

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

**Date:** 11 July 2017

**Public Authority:** Amber Valley Borough Council  
**Address:** Town Hall  
Ripley  
Derbyshire  
DE5 3BT

**Decision (including any steps ordered)**

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1. The complainant requested the legal advice considered at a meeting of the Planning Committee of Amber Valley Borough Council ("the council"). He also asked some questions relating to the provision of the advice. The council said that all the information requested was exempt under section 42(1) of the Freedom of Information Act 2000 ("the FOIA") although it later confirmed a limited amount of information about the provision of the advice. It said that the public interest did not favour disclosure. During the Commissioner's investigation, information about the provision of the advice was disclosed with the agreement of the council. The Commissioner's decision about the remaining request for the legal advice itself is that the request should have been considered under the terms of the Environmental Information Regulations 2004 ("the EIR") however the information could be correctly withheld under regulation 12(5)(b) of the EIR. The public interest does not favour disclosure in this case. The Commissioner has found breaches of regulations 14(2) and 14(3) of the EIR. There are no steps to take.

**Request and response**

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2. On 15 November 2016 the complainant requested information in the following terms:

*"Planning Committee – 14 November 2016"*

*I refer to the above meeting, where an Application for 200 Houses at Lower Somercotes was considered; can I ask for the written notes of the Meeting Clerk, and all Officers attending the meeting, please?*

*Further to the meeting notes, and of specific importance, is the Written Advice distributed to the Planning Committee, which the Planning Committee Member referred to in the meeting – which is clearly a material matter, as part of the Decision making process”.*

3. The council responded on 17 November 2016. The council disclosed some information but said that the exemption under section 42(1) of the FOIA applies to the remaining information. It said that the public interest did not favour disclosure.

4. On 22 November 2016, the complainant wrote and asked some additional questions as follows:

*“1. Who requested the advice and when, and who gave the advice and when.*

*2. How and when the advice was distributed to the members of the Planning Committee.*

*3. Whether or not the advice was distributed to anyone else, and if so to whom and when.*

*4. Whether or not there are any instructions, correspondence, notes or other documents relating to obtaining, giving or distributing the advice, and if so the parties, format and the dates of the same”.*

5. On 14 December 2016, the council said that it could not comment or answer questions on legally privileged information.

6. The complainant asked the council for an internal review on 19 December 2016.

7. The council completed its internal review on 19 January 2017. It said that it wished to maintain its position.

8. In follow up correspondence on 31 January 2017, the council added that it maintained its position with regard to the additional 4 questions posed on 22 November 2016 however it was prepared to tell the complainant that legal advice was supplied by a qualified lawyer on 28 October 2016 to Members of the Planning Board by email.

## Scope of the case

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9. The complainant contacted the Commissioner on 6 February 2017 to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the council had correctly refused to provide the information he requested on 15 and 22 November 2016.
10. During the Commissioner's investigation, the information requested on 22 November 2016 was disclosed. The Commissioner has not therefore considered this any further.

## Reasons for decision

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### Environmental information

11. In this case, the council sought to rely on the exemption under section 42(1) of the FOIA. The council said that it had made this decision because of the general nature of the advice. It states that it does not relate to the complainant's planning application. The Commissioner has inspected the information and has formed a different view. The Commissioner considers that the advice clearly relates to plans affecting or likely to affect the elements and factors of the environment. It therefore falls within the scope of regulation 2(1)(c) of the EIR.

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

12. 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.
13. 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.
14. 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 he was satisfied that the information is covered by legal professional privilege.

15. 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".
16. 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.
17. 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**

18. 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. The complainant has alleged in this case that the council has acted unlawfully when it refused a planning application made by the complainant. 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**

19. 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.
20. 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".*

21. 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.
22. 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..."*

23. 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**

24. The Commissioner understands that the history to this matter is that the complainant submitted a planning application to the council for 200 houses in Somercotes. The application was considered at the Planning Board on 17 October 2016 and was refused. The basis for the refusal

was that the Local Planning Authority considered that it had not been demonstrated that the site could adequately be remedied from ground contamination to the detriment of public health. This was considered to be contrary to the provisions of paragraphs 109, 120, 121 and 122 of the national Planning Policy Framework, which seek that the sites are suitable for their intended use.

25. In the officers' report to the Planning Board meeting on 14 November 2016, a recommendation was made for the application to be reconsidered in the interests of openness and transparency because concerns had been raised as to the due process, including confusion over whether members would be personally liable for their decision-making. It was noted that the Planning Board is required to have regard to all relevant planning considerations and to disregard all irrelevant planning considerations. Following this, the planning application was again refused due to insufficient information.
26. The complainant argues that there is a presumption in favour of disclosing the requested information in the EIR and a general public interest in accountability, transparency and a sustainable environment. He argues that this is important to promote public understanding and to safeguard the democratic process. He says that there is a public interest in good decision making by public bodies, in upholding standards of integrity, ensuring justice and fair treatment for all. He considers that there is a public interest in ensuring the best use of environmental resources.
27. The complainant has criticised the council for not considering all the circumstances of the case, identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining the exception. The complainant says that the council should not "automatically" find that the public interest favours maintenance of the exception and that of substantial weight in favour of disclosure is the fundamental importance of upholding the administration of justice. He highlights that "justice should be seen to be done". He argues that the threshold to justify non-disclosure is a high one.
28. The complainant says that the council should also have considered whether the information it withheld could have been separated from other information that can be released. Furthermore, if disclosing parts of the requested information would not have the relevant adverse effect, the exception is not engaged in respect of those parts.
29. More particularly, the complainant has alleged that the council dealt with the planning application unfairly and unlawfully and that this undermines the integrity of the planning system and the trust the public may have in it. He has alleged that the council's planning



- decision notice was clearly inadequate and did not specify what was considered to be missing. The complainant highlights that the information that the Local Planning Authority must provide on their decision notices is set out in article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. This includes the requirement, where planning permission is refused, to state clearly and precisely the full reasons for the refusal, specifying all policies and proposals in the development plan that are relevant.
30. The complainant says that the council has failed to be transparent about its considerations and that the existence of the legal advice that is the subject of this complaint only itself came to light because a Member referred to it in the Planning Board meeting. He says that this is not consistent with the council's recommendation to reconsider the planning application in the interests of openness and transparency. He argues that this commitment by the council meant that Officers and Members should therefore have been particularly scrupulous in ensuring transparency, due process and fairness. The complainant believes that this adds substantial weight to the public interest in disclosing the legal advice, particularly because the complainant believes that the advice relates to the decision-making process. The complainant argues that this information would not be covered by the exception under regulation 12(5)(b) of the EIR.
  31. The complainant has stated that he has suffered substantial injustice as a result of the council's unlawful behaviour and he believes that the legal advice probably relates to that wrongdoing. He says that if the legal advice is a "smoking gun" there is a strong public interest in disclosure. However, if it refutes his suspicions, then there is equally a strong public interest in disclosure to clear up the misconception.
  32. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable and transparent as possible in relation to their decisions and he does not take issue with many of the general and perfectly valid points raised by the complainant in favour of disclosure as set out above. 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.
  33. The complainant is correct that there is a specific presumption in favour of disclosure in the EIR. The FOIA carries a similar general assumption in favour of disclosure as the starting point of any consideration. However, 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.

34. The Commissioner notes that the complainant's arguments in favour of disclosure focus on allegations of unlawful activity and a significant lack of appropriate transparency. However, 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. It is not the Commissioner's role to form a view on whether or not the authority is acting legally in these circumstances. The only way to receive a definite statement on the legal position is through the courts.
35. There is also an appeal mechanism in place to challenge the council's planning decision via the Planning Inspectorate and the Commissioner's understanding is that the complainant is pursuing an appeal at the time of writing this decision notice. The council says that it is due to be heard on 19 July 2017. This independent mechanism is an integral part of the usual planning process to ensure appropriate transparency, accountability and fairness whenever this may be lacking as a result of the consideration by a Local Planning Authority. This process also permits the council a 'right of reply' to the allegations made by the complainant. The fact that this process has not yet been completed weighs strongly against disclosure in the Commissioner's view.
36. The Commissioner notes that the legal advice in question is relatively recent. It is clear that the issues are still on-going and subject to a live appeal to the Planning Inspectorate and therefore the prejudice caused by any disclosure would still be sufficient to warrant the continued maintenance of the exception. It is not, in the Commissioner's view, a proportionate remedy to the issues raised to disclose the council's legal advice.
37. As regards the issue of separating out some of the information, the Commissioner did not consider that there was a compelling case for not considering the information holistically on this occasion in view of the nature of the information itself and the circumstances of the case. The Commissioner notes that the complainant submitted four additional questions to the council about the legal advice following the main request and these requests have now been responded to. The fact is that the exception for legal advice is a very strong one and that there are good reasons, as described in the notice, for protecting the general principle that communication with one's legal advisor is confidential in



nature. In the Commissioner's view, there is no obviously strong public interest in attempting to isolate any further details about the nature of this communication.

38. 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.

#### **Regulation 14**

39. The Commissioner has found a breach of regulations 14(2) and 14(3) of the EIR because the council did not provide a refusal notice in accordance with the EIR within 20 working days or by the date of the internal review.

## Right of appeal

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40. 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)

41. 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.
42. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**