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

**Decision notice**

**Date:** 17 January 2017

**Public Authority:** Shepway District Council

**Address:** Civic Centre  
Castle Hill Avenue  
Folkestone  
Kent  
CT20 2QY

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the public authority for the legal advice obtained by the authority in relation to the construction of a lorry park in Stanford by Highways England to ease congestion on the M20/A20 road network, along with correspondence relating to the legal advice. The public authority disclosed the related correspondence held within the scope of the request during the course of the Commissioner's investigation. However, it maintained that the instructions to counsel and the advice provided by counsel are legally privileged and therefore exempt from disclosure.
2. The Commissioner finds that the instructions to counsel and the advice provided by counsel (the withheld information) constitute environmental information within the meaning in regulation 2(1) of the EIR. She has also concluded that the public authority was entitled to rely on the exception contained at regulation 12(5)(b) of the EIR as the basis for not disclosing the withheld information.
3. No steps are required.

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**Background, request and response**

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4. The public authority provided the Commissioner with the following useful background to the request.
5. The M20 motorway runs through the district of Shepway connecting via the A20 with the Port of Dover. Nearly 90% of all UK roll-on, roll-off international freight goes through the Strait of Dover and that puts 11,000 lorries per day on Kent's roads.
6. There are occasions when the crossing to France is disrupted, for example through bad weather or industrial action. Depending on the length of the disruption, traffic can quickly back up causing large traffic jams. In the most severe cases the police then put in place "Operation Stack" which in effect turns the coast bound carriage way of the M20/A20 into a linear car and lorry park. This causes severe disruption to the national road network and inconvenience to travellers as well as, more locally, disruption to the district.
7. The problem has been recognised as a national issue and was mentioned in the 2015 autumn statement with a view to finding a long term and more sustainable solution.<sup>1</sup> In order to address the problem, Highways England carried out a consultation on proposals for a lorry site at Stanford adjacent to the M20 junction 11. Two sites were put forward as possible locations, and on 6 July 2016, the then Secretary of State for Transport revealed Stanford West as the preferred location.<sup>2</sup> Highways England subsequently carried out a consultation on certain details.<sup>3</sup>
8. There has been strong local opposition to the proposal, for example, by the Sellindge and District Residents Association.<sup>4</sup> However, the public authority will not be opposing it.

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<sup>1</sup> Page 67 of the autumn statement:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/479749/522\\_29\\_Blue\\_Book\\_PU1865\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479749/522_29_Blue_Book_PU1865_Web_Accessible.pdf)

<sup>2</sup> <https://www.gov.uk/government/news/transport-secretary-announces-proposed-site-for-operation-stack-lorry-area>

<sup>3</sup> <https://highwaysengland.citizenspace.com/he/managing-freight-vehicles-through-kent/>

<sup>4</sup> <http://www.slurry.org.uk/>

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9. On 11 September 2016 the complainant wrote to the public authority in connection to the proposal and requested information in the following terms:

"Could you please provide me with a copy of the legal advice relating to Highways England's proposed lorry park in Stanford, specifically, the advice which confirmed that the Highways Act 1980 provided sufficient grounds for permitting its construction. Please also provide me with copies of all emails, memos and correspondence relating to this legal advice."

10. On 29 September 2016 the public authority issued its response to the request. It withheld the information held in reliance on the exemption at section 42(1) FOIA – legal professional privilege.
11. On 29 September 2016 the complainant requested an internal review.
12. The public authority wrote to the complainant with details of the outcome of its internal review on 30 September 2016. The review upheld the original decision.

**Scope of the case**

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13. The complainant initially contacted the Commissioner on 3 October 2016 to complain about the public authority's handling of his request, specifically the decision to withhold the information requested. He provided the Commissioner with submissions to support his view that the withheld information was not exempt from disclosure and the Commissioner has referred to these submissions at the relevant parts of her analysis below.
14. During the course of the Commissioner's investigation, the public authority accepted the Commissioner's view that the request ought to have been handled under the EIR, rather than the FOIA. The Commissioner has found that the withheld information relates to a measure and an activity (ie the construction of a lorry park) likely to affect the state of the elements/ factors referred to in regulations 2(1)(a) and (b) EIR. She has therefore concluded that the withheld information is environmental information within the meaning in regulation 2(1)(c) EIR.<sup>5</sup> As mentioned, the public authority has not
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<sup>5</sup> <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

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disputed this finding. Therefore, the Commissioner has not deemed it necessary to set out her full reasoning for same in this notice.

15. Having accepted that the request ought to have been handled under the terms of the EIR, the public authority sought to rely on the exception at regulation 12(5)(b) EIR instead as the basis for not releasing the withheld information.
16. Therefore, the scope of the Commissioner's investigation was to determine whether the public authority was entitled to rely on this exception.

## **Reasons for decision**

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### **The withheld information**

17. The public authority explained that following the then Transport Secretary's decision, Highways England stated that they intended to construct the lorry park pursuant to permitted development rights contained in schedule 2, part 9 of the Town and Country (General Permitted Development) (England) Order 2015 ("permitted development order").
18. The public authority therefore sought legal advice as to whether an express grant of planning permission would be required, contrary to Highways England's view that planning permission was not required, before the construction could proceed. It is this legal advice, along with a small amount of related email exchanges including the instructions to counsel that the public authority originally withheld from the complainant. The fact that the advice generally supports Highways England's view that the park can be constructed pursuant to permitted development rights without an express grant of planning permission by the public authority was revealed by the authority prior to the complainant's request.
19. However, during the course of the Commissioner's investigation, the public authority disclosed all of the emails including those relating to the cost of the legal advice. Therefore, those emails are no longer part of the withheld information because they have now been supplied to the complainant. The withheld information for the purposes of the Commissioner's decision comprises of instructions to counsel and the advice provided by counsel in response.

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

20. Regulation 12(5)(b) states:

*".....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 inquiry of a criminal or disciplinary nature."*

21. The public authority considers that disclosing the information withheld on the basis of this exception would adversely affect the course of justice, specifically on the basis that the information is subject to legal professional privilege (LPP). It considers that the information is subject to legal advice privilege because the primary purpose of seeking the advice was to test Highways England's view that they could rely on the permitted development order to construct the lorry park.<sup>6</sup> It had not taken any decision at the time with regards to the next steps had the advice been that an express planning permission was required so no litigation was reasonably in prospect at the time.

22. The public authority further submitted that disclosing the withheld information would adversely affect the course of justice because it would weaken the underlying principle behind LPP consequently affecting the authority's ability to obtain frank legal advice. It further argued that the advice in question relates to a current matter, and it may well have a bearing, depending on how matters proceed, on the authority's actions and stance in the future.

23. The Commissioner considers that the "*course of justice*" element of the exception at regulation 12(5)(b) is very wide in coverage and includes material covered by LPP. In terms of the scope of LPP itself, she has been guided by the Information Tribunal's (now First-Tier Tribunal) description of the meaning of the concept.<sup>7</sup> The Tribunal described LPP as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges"*

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<sup>6</sup> Legally privileged information could be subject to legal advice privilege or litigation privilege. The latter is available where the dominant purpose of providing or obtaining legal advice is in relation to proposed or contemplated litigation.

<sup>7</sup> In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023)

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*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 [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."*

24. The Commissioner has inspected the withheld information. She is satisfied that it is information in respect of which a claim to LPP could be maintained in legal proceedings, primarily on the grounds that it is subject to legal advice privilege.
25. The Commissioner has therefore concluded that the public authority was entitled to engage the exception at regulation 12(5)(b).

**Public interest test**

26. In common with all EIR exceptions, the exception at regulation 12(5)(b) is subject to a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

*Complainant's arguments*

27. The Commissioner has summarised below the complainant's arguments in support of his view that the withheld information ought to have been disclosed in the public interest.
28. The public authority's view that the proposed lorry park does not require planning permission and could go ahead with a permitted development order means that the proposals will not be subject to the normal scrutiny, analysis and evaluation that a development of this scale would normally be subject to.
29. Given that this is a £250 million development that will have a massive impact on the local environment, it is overwhelmingly in the public interest that the public authority demonstrates why it has concluded that it does not require planning permission.
30. He has argued that this public interest can only be met by revealing the legal advice that supports the public authority's conclusion.

*Public authority's arguments*

31. The Commissioner has summarised below the public authority's arguments in support of its view that the public interest in maintaining

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the exception outweighs the public interest in disclosing the withheld information.

32. The public authority acknowledged that there is a general public interest in openness and transparency which supports the disclosure of the withheld information in this case.
33. However, it considers that there is a significant public interest in not weakening the principle behind LPP. Disclosure would affect the authority's ability and confidence in obtaining legal advice in future.
34. The fact that the matter was, and is still live, is controversial and is also very likely to be subject to litigation in the future<sup>8</sup> increases the public interest in maintaining the exception. It is not certain how the matter will develop but the likelihood of litigation cannot be ruled out at this stage. Disclosing the withheld information could undermine the public authority's ability to defend its position in any future litigation relating to the matter and that would not be in the public interest.
35. It pointed out that others could have also obtained legal advice in relation to the proposed lorry park including those contemplating litigation. Therefore, it does not consider that there is a public interest in the public authority in particular disclosing the legal advice it has obtained, given that others with a similar interest in the matter would have the benefit of scrutinising the authority's advice in advance of possible litigation without having to reveal the advice they have obtained.

*Balance of the public interest*

36. The Commissioner shares the view that given the scale, cost and environmental impact of the proposed development, there is a strong public interest in revealing the legal advice on which the public authority has based its conclusion that an express grant of planning permission would not be required by Highways England in order to proceed with the development.
37. She however considers it important in the circumstances to note that the decision to go ahead with the construction of the lorry park has been made and a location has been identified. Therefore, the only issue for

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<sup>8</sup> It noted that there is talk of possible litigation on the website of the Sellindge and District Residents Association.

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her to consider in terms of balancing the competing public interest factors is actually whether there is a weightier public interest in revealing the information (primarily legal advice in this case) on the basis of which the public authority has concluded that Highways England is entitled to proceed with the construction without obtaining planning permission. Although it is likely that some of those opposed to the proposed development are also more generally opposed to the idea of a lorry park as a means of easing congestion on the M20/A20, it is important not to conflate both issues in the context of this investigation.

38. There will always be a strong public interest in maintaining LPP due to the important principle behind it which is; safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice which is in turn fundamental to the administration of justice. The Tribunal in the Bellamy case observed:

"...there is a strong element of public interest inbuilt into the privilege itself [ie LPP]. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

39. Although the Commissioner considers that there is a strong public interest in disclosing the withheld information, she considers that the strong public interest inherent in protecting LPP is significantly enhanced in the circumstance of the case. The issue was, and remains live. It is likely to lead to litigation in future involving the public authority. Therefore, there is a significant public interest in ensuring that the authority is able to obtain full and frank legal advice in future in relation to this matter. It is also in the interests of natural justice not to publicly reveal details of the legal advice that the authority has obtained, which is highly likely to be relevant in future litigation, given that others with an interest in the matter have not been compelled to reveal similar information.
40. It is important to point to the fact that the conclusion of the legal advice has been revealed. The public is aware it states that Highways England is able to proceed with the development without obtaining planning permission. In the circumstances, it is in the public interest to withhold details of the rationale for the advice given that it is very likely to be relevant to future litigation. Nevertheless, it is clearly possible to challenge the authority's view without having to publicly reveal details of the legal advice in support of its position. The prejudicial effect of doing so outweighs the benefits in the circumstances of this case given that those opposed to the development are able to challenge the conclusion of the legal advice (ie the public authority's position) without the details being revealed publicly.



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41. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

## Right of appeal

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

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

43. 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.
44. 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** .....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**