

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

Date: 26 July 2017

Public Authority: Wealden District Council
Address: Council Offices
Vicarage Road
Hailsham
East Sussex
BA27 2AX

Decision (including any steps ordered)

1. The complainant has requested information from Wealden District Council (the council) concerning legal advice sought by the council regarding the 5 Year Housing Land Supply. The council refused to provide the majority of the requested information stating that it was legally privileged and disclosure would adversely affect the course of justice. It stated that regulation 12(5)(b) therefore applied.
2. The Commissioner's decision is that the council was entitled to rely on regulation 12(5)(b) in this case, and has therefore complied with the EIR.

Request and response

3. On 10 October 2016 the complainant made the following request for information to the council:

"In your Objectively Assessed Housing Need and 5 Year Land Supply note issued to councillors in May, you stated that you have taken legal advice that maintains that you cannot include windfalls in the 5 year land supply calculation. The note also states that you are obtaining advice on exactly what constitutes "compelling evidence".

1. *Please can you advise how many times you have sought legal advice this year on the 5 year land supply issue and whether this was from internal or external advisors.*
2. *Please provide a copy of the brief issued to your legal advisors for each element of the legal advice sought.*
3. *Please provide a copy of the legal advice provided.*

I have heard that you normally do not release legal advice, but given the large concerns across the district of the effects of a lack of a 5 year land supply, I feel that the requested information falls fully within the public interest test of the regulations."

4. On 17 November 2016, the council responded. It provided the complainant with the information requested at part one, but advised that the remainder was withheld under regulation 12(5)(b) of the EIR as the information was covered by legal professional privilege and was therefore information which would adversely affect the course of justice. The council maintained that the public interest favoured maintaining the exception.
5. The complainant requested an internal review on 28 November 2016. The council sent him the outcome of its internal review on 22 December 2016 in which it upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 9 January 2017 to complain about the way his request for information had been handled. He asked the Commissioner to determine whether the council was correct to withhold the requested information.
7. The Commissioner considers the scope of this investigation to be to determine whether the council was entitled to rely on regulation 12(5)(b) to withhold the requested information.

Reasons for decision

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

8. 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.

Is the information covered by legal professional privilege?

9. The complainant has argued that the information is not legally privileged as it has not been sought in connection with ongoing or contemplated litigation. He also argues that the information is not legal advice, but expert advice provided by a legally qualified person.
10. The Commissioner recognises that there are two branches of legal professional privilege, litigation privilege, and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege is generally considered where no litigation is in progress or contemplated. It is therefore not necessary for litigation to be in progress in order for a claim of legal professional privilege to be maintained. As such, ongoing litigation is not a requirement for the application of regulation 12(5)(b).
11. The council has stated that it considers that the withheld information at points 2 and 3 of the request attracts legal advice privilege because it relates to communications between a professional legal advisor and his client (the council) for the sole or dominant purpose of seeking and obtaining advice. The council confirmed that the information was communicated by the legal adviser in his professional capacity. It clarified that the advice was sought and is being relied upon by the council in relation to a number of different matters. The council also confirmed to the Commissioner that the privilege attached to the withheld information has not been lost.
12. Having viewed the withheld information, the Commissioner is satisfied that it constitutes advice on a specific matter, and that it has been provided by a qualified legal professional. She is therefore satisfied that the information is covered by legal professional privilege.

Adverse effect on the course of justice

13. The council considers that undermining the general principle of legal professional privilege would result in adverse effects of the course of justice. In applying this exception, the council informed the Commissioner that it relied on the Upper Tribunal judgment in *DCLG v Information Commissioner & WR* [GIA/2545/2011], which found that undermining of the general principle of legal professional privilege would result in adverse effects on the course of justice. The council also

considered the Information Tribunal case of Kirkaldie v ICO & Thanet District Council [EA/2006/0001] which 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."* In this regard, the council further cited Rudd v ICO & The Verderers of the New Forest [EA/2008/0020] in which the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is *"a more generic concept somewhat akin to 'the smooth running of the wheels of justice'"*.

14. The council explained to the Commissioner that it considers that the ability of both parties to obtain frank and comprehensive advice (without showing the strength and weaknesses of their situation to others) to help them decide the best course of action has long been recognised as an integral part of our adversarial system. The Council also had regard to the views of the Tribunal in Bellamy v ICO & DTI [EA/2005/0023] which described legal professional privilege 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.
15. Having regard to these Tribunal decisions, the council has argued that disclosure of the withheld information in this case would have an adverse effect on the course of justice because it would undermine and weaken the doctrine of legal professional privilege. The council has stated that disclosure would affect the ability of the council to seek and receive full and frank advice and would in particular discourage it from seeking legal advice in the context of contentious matters such as those relating to planning. The council argues that if it is discouraged from obtaining full and thorough legal advice, this in turn will have a negative impact upon the quality of decisions it makes, and on its public function as local planning authority.
16. The council has explained that the withheld information in this case was, at the time of the request, actively being considered and applied in regard to a number of matters, including a planning inquiry, other planning appeals and in relation to the council's local plan. Indeed it has confirmed that at the time of the request, the council was waiting to receive further written advice from its barrister in response to a request for advice submitted prior to the request. In support of its position that the legal advice in question is still live, the council informed the Commissioner that further legal advice on the matter of the Council's 5 year housing land supply has continued to be sought since the request.

It maintains therefore that the information is current and actively being relied upon.

17. The council has also argued that it considers that disclosure would be unfair as the advice could then be used by any party (at appeal) against the council when the council would not be in a position to see what advice that other party is relying on.
18. The council has acknowledged that the issue of the calculation of the 5 year housing land supply is a contentious matter, and that opinion varies depending on the viewpoint. With regard to the instructions to counsel, the council has stated that it is concerned that disclosure could lead the public to make incorrect assumptions on the matters advice has been sought on, and would not on its own provide a full picture and could therefore instead inhibit transparency and openness. Further the council states that it considers that the disclosure of the instructions will adversely affect the course of justice because officers will need to seek further advice in relation to an upcoming Planning Inquiry, and other related matters, in the future. It is concerned that the council may become discouraged from seeking full and frank legal advice for fear that the contents of the instructions will not remain confidential therefore putting it on the back foot and unbalancing the level playing field under which these proceedings should be carried out.
19. The Commissioner has considered the council's arguments and finds that the council has correctly engaged the exception at regulation 12(5)(b) as it has demonstrated that disclosure of the information would have an adverse effect on the course of justice, both in terms of the specific information and circumstances, and also in terms of undermining the general doctrine of legal professional privilege.
20. The Commissioner must therefore consider the public interest test.

Public interest in disclosure

21. The council has acknowledged the following public interest arguments in favour of disclosure:

"1) The information relates to a matter of concern across the district and disclosure could assist transparency and openness, enable better public understanding and help to address concerns.

2) There is a wider public interest as it affects planning applications across the whole of the district.

3) The opportunity to give local people the chance to challenge the Council on its 5YHLS assessment."

22. The complainant is strongly of the view that the circumstances of this case are such that the public interest is in favour of disclosing the withheld information. He considers that the council's decision not to include future windfalls in its calculation of the 5 year housing land supply, resulting in a land supply of 3.96 years, is unsound. He has explained that as the calculation is less than the required 5 years, the Local Plan is no longer viable, and so planning applications are now being decided on the terms of the National Planning Policy Framework. The complainant is concerned that this has resulted in an increase in applications and developments and a loss of countryside.
23. The complainant considers that the public interest is in giving residents the opportunity to challenge the council on its 5 year housing land supply calculation. He is of the view that not including windfall planning application in its 5 year housing land supply assessment, is the reason that the council has not been able to demonstrate a 5 year land supply, and believes that the recent evidence of windfall numbers suggests that the 5 year housing land supply could be demonstrated. He argues that the information is therefore in the public interest as it would enable local people to persuade the council that it can demonstrate a 5 year land supply, and therefore reinstate the Local Plan with its greater planning controls. The complainant has put forward that the longer this is delayed the more likely it is that an increased number of unsuitable developments will be granted planning permission.
24. The council has acknowledged that different interested parties have different and contrasting viewpoints on the 5 year housing land supply, and in the case of residents and developers, these views could be considered to be opposing.

Public interest in maintaining the exception

25. The council has put forward the following public interest arguments in support of maintaining the exception at regulation 12(5)(b):
 - 1) *The strong public interest in the Council not being discouraged from obtaining full and frank legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed, particularly in the context of contentious matters such as those relating to planning decisions and plan making. The significant public interest in not weakening the doctrine of LPP.*
 - 2) *The legal advice relates to a live, contentious and ongoing matter for which the Council may seek further advice in the near future. The Council requires space and time to fully consider the advice in light of specific applications and its emerging Local Plan. At the time of the request and the internal review, the Council was due to defend its*

position at a public Inquiry (Eastbourne Road). This appeal has now been withdrawn by the appellant. There is another public inquiry which is set for later this year and the prospect of other less high profile appeals where the Council is relying on the legal advice. Disclosure would affect the Council's ability and confidence in obtaining legal advice for these matters (and others) in the future.

3) Planning and legal processes provide parties with other remedies to scrutinise and challenge the Council's decision making in relation to the calculation of its 5YHLS by virtue of statutory appeals and judicial review.

26. The council has elaborated on the points above and has informed the Commissioner that it considers that the risk of disclosure weakening the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception. It does not consider that there are special or unusual factors to justify not giving it this weight and although the complainant and the wider public may be interested in and concerned about certain elements of the requested legal advice, it argues there is no compelling evidence to suggest that it should not be relying on the legal advice or that it is acting contrary to its public duties in doing so.
27. Furthermore, the council explained that it considers that the strong public interest inherent in protecting legal professional privilege is significantly enhanced by the fact that at the time of the request the council was actively seeking further legal advice on the subject. It confirmed that it has since sought additional advice and is likely to seek further advice on this matter in the near future. It explained to the Commissioner that the advice was sought, in part, to inform its emerging draft local plan policy and to confirm the legal position relating to planning applications and appeals going forward. Therefore it considers that the advice was and continues to be of an interim nature, left open to help guide it through an evolving process, on the basis that it would return for further advice, as required. The council explained that its local plan process is still at a very early stage and the withheld information is still relevant to this and to ongoing applications and appeals. Therefore, the council considers there is significant public interest in ensuring that it is able to obtain full and frank advice in what was and continues to be a live and contentious issue. It argues that it must not be prevented from making informed, well thought out and balanced decisions on the basis that it feels unable to seek the legal advice it requires. It considers that this will have a negative impact on the quality of its decisions and would therefore not be in the public interest.

28. The council also considers that disclosure of the withheld information would be unfair as it is relying on the advice to defend its position at a public inquiry regarding the calculation of the 5 year housing land supply. It argues that if the withheld information is disclosed, the other party will have access to its legal advice without it being given corresponding access to the appellant's legal advice. It suggests that this could put it at a disadvantage and again undermine the principle of legal professional privilege.
29. The final factor taken into account by the council is that anyone aggrieved by its position on its 5 year housing land supply calculation has other remedies within planning law and the wider legal context to challenge planning and policy decisions made by the council. In particular, it advises that the draft Local Plan will be going out for public consultation in the summer, at which time interested parties and members of the public will have the opportunity to scrutinise and comment on all aspects, including the 5 year housing land supply calculation. The council argues that this, along with the appeal and judicial review routes for individual planning applications, provides an appropriate and recognised forum for local people to challenge the council.

Balancing the public interest

30. In balancing the public interest, the council informed the Commissioner that it finds the public interest in maintaining the exception outweighs that in disclosing the withheld information. It recognises that its current lack of a 5 year housing land supply has resulted in development occurring in areas where a particular community doesn't want it and that this has potential to affect land and house values and which may also create additional pressures on communities and local infrastructure. The council states that it gives weight to this but sees it as only one of many factors that it must take into account when considering planning applications and its planning policies. The council also recognises the strong public interest in disclosing the withheld information to assist in dispelling any concerns held regarding its decision not to include windfall development in its calculation. The council has therefore acknowledged that there is a public interest in the disclosure of the information which it needs to balance against.
31. As noted above, the council has placed great weight in the public interest in upholding the general principle of legal professional privilege, and does not consider that there are any compelling reasons in this case for that principle to be undermined.
32. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their

actions, particularly with regard to information subject to the EIR, regulation 12(2) of which states that a public authority shall apply a presumption in favour of disclosure. She also recognises that there is a strong public interest in the specific information in this case due to the ongoing concerns of local residents with regard to how the council is implementing planning policy.

33. However, the Commissioner has observed that the public interest in maintaining this exception is a particularly strong one in terms of not undermining the principle of legal professional privilege. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors. In this case, the Commissioner considers that whilst there is a public interest in disclosure in this case, it does not equal or outweigh the strong public interest that is inherent in maintaining the council's right to obtain legal advice in confidence. She therefore finds that the council was correct to withhold the legal advice under regulation 12(5)(b).

Right of appeal

34. 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

35. 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.
36. 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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