

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

Decision notice

Date: 9 July 2014

Public Authority: Nottinghamshire County Council

Address: County Hall
West Bridgeford
Nottingham
NG2 7QP

Decision (including any steps ordered)

1. The complainant has requested information regarding legal matters referring a specific road. Nottinghamshire County Council refused the request under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that Nottinghamshire County Council:
 - Failed to issue a valid refusal notice in time and breached regulation 14(2) of the EIR and;
 - correctly applied regulation 12(5)(b) to withhold the requested information and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 19 January 2014, the complainant wrote to Nottinghamshire County Council (the "council") and requested information in the following terms:

"In the past few years a letter has been written on behalf of Nottinghamshire County Council to legal briefs with regards to the status and responsibilities of the County Council with regards to Bridle Road Burton Joyce. Mr Neil Lewis will have information regarding dates and places of filing etc. Under the Freedom Of Information Act I am requesting copies of the original letters from the County Council and any replies from the legal teams contacted, and any further or subsequent replies with regards this matter."

5. The council responded on 5 February 2014. It stated that it was refusing the request, citing the exemption for legal professional privilege (section 42 of the FOIA).
6. Following an internal review the council wrote to the complainant on 28 February 2014. It stated that it was maintaining its position but also made reference to the request having been dealt with under the EIR rather than the FOIA.

Scope of the case

7. On 23 March 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the requested information
9. During the course of the investigation the council confirmed to the Commissioner that it considered that the request should have been handled under the EIR rather than the FOIA. It stated that it was now relying on regulation 12(5)(b) of the EIR to refuse the request.

Reasons for decision

Regulation 14 – refusal of request

10. The relevant parts of regulation 14 of the EIR state that:

"(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including-

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3)."

11. In this case, the council failed to state that it was relying upon regulation 12(5)(b) of the EIR until the Commissioner's investigation was underway. In issuing a late refusal notice, the Commissioner therefore, finds that the council breached regulation 14(2) of the EIR.

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

12. Regulation 12(5)(b) of EIR states that:

"(...a public authority may 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 enquiry of a criminal or disciplinary nature."

Is the exception engaged?

13. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] 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".

14. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated 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".

15. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & 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 litigation¹".
16. There are two types of privilege – legal advice privilege and litigation privilege. In this case, the council considers the withheld information is subject to legal advice privilege and that release of the withheld information would adversely affect the course of justice. The council has claimed advice privilege in relation to the withheld information, on the basis that the withheld information constitutes advice given to the council by a solicitor in relation to a damage to and maintenance of a specific highway.
17. Having considered the withheld information the Commissioner notes that it consists solely of instructions to counsel and the corresponding legal

¹ EA/2005/0023, para 9

advice provided. He is satisfied that the information constitutes legal advice that would be subject to the confidentiality provided by LPP.

18. In relation to the adverse affect to the course of justice which disclosure would cause, the council has confirmed that disclosure would disadvantage the council's interests in any proceedings in favour of the private interests of third parties. The council has further argued that disclosure of the information would undermine confidence in the general principles of LPP, a principle which is integral to the smooth course of justice. The Commissioner notes that disclosure in this case would also unfairly disclose the council's legal position, something which a potential opponent or litigant would not be required to do.
19. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to highway maintenance, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
20. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.
21. 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. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the information

22. The council has acknowledged that there is a public interest in allowing the public to scrutinise public spending and to understand how decisions which affect the local and wider community are made.
23. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.

Public interest in maintaining the exception

24. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest.
25. The Commissioner notes that disclosure of the information would be unfair since parties seeking to challenge the council's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position. There is a public interest in maintaining the integrity and fairness of the course of justice and there are legal mechanisms, such as the right to appeal planning applications, in place for those wishing to challenge the council's decision in this matter.
26. The council has confirmed that the matters to which the legal advice relate are still 'live' and that legal action in relation to the maintenance of the highway in question is a distinct possibility. The council considers that this provides an enhanced need for the principle of LPP to be maintained in this case.

Balance of the public interest

27. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: 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 course of justice.
28. The Commissioner notes that the issues to which the legal advice relate were still live at the time of the request. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would result in adverse effect to the course of justice by revealing the council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
29. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the council and its legal

advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.

30. The council maintains that there is no overwhelming public interest in this case which would warrant disregarding the principle of LPP. It considers that disclosure of the information would, in addition to weakening confidence in this general principle, also result in adverse affect to the council's ability to defend its position in the event of a challenge.
31. Whilst the Commissioner understands that the complainant has an interest in accessing the information, he has not been provided with any evidence which shows that disclosure would serve the wider public interest in this case and to the extent that would warrant any adverse affect to the course of justice.
32. The Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception. He has, therefore, concluded that the council has correctly applied the exception to the withheld information.

Right of appeal

33. 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

34. 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.
35. 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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