

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

Decision notice

Date: 25 July 2016

Public Authority: Horsham District Council

Address: Parkside
Chart Way
Horsham
West Sussex
RH12 1RL

Decision (including any steps ordered)

1. The complainant has requested information relating to various planning applications which were approved by Horsham District Council. Most of the information sought by the complainant is available to him via the Council's planning portal or has been provided to him. A small amount of information, comprised of an email and legal advice, has been withheld from the complainant on the grounds that legal professional privilege attaches to it. The Council has therefore applied the exception to disclosure provided by Regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Horsham District Council has properly applied Regulation 12(5)(b) to the information it is withholding.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 31 July 2015, the complainant wrote to Horsham District Council and requested information in the following terms

"...I wish to inform you that it is our intention to seek full disclosure of all material relating to both Planning Applications [DC/13/1171 and DC/08/2317] as documented within this report."

5. The complainant wrote again to the Council on 3 August 2015, to ask for:

"...all relevant material in relation to the following Planning Application reference numbers: DC/082321, DC/12/1794.

Finally, can you please confirm whether or not Horsham District Council own the Old Town Hall building subject of Planning Application DC/08/2317?"

6. The Council acknowledged the complainant's request on 3 August, informing him that it would be dealt with under the terms of the FOIA.
7. On 27 August, the Council wrote to the complainant again to advise him that his requests were being considered under the Environmental Information Regulations 2004, and further, that under Regulation 7 of the EIR, the Council is extending the time limit to 40 working days.
8. On 28 September the Council made its formal response to the complainant. The Council provided pdf documents in respect of applications DC/08/2317, DC/13/1171, DC/082321 and DC/12/1794 and a pdf document entitled '[name redacted] Drawings'. In addition to this information, the Council advised the complainant that additional information relating to these applications can be found on the Council's planning pages at:

<http://www.horsham.gov.uk/planning/view-and-comment-on-planning-application>
9. The Council also confirmed that it was withholding the remainder of the information which falls within the scope of the complainant's request in reliance on Regulation 12(5)(b). The Council explained that the withheld information is subject to Legal Professional Privilege and that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing it.
10. The complainant wrote again to the Council on 12 November 2015, making clear to the Council that he seeks, "material relating to all aspects of the planning process in relation to Bill's Restaurant from 2008 to the current day. This will include material held by all of the officers involved with any aspect of this process, including emails between parties. The planning number is DC/08/2317. I am also seeking similar material in relation to planning application DC/131171 (14 – 16 Market Street, Horsham) as this planning application has been markedly affected by DC/08/2317."
11. The complainant asserted that there is a huge anomaly between decisions made in relation to these planning applications. Furthermore,

the complainant asserted that Bill's Restaurant remains open for business prior to discharge of planning conditions and, in respect of 14 – 16 Market Street, certain pre-conditions were not adhered to. The complainant stated that he "can't rule out the possibility that civil and/or criminal offences may have been committed and these could be wide ranging".

12. The Council treated the complainant's email of 12 November as a request for it to undertake a review of its decision to withhold information in reliance on Regulation 12(5)(b).
13. Having conducted its review, the Council wrote to the complainant on 11 January 2016 to advise him that it was, "satisfied that the Council has disclosed to you the information which is not covered by any exceptions contained within the Act" and, "I am satisfied that the information not disclosed falls within this exception [Regulation 12(5)(b)] and the Information Commissioner's Decision Notice FER0529022 supports this".

Scope of the case

14. The complainant contacted the Commissioner on 2 March 2016 to complain about the way his request for information had been handled.
15. In view of the complainant's assertions, the Commissioner's investigation was focussed on whether the Council is entitled to rely on Regulation 12(5)(b) of the EIR in respect of the information it is withholding.

Reasons for decision

Environmental Information

16. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies this definition the request must be considered under the terms of the EIR rather than the FOIA.
17. Under regulation 2(1)(c) of the EIR, 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 land.
18. The Commissioner has considered the nature of the information sought by the complainant. He has determined that the information is environmental information on the basis that it relates to a substantially

completed development which is subject to a number of pre-commencement conditions. The Commissioner therefore considers that the withheld information concerns an element of the environment.

Regulation 12(5)(b) – where disclosure could prejudice the course of justice

19. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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.
20. The Council has made clear to the Commissioner that the withheld information is subject to legal advice privilege. The Council considers that disclosure of this information would likely prejudice the course of justice in a matter which is still live. In the Council’s opinion, disclosure of the withheld information would have the effect of ‘unbalancing the level playing field under which adversarial proceedings are meant to be carried out’.
21. The Council asserts that disclosure of the withheld information would likely result in a high possibility of adversely affecting the course of justice. It has referred the Commissioner to the complainant’s letter of 12 November 2015, which suggests the possibility of legal action.
22. Notwithstanding the Council’s assertion above, the Commissioner has examined the withheld information: He has found it to consist of an email from a Council lawyer, together with a background, legal advice and legal commentary concerning the pre-commencement conditions imposed on a particular development. The withheld information most certainly consists of a communication between a professional legal advisor and client and the dominant purpose of the communication is the provision of legal advice.
23. The Commissioner accepts the Council’s assertion of the high probability of the adverse affect. This is due to the relatively recent date of the withheld information and the potential threat of legal action contained in the complainant’s letter. He also accepts the Council’s assurance that the confidence associated to the withheld information has not been lost.
24. 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 explained that there must be an “adverse” effect that would result from the disclosure

of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word “would” as being “more probable than not”.

25. 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 this important common law principle. He further accepts that disclosure would in turn undermine a lawyer’s capacity to give full and frank legal advice and would discourage people from seeking legal advice.
26. In this case, the Commissioner considers that disclosure of the withheld information would adversely affect the Council’s ability to defend itself should it be faced with a legal challenge.
27. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest

Arguments in favour of disclosing the requested information

28. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
29. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of the pre-commencement conditions attached to a particular property. It would also allow the public to consider the quality of the legal advice which was given to the Council.

Arguments in favour of maintaining the exception

30. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.

31. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. 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."

32. Where a public authority is faced with a legal challenge, or a potential legal challenge (as in this case), it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
33. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:
- "...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..."*
34. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
35. The Commissioner considers that the Council should be able to defend its position against any claim made against it, without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.

Balance of the public interest arguments

36. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
37. However the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which its favour disclosure.
38. In this case, there is clearly a strong personal interest in having access to the withheld information. However, this does not mean that there is a wider public interest.
39. The public interest in disclosure is limited in terms of the value of the withheld information to the general public. Conversely, withholding the legally privileged information mitigates the risk of potentially costly legal proceedings against a public authority and the associated increased burden this would have on public finances.
40. Here, the Commissioner is satisfied that the public interest is best served by maintaining the Council's right to obtain legal advice and for its lawyer to provide that advice in confidence. He takes this position on the grounds that the public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
41. Having considered the purpose and the circumstances in which the withheld information was created, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
42. The Commissioner has decided that the council has properly applied regulation 12(5)(b) to the information sought by the complainant.

Right of appeal

43. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

44. 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.
45. 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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