

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

Date: 29 June 2017

Public Authority: Durham County Council
Address: County Hall
Durham
DH1 5UL

Decision (including any steps ordered)

1. The complainant requested a copy of the legal advice received by Durham County Council ("the council") about whether it could insist a particular report was uploaded onto the internet. The council refused to provide the information using the exception under regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR"). This exception concerns prejudice to the course of justice. It said that the public interest did not favour disclosure. The complainant asked the Commissioner to decide whether the council had responded correctly. The Commissioner's decision is that the exception was engaged and that the public interest did not favour disclosure. She does not require any steps to be taken.

Request and response

2. On 7 November 2016 the complainant requested information from the council in the following terms:

"Under the terms of the Freedom of Information Act 2000, I would like to request the following information:

In the second email below, dated 20 October 2016 I asked Planning Officer [name] for some notice or correspondence from the Council's Legal Department on whether they could legally insist that we upload a report containing photographs and plans of a client's home onto the OASIS website where they would be openly available. [Name]

responded on 31 October 2016 but did not include or pass on anything recognisably from the Council's Legal Department. I would like to see all correspondence between [name] and the Council's legal advisor or solicitor whom she consulted regarding this case".

3. On 14 November 2016, the council responded. It said that it was withholding the information because the exception under regulation 12(5)(b) of the EIR applied. This exception relates to disclosures that would adversely affect the course of justice. It said that the public interest did not favour disclosure in this case.
4. Following the complainant's request for a review, the council wrote to him again on 28 November 2016. The council said that it wished to maintain its position.

Scope of the case

5. The complainant contacted the Commissioner on 2 February 2017 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had correctly withheld the information.
6. For clarity, the staff member named in the request did not consult the lawyer directly. The withheld information includes correspondence between a lawyer and another staff member who was consulted about the matter. The Commissioner agrees with the council that it is reasonable to regard this as the information being sought.

Reasons for decision

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

7. Under this exception, a public authority can refuse to disclose information to the extent that 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.
8. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of Legal Professional Privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is

underway or anticipated). In this case, the council sought to rely on advice privilege.

9. The council provided a copy of the withheld legal advice to the Commissioner. The Commissioner was satisfied that it represents legal advice from a legally qualified person. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice had been shared with third parties to the extent that it had lost its confidential character. Therefore she was satisfied that the information is covered by legal professional privilege.
10. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal ("the tribunal) highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with another tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
11. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the 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 the legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. She also considers that disclosure of the legal advice would adversely affect the council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
12. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and she is therefore satisfied that regulation 12(5)(b) was engaged.

Public interest arguments in favour of disclosing the requested information

13. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. This is particularly so in relation to planning

information. The complainant in this case is challenging the appropriateness of the council's requirement to upload a copy of a report. Disclosure of the legal advice would help the public to understand more about the decision-making process in the council relating to this matter and consider the quality of the legal advice relied upon.

Public interest arguments in favour of maintaining the exemption

14. As already indicated, the Commissioner and the tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
15. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. 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".

16. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
17. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...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..."

18. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

19. To provide some background to this matter, a listed building consent was granted for works comprising of internal and external alterations, including a proposed extension. The consent contained conditions that required the submission and approval of a written scheme of investigation ("WSI"). The condition was that no development should take place until the applicant has secured the implementation of the programme of archaeological work in accordance with a written scheme of investigation, which has been approved in writing by the local planning authority. The written scheme of investigation was to include methodologies, a timetable of works, monitoring arrangements and a list of all staff involved for example.
20. The complainant in this case is a developer's agent who is in dispute with the council about what the WSI should contain. Specifically he was told that the council's planning officers would not approve the WSI unless it contained a commitment to upload the report to an 'OASIS' website. OASIS is a national project supported by many national organisations responsible for promoting best practice in planning related archaeological work. Since July 2016, the council has been requiring all contractors to include in their WSI a statement regarding the upload of a digital report to OASIS for all types of archaeological work. The council highlighted that no other archaeological contractor had raised any objection to doing so.
21. The complainant has expressed concerns about uploading the scheme because it includes plans, description and photographs both inside and outside a private dwelling. The complainant believes that it would be inappropriate to make this information publicly available. He would like to see the legal advice the council sought when the complainant raised his concerns about the requirement to upload the report.
22. The council has explained to the complainant that the National Planning Policy Framework makes clear in paragraph 141 that information regarding the historic environment gathered through the planning process should be made publicly available. It is also stated in The Culture White Paper on page 39 that the government wants to make access to historic environmental information more easily accessible. The council considers that asking for the scheme to be uploaded onto OASIS is therefore fully in line with extant planning policy and the intended future aims of government policy, and is a reasonable and proportionate stipulation.
23. The Commissioner appreciates that there is a general presumption in favour of disclosure and specific weight favouring transparency and accountability in relation to planning matters. 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 obtain legal advice in confidence.

24. The Commissioner observes that the public interest in maintaining this exception 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, where a decision will affect a substantial amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following her inspection of the withheld information and consideration of all the circumstances, the Commissioner did not consider that there were any factors that would equal or outweigh the particularly strong public interest inherent in this exception.
25. The council has explained to the Commissioner that if a developer thought that there was an unreasonable condition proposed for a WSI, the correct course of action would be to submit the WSI without that commitment and let the Local Planning Authority refuse the application or for the determination period to expire. An appeal could then be made to the Planning Inspectorate against the requirement. If however a WSI contained the statement about uploading the report, the council's belief is that non-compliance would represent a breach of the requirement.
26. The Commissioner considers that the council has explained its decision and furthermore, as the council highlights, there is already a mechanism in place to ensure appropriate transparency, accountability and challenge within the planning system via the Planning Inspectorate. This adds further substantial weight to the case for maintaining the exception.
27. The complainant wishes to be reassured that the council's position is accurate or is looking for a way to challenge that position. It is important to appreciate that the legal advice relied upon by the council is simply advice which the council may choose to follow or not follow. It is not a definite statement of the legal position. The complainant is free to obtain his own legal advice. In the circumstances, it would not be fair or proportionate to compel the council to share its legal advice when an opposing party is not subject to the same requirement.
28. The Commissioner notes that the legal advice in question is relatively recent. It is clear that the issues are still on-going and therefore the prejudice caused by any disclosure would still be sufficient to warrant the continued maintenance of the exception. The council is entitled to conduct a free and frank exchange with a lawyer in order to guide its

decision-making process without intrusion in the absence of a compelling case for disclosure.

29. In view of the above, the Commissioner agrees with the council on this occasion that the public interest favours maintaining the exception under regulation 12(5)(b) in all the circumstances of the case.

Right of appeal

30. 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

31. 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.
32. 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

Elizabeth Archer
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