

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

**Date:** 5 October 2017

**Public Authority:** Kent County Council  
**Address:** County Hall  
Maidstone  
Kent  
ME14 1XQ

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a letter sent to them by the council regarding a planning application. Kent County Council initially refused the request under the exemption for Legal Professional Privilege – section 42 of the FOIA. During the Commissioner's investigation it reconsidered the request under the EIR and applied the exception for the course of justice (regulation 12(5)(b)) to withhold the information.
2. The Commissioner's decision is that Kent County Council:
  - wrongly handled the request under the FOIA and breached regulation 5(1) and 14 of the EIR and,
  - correctly withheld the requested information under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 28 November 2016 the complainant wrote to Kent County Council (the "council") and requested information in the following terms:

**"F/TH/13/0147**

*On 14 June 2013, <name redacted> wrote to <name redacted> and to me, your ref: 13-423MS.*

*I request the precise terms of all information and advice, both written and oral, and drafts of the letter, given to <name redacted> in his investigation, and which preceded the letter being sent by <name redacted>, whether from <name redacted>, from <name redacted> or from any other employee or agent of KCC, whether directly to <name redacted> or between any employee or agent of KCC."*

5. The council responded on 10 January 2017. It stated that it was withholding the requested information under the exemption for Legal Professional Privilege – section 42 of the FOIA.
6. Following an internal review the council wrote to the complainant on 21 March 2017. It stated that it was maintaining its position.

## Scope of the case

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7. On 14 April 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.
9. During the course of her investigation the Commissioner advised the council that, in her initial view, the nature of the information requested was such that it was likely to constitute environmental information as defined by the EIR. She, therefore, invited the council to reconsider the request under the EIR.
10. The council reconsidered the request under the EIR and confirmed that it was withholding the information under the exception for the course of justice – regulation 12(5)(b).

## Reasons for decision

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### Is it Environmental Information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
  - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. In this case the withheld information relates to a planning application, specifically policies or measures which would have an impact on this provision.
15. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information

Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

16. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

#### **Regulation 14 – refusal to disclose information**

17. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
18. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
19. As the council addressed this failing during the course of her investigation the Commissioner does not require it to take any steps in this regard.

#### **Regulation 12(5)(b) – Adverse affect to the course of justice**

20. The withheld information consists of drafts of a letter sent to the complainant (in relation to concerns they had raised about the council's administration of their planning application) and other internal council email correspondence.
21. Under this exception a public authority can refuse to disclose information on the basis 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*".
22. The Commissioner's guidance explains that '*an inquiry of a criminal or disciplinary nature*' is likely to include information about investigations

into potential breaches of legislation, for example, planning law or environmental law<sup>1</sup>. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.

23. 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 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 the Tribunal decision of *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".

*Is the exception engaged?*

24. The council has confirmed that it considers the withheld information is subject to Legal Professional Privilege (LPP). It explained that the complainant had written to the council in relation to its handling of their planning application. The complainant's letter made allegations of malfeasance and maladministration, necessitating the council consulting with its legal team prior to issuing a response. The council clarified that it was relying on the advice limb of LPP because no litigation was underway at the time.
25. Having seen the withheld information the Commissioner is satisfied that it consists of communications between a solicitor and a client for the dominant purpose of seeking and giving legal advice. More generally, the Commissioner notes that the information also falls within the wider category of information covered by the exception, namely the council's administration of statutory planning law.
26. The Commissioner is mindful that the complainant considers that the requested information no longer attracts LPP because the letter sent by the council to the complainant is derived from the withheld information.
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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

The confidence attached to the information has, by this line of reasoning, been lost.

28. The complainant has also argued that the legal advice in question has lost the quality of confidence because it has been disclosed in open court.
29. In response to the complainant's assertions, the council has argued that the withheld information remains protected by LPP because the advice contained within it was not disclosed during court proceedings. It has stated that only the final version of the letter (also provided to the complainant) was disclosed in open court and this is not subject to LPP.
30. The council has argued that the draft letter and associated information withheld are not in the public domain, were not filed in court proceedings and so the information contained within remains subject to LPP. The Commissioner has no evidence that contradicts the council's portrayal of events and is satisfied that the withheld information attracts LPP.
31. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. She considers the likelihood of this happening to be more probable than not. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

### **The public interest test**

32. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

#### *Public interest in disclosing the requested information*

33. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. In her view this helps create a degree of accountability and enhances the transparency of the process through which such decisions

are arrived at. She considers that this is especially the case where the public authority's actions have a direct effect on the environment.

34. The complainant considers that the council has engaged in malfeasance and maladministration in its handling of their planning application. Disclosure of the information would serve the public interest in knowing whether a public authority has behaved lawfully in carrying out its duties as a local planning authority.

*Public interest arguments in maintaining the exception*

35. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought which, in turn, would have a negative impact upon the quality of decisions made by the council which would not be in the public interest.
36. The council has highlighted previous decisions issued by the Commissioner and decisions of the First-Tier (Information Rights) Tribunal which have found that LPP is fundamental to the administration of the course of justice and, therefore, any decision that could weaken the confidence in the protection that LPP provides should not be taken lightly.
37. The council has argued that the public interest in maintaining the 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 large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. The council maintains that the information shows no sign of unlawful activity, misrepresentation or evidence of a significant lack of transparency and that it relates only to the complainant's interests.
38. The council has also argued that the matter is still live as the complainant could use the information as grounds to pursue further legal action even though the matter has been dismissed by the High Court.

*Balance of the public interest*

39. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the

importance of the principle behind LPP: Safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.

40. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
41. The Commissioner notes that the legal advice is still current. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's strategy in such scenarios. She acknowledges that this would result in adverse effect to the course of justice by revealing the council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. . In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
42. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. She also notes that the complainant has concerns that the council has been involved in wrongdoing.
43. However, the Commissioner has not been presented with any compelling evidence that this is the case, nor does she consider that it falls within her remit to determine whether it is the case. She also considers that the planning process and other dispute procedures provide mechanisms for such issues to be addressed and concerns about malfeasance and maladministration, can be progressed in other arenas than under the EIR. The Commissioner is concerned that the complainant might be trying to use the EIR to continue their personal legal grievances with the council via another channel. She does not consider that the EIR was created for this purpose.
44. Whilst the Commissioner acknowledges the complainant's interest in this matter, she does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
45. Furthermore, the Commissioner considers that the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake planning matters and inquiries on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.



46. In reaching her conclusions the Commissioner has referred to the decision issued by the First-Tier (Information Rights) Tribunal decision in EA/2013/0184, which she considers has parallels with and accords with the decision in this case<sup>2</sup>.
47. The Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. She has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
48. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1311/de%20Hussey,%20Rosemary%20EA.2013.0184%20\(16.06.14\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1311/de%20Hussey,%20Rosemary%20EA.2013.0184%20(16.06.14).pdf)

## Right of appeal

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49. 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)

50. 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.
51. 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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