council* EA/2007/0037 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. 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* 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.

29. The Commissioner notes that LPP 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 confidential.
30. The Commissioner accepts that a disclosure of information which is subject to LPP will have an adverse effect on the course of justice 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.
31. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by LPP. The Commissioner must also consider the actual information requested when making his decision.
32. The Commissioner considers that the 'course of justice' exception can be applied broadly to a number of circumstances where disclosure of the requested information would result in some prejudicial effect.
33. The Commissioner notes the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest EA/2008/002*, which states that:

*"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system"*.
34. In assessing whether regulation 12(5)(b) is engaged, the Commissioner must have regard to the circumstances of the case as they were at the time the request for information was made. He notes that in its refusal notice of 11 April 2013, the council explained to the complainant that a final decision would not have an impact at the national, London or North-West London areas. The Commissioner is therefore satisfied that

at the time of the request a final decision had not been made about the proposed diversion order in relation to the footpath in question.

35. As the Commissioner is satisfied that regulation 12(5)(b) applies to the requested information, and given the finding below on the balance of the public interests in relation to that exception, he has not gone on to consider the application of 12(4)(e) – internal communications. As all the exemptions in the EIR are subject to the public interest test under regulation 12(1)(b), the Commissioner will go on to consider the public interest arguments for and against disclosure.

### **Public interest arguments in favour of maintaining the exception**

36. The council acknowledged the importance of transparency and public scrutiny of local authority decision making. However, it explained that local authority decision making was often difficult with finely balanced interests and competing arguments to consider. If local authority officers were deterred from seeking open and frank legal advice from its lawyers for fear of having to disclose that advice, then the quality of local authority decision making is likely to suffer and this is not in the public interest.
37. The council also acknowledged the importance of any proposed interference with public rights of way. However, it pointed out that the path in question was a local path which was being diverted rather than closed completely and so any final decision would not have wider impact and the local population would still have use of a (diverted) footpath. Therefore any potential impact of any final decision after full due process is relatively small.
38. The council also pointed out that the general public interest inherent in LPP is very strong due to the important principle behind it: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
39. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings.
40. The council explained that the requested information, related to contentious and very live issues as clearly demonstrated by the fact that the current request arose as a result of the current proposed path diversion order. However, the council went on to explain that the requested information was not actually directly relevant to the current

proposed diversion order, which was not in issue in 2003. It explained that the situation had developed and things had moved on.

41. The council argued that the legitimate public interest in how the law applied to this particular proposed diversion order and in whether due legal process was being followed would be fully met during the diversion process itself. Legal arguments and representations would be made and argued by opposing sides in the debate and so in a sense any relevant legal advice that the council has given is likely to be debated in due course. The council argued that all legal issues were likely to be fully canvassed in public and that it considered that it was very unlikely that public disclosure of the requested information at this stage would inform or otherwise improve the potential public debate.
42. As mentioned above, the council also explained that the footpath in question was a local path and that any final decision regarding it would not have anything other than a very local impact. The council also pointed out that the local population would still have a diverted path to use.
43. The council also stated that it was not aware of any allegation of wrong doing by it relating to the proposed diversion order. It also stated that it was not aware of any wider public outcry about the proposed diversion order or relating to the disputed path generally.
44. Furthermore, the council explained that in order to counter its compelling reasons in favour of withholding the requested information, the complainant must show clear, compelling and case specific reasons in favour of disclosure of the requested information.

### **Public interest arguments in favour of disclosing the information**

45. Under the EIR there is a presumption in favour of disclosure (regulation 12(1)(a)). The Commissioner considers that disclosure would foster transparency and accountability. He further notes that some people have been affected by the diversion of the path.
46. The Commissioner also considers that disclosure would help to promote accountability and transparency of the decision-making process of the Council.
47. The complainant explained that she had contacted the council in October 2003 about the blockage of a footpath by Harrow School – it had installed locked gates. The council entered into correspondence with the school and the complainant which culminated in a letter from the council to the complainant dated 27 January 2004 in which the council said it



could not be of any further assistance to her. As a result of this letter, the complaint and other walkers did not use the blocked path in question for approximately 10 years. There was a diversion path in operation.

48. However, in 2009 the Ramblers Association challenged this and the council required Harrow School to open these gates, as it should not have blocked the path.
49. The complainant argued that there had been substantial local objections to the diversion from ancient rights of way and that the diversion in question was much less attractive and much longer. She also argued that the point was that Harrow School had knowingly built over a public right of way.
50. The complainant explained that she wanted to dispel any possibility of any wrong doing by the council.

### **Balance of public interest arguments**

51. 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.
52. 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.
53. 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 or where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. The Commissioner notes the complainant's comments regarding Harrow School having knowingly built over a public right of way and her wish to dispel any notion of wrongdoing by the council. However, he notes that the Rambler's Association had challenged the blocking of the original footpath successfully in 2009 and that the council had ordered Harrow School to reopen the original path. Therefore, he considers that this issue has already been dealt with.

54. Furthermore, the Commissioner notes that at the time of the request, a decision about the diversion order had still not been reached.
55. Taking everything into account, 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 is also satisfied that the strong public interest in favour of the council being able to fairly present its position is not outweighed by any public interest factor 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

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56. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
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