

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 30 January 2018

**Public Authority:** Wealden District Council  
**Address:** Council Offices  
Vicarage Lane  
Hailsham  
BN27 2AX

#### **Decision (including any steps ordered)**

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1. The complainant requested information held by Wealden District Council (the council) relating to its five year housing land supply and a particular meeting that took place on 26 October 2015.
2. The council initially withheld that information it had identified as being relevant to the request under section 42 of the Freedom of Information Act 2000 (the FOIA), stating it was subject to legal professional privilege. Following the involvement of the Commissioner, the council agreed to review matters under the EIR.
3. The council advised that certain information that it had originally withheld under section 42 of the FOIA was to be withheld under the exception for the course of justice - regulation 12(5)(b).
4. The council also confirmed that during its review it had identified additional information that was relevant to the request. Whilst some of this information was then provided to the complainant, the council advised that it was to withhold certain information under the exception for personal data - regulation 13, and the exception for internal communications - regulation 12(4)(e).
5. After further communications with the Commissioner, the council then provided the complainant with information which it had previously withheld under regulation 13.
6. It is the Commissioner's decision that the council breached regulation 5(2) as it did not provide the complainant with copies of all relevant information within the prescribed time period of 20 working days.

7. The council has also breached regulations 14(1) and 14(2) by failing to provide a refusal notice that complied with the provisions contained with the EIR.
8. However, with regard to the remainder of the information that has been withheld in this case, the Commissioner's decision is that the council was entitled to rely on regulation 12(5)(b) and 12(4)(e) of the EIR.
9. The Commissioner is satisfied that, on the balance of probabilities, the council has now provided complainant with all the information relevant to the request which is not subject to an appropriate exception and has therefore complied with regulation 5(1).
10. The Commissioner does not require the council to take any steps.

### **Request and response**

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11. The complainant has made a number of requests for information to the council since 23 June 2016 for details relating to the council's five year housing land supply.
12. It is only the complainant's information request made on 7 November 2016 which is to be considered in this decision notice. This was set out in the following terms:

*'It would appear from your previous responses that on 26 October 2016 [2015] and only on that date a meeting or an exchange of documents took place which established that a five year supply did not exist.*

*Your previous responses also indicate a highly unlikely claim that until the conclusion of the meeting on 26th October 2016 [2015] no officer or member was in a position to reasonably conclude that the Council did not have a five year supply of land. I.e. no officer or member was able to attend the meeting on 26th October having already formed a view that the council did not or did not likely have a five year supply of housing land.*

**Q1.** *Please therefore supply a copy of the minutes of that meeting, a list of attendees and any documents such as email correspondence, pre meeting minutes, un published reports in accordance with section 84 of FOIA which were available to any and all the attendees of that meeting or prior to that meeting and which in any way informed the decision which you claim was reached solely at the meeting on that date.'*

The complainant then went on to say that:

*'If the council considers the scope of this request to be unreasonable please disclose the Minutes of the meeting and then on a date by date basis working backwards from 26 October disclose all relevant documents for a period which the council considers is reasonable and would be considered reasonable by the ICO.'*

13. The council responded to the complainant on 1 December 2016 and advised that it did not hold a copy of minutes for the meeting or a list of attendees.
14. The council went on to say that the only documents that were made available at the meeting consisted of a briefing note to counsel seeking advice, and that advice given in response by counsel. The council stated that this information was exempt from disclosure under section 42 of the FOIA (legal professional privilege).
15. The council also advised that, having considered the public interest test, it took the view that the balance lay in favour of withholding, rather than disclosing, the information in this instance.
16. The complainant requested an internal review on 22 December 2016. They made reference to information published on the council's website which they believe indicated that the public was already aware of some of the information that had been withheld. The complainant added that, given the seriousness of the issue, they believed that it was '*not credible*' for it to be the case '*that there were no email records, minutes, or list of attendees held*' in relation to the meeting that took place on 26 October 2015.
17. The complainant went on to question how anyone could be aware that a meeting was to take place about the relevant matter without prior correspondence being sent between relevant parties and that there must, at the very least, be some information held in relation to this.
18. The council provided its internal review response on 20 January 2017. Whilst it maintained its original position, it did refer the complainant to further information which had been published on its website on 30 September 2016. This set out the council's position in relation to the five year land supply.

### **Scope of the case**

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19. The complainant contacted the Commissioner on 24 January 2017 to complain about the way their request for information had been handled.

They believed certain additional information was held that should have been considered for disclosure and that the council was wrong to withhold information.

20. The Commissioner has considered whether the information held relevant to the request falls under the scope of the EIR or the FOIA.
21. She has then gone on to determine whether the council was entitled to withhold certain information relevant to the request.
22. The Commissioner has also considered the likelihood of additional information being held that the council has failed to include within the scope of the request.

## Reasons for decision

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### Correct Access Regime

23. The council initially considered the request under the FOIA. However, the Commissioner is satisfied that the EIR, rather than the FOIA, is the correct access regime in this instance.
24. The definition of environmental information is set out at regulation 2(1) of the EIR. In the Commissioner's opinion regulations 2(1)(a) and (c) are most relevant in this case:

*"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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:*

*(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:'*

25. The information request relates to a supply of land which will form part of the proposed plan for housing in the Wealden district. It is the Commissioner's opinion that this can be seen as information on a measure that is likely to affect the land itself and therefore can be

regarded to be environmental information within the meaning of 2(1)(c) of the EIR. The Commissioner is satisfied that the requested information is environmental information, and the EIR is the correct access regime.

26. The Commissioner therefore contacted the council to reconsider the request under the EIR.

### **The councils revised response**

27. The council confirmed that, after taking account of the Commissioner's guidance, it had reconsidered the complainant's request under the EIR. It also confirmed that certain additional information had been identified as being relevant to the request.
28. The council then provided the complainant with copies of emails sent between council officers prior to the meeting of 26 October 2015. However, it advised that certain third party personal information contained within the emails was to be withheld under regulation 13(1) (personal data).
29. The council confirmed regulation 12(5)(b) (course of justice), and regulation 12(4)(e)(internal communications), had been applied to the remainder of the information that had been withheld.
30. The council reconfirmed that no minutes, notes, or pre meeting notes existed in respect of the meeting held on 26 October 2015.

### **Regulation 13(1)-personal data**

31. If the environmental information requested is personal data about someone other than the requester it can only be disclosed in accordance with regulation 13.
32. The exception for disclosure that would breach the data protection principles is set out in regulation 13(1), together with the condition in 13(2)(a)(i) or 13(2)(b). There is no additional public interest test.
33. Following its review of the request under the EIR the council identified copies of certain emails that were sent between a number of officers at the council between 29 September 2015 and 26 October 2015. It provided copies of these emails to the complainant but redacted certain third party personal data. This was primarily information that would identify certain officers within the council.
34. The council referred to regulation 12 and 13 of the EIR indicating that the disclosure of this third party personal information would breach the Data Protection Act 1998 (DPA).

35. The Commissioner, after consideration of the information that had been withheld, was not persuaded that the council had taken the correct approach when redacting certain personal data in this instance. She therefore provided the council with one final opportunity to review matters.
36. The council subsequently confirmed that, having considered the Commissioner's comments and guidance, it would now disclose additional third party information to the complainant contained within the relevant emails.

### **Regulation 12(5)(b)-Course of justice**

37. The council, after reconsidering the case under the EIR, had confirmed to the Commissioner that certain information previously withheld under section 42 of the FOIA was now to be withheld under regulation 12(5)(b). This is because it believed it to be subject to legal professional privilege.
38. Regulation 12(5)(b) provides an exception to the general duty to disclose environmental information where 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 enquiry of a criminal or disciplinary nature.
39. There is no specific exception within the regulations referring to information that is subject to legal professional privilege. However, both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.
40. In the case of *Kirkaldie v the Information Commissioner and Thanet District Council*, (Appeal Number: EA/2006/001), The Tribunal expressed the view that the purpose of section 12(5)(b) was reasonably clear. It said that 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 rights of individuals or organisations to a fair trial.*" It therefore accepted that this Regulation "*covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation*" (para. 21).

### **Is the information covered by legal professional privilege?**

41. The principle of legal professional privilege is based on the need to protect a client's understanding that any communication with their legal advisor will be treated in confidence. There are two limbs 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 where litigation is underway or anticipated. Legal advice privilege is generally considered where no litigation is contemplated or underway.

42. The Commissioner notes that when the council had considered the request under FOIA, it had advised the complainant that two documents were to be withheld under section 42 (legal professional privilege). The first document contained instructions to counsel for advice, and the second document was the advice which the council subsequently received.
43. After considering the request under the EIR, the council advised the Commissioner that it now believed that only one of the two documents previously referred to fell within the scope of the request, that being the instructions to counsel for advice.
44. The Commissioner accepts that the advice from counsel, which appears to have only been received by the council on 21 March 2016, does not fall within the terms of the request.
45. The Commissioner has had sight of that information which the council has withheld under regulation 12(5)(b) and can confirm that it consists of instructions to counsel for advice on matters relating to the council's five year housing land supply. She is satisfied that the information in question constitutes advice on a specific matter and that it has been provided by a qualified legal professional and is covered by legal professional privilege.
46. In this case, the council sought to rely on legal advice privilege stating that it considers that the disclosure of the instructions would adversely affect the course of justice. It goes on to say that the advice was sought by the council's solicitor and continues to be relied upon by the council in relation to a number of matters. It states that the privilege attached to the instructions has not been lost over time.
47. In its submissions to the Commissioner, the council made reference to decision notice FER0662407. The information that the council has withheld in this case under regulation 12(5)(b) also fell within the scope of the request considered in that decision notice. The council believed the consideration given in that case, and its outcome, is still relevant and it has submitted almost identical representations for both cases.
48. The Commissioner notes that the request relevant to decision notice FER0662407 and the request being considered in this case were submitted in close proximity to each other, that being on 10 October 2016 and 7 November 2016 respectively.
49. Whilst in both cases the instructions to counsel fell within the scope of the request, it should be noted that in decision notice FER0662407 the

request also extended to the legal advice received from counsel. However, the Commissioner is satisfied that the similarities between the two cases are still so significant that it is reasonable to take account of decision notice FER0662407 when considering this case.

50. The Commissioner has decided that, rather than to repeat the same details and arguments as set out in decision notice FER0662407, it would be appropriate to reproduce the full details of decision notice FER0662407 in Annex 1 of this decision notice.
51. The Commissioner has given full regard to the information held in relation to both cases and has decided that there has been no significant material change in circumstances to note that would lead her to form a different conclusion to that set out in decision notice FER0662407 in relation to the information that has been withheld under 12(5)(b) in this case.
52. The Commissioner also notes that in its most recent representations the council argues that the matters to which the information relates are still live and ongoing. It states that the local plan process is still in its early stages and that the information that has been withheld is still relevant to this, and ongoing planning applications and appeals.
53. It is therefore the Commissioner's finding that the council is still correct council is still correct to apply regulation 12(5)(b) to the withheld information and that the public interest in maintaining the exemption is not outweighed by the public interest in disclosure in this instance.

### **Regulation 12-internal communications**

54. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has published guidance<sup>1</sup> on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
55. The information that has been withheld consists of two documents, both of which are described as 'advice notes' by the council. They have been formulated by officers within the council and report varying details with regards to the council's position in respect of the five year housing land supply.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)



56. The first factor that must be considered is whether the information in question can be reasonably described as a 'communication'.
57. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
58. In this instance, given that the information in question was recorded in order to help inform the council of its position with regards to the five year housing land supply, the Commissioner is satisfied that the information contained within the relevant documents falls within the definition of a 'communication' for the purpose of the exception. She has therefore next considered whether the withheld information constitutes 'internal' communications.
59. The EIR do not provide a definition of what constitutes an internal communication. However, the Commissioner accepts that, in general, communications within one public authority will constitute 'internal communications'.
60. In this case there is no indication that the information has been processed for any other purpose other than to help inform the council of its position with regards to the five year housing land supply. The Commissioner therefore considers the information to be internal communications and that the exception is engaged.
61. As the Commissioner considers that the exception is engaged, she has gone on to consider the relevant public interest arguments in this case.

### **Public interest in favour of disclosure**

62. The council has acknowledged that there is a public interest in disclosure and has stated that it gave consideration to the following points:
  - "1) The information relates to a matter of concern across the district and disclosure could assist transparency and openness, enable better public understanding.*
  - 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."*
63. The complainant states that the council is required to meet a five year supply of land and that the failure of the council to meet this duty

means that residents of the district are subject to severe financial hardship and administrative penalties.

64. The complainant goes on to say that the information should be made available to the public in order to establish whether the council has been competent when dealing with matters relating to its five year housing land supply. The complainant also refers to certain inconsistencies with information which has been made available and that disclosure required to understand what information that has been provided is correct.

### **Public interest in maintaining the exception**

65. The council has put forward a number of detailed arguments in favour of the maintaining the exception.
66. Firstly, the council states that the information contained within the notes relate to ongoing, live contentious matters and that to have released the information at the time of the request was likely to have undermined the council's work to date and distract public debate, potentially then leading to a delay in the council's Local Plan.
67. The council makes reference to the case of the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072)<sup>2</sup>. It states that in that case it was acknowledged that the public interest in maintaining the exception is strongest when policy is still being formulated and in the process of development. The council advises that it has attached greater weight to maintaining the exception for this reason.
68. The council has also confirmed in its response to the Commissioner in August 2017 that the Evidence Base for the Local Plan was due to be published within a few months. It advised that it anticipated that a final and agreed position as to the calculation of the five year housing land supply would be approved at around the same time. It states that to release the notes at this stage of the process would be premature and place the council in a vulnerable and difficult position, which is contrary to the interests of the public at large.
69. The council has also advised that it is necessary for it to be able to maintain a safe thinking space to formulate and develop policies in

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i181/DBERRvIC\\_FOEFinaldecision\\_web0408.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEFinaldecision_web0408.pdf)

confidence, and it should be entitled to internally challenge the robustness of its policies away from public scrutiny until such a time the policy has been formulised.

70. The council suggests that if the 'advice notes' were disclosed in response to the request, this would have a profoundly negative effect on its ability to formulate sensitive policy documents in the future. It believes that officers would be less frank and candid when formulating and analysing policies in fear that any concerns raised would be used adversely against the council. This could then have a detrimental effect on the quality and reliability of future council policies.
71. The council also argues that the disclosure of the advice notes could leave it exposed and vulnerable to further legal challenges and appeals. If the information was disclosed before the council had reached a final agreed position compatible with the Local Plan, then the council argues that the planning process would be placed into a degree of uncertainty at a time when stability is required to enable the council to address the key environmental issues facing the district.
72. The council has advised that it considers that the public interest in maintaining the exception significantly outweighs that in disclosing the information.

### **Balancing the public interest**

73. As stated in her aforementioned guidance on the subject, there is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
74. The Commissioner accepts that a public authority needs a safe space to discuss the merits of views and proposals and the implications of decisions internally without outside interference or the fear that the information will be disclosed.
75. However, she does not consider that safe space arguments automatically carry much weight in principle. The weight accorded to such arguments depends on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.
76. The Commissioner has taken into account the complainant's argument that disclosure would provide further information about how the council has calculated its five year housing land supply and why there was a difference in the figures published in relation to this. This would be an argument in favour of transparency and accountability.

77. The Commissioner considers that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. She considers that some weight must be always be attached to the general principles of achieving accountability and transparency which, in turn, can help to increase public understanding, trust and participation in the decisions taken by public authorities.
78. The Commissioner also appreciates that this is a contentious matter and that the publication of certain information suggesting that there was a five year land supply surplus, and then that there was a deficit, may have caused concern amongst certain affected residents and other interested parties.
79. However, the Commissioner has noted, and taken into account, that there is some information within the public domain about the five year housing land supply and the different figures which have been published in relation to this.
80. The council has provided a public explanation for the disparity between the figures that have been published. It states that prior to the publication of the council's draft Strategic Housing Market Assessment (SHMA) in October 2015, its housing requirement was assessed in relation to the Wealden Core Strategy and this was based on the provision of 450 houses per year. The subsequent draft SHMA included an additional figure for the 'District's Objectively Assessed Housing Need' and this figure of 735 dwellings per year was higher than that which had been previously included in its calculations.
81. The council has also confirmed to the complainant in response to their requests that it first came to the conclusion that it 'cannot currently substantiate' a five year housing land supply at a meeting that was held on 26 October 2015. It also confirmed that it first published a precise figure of 4.28 years supply in a report on 2 March 2016.
82. The Commissioner is of the view that the information that has already been placed in the public domain does provide interested parties with some understanding of why different figures have been published relating to the five year housing land supply over a period of time. She also notes that the council has advised that previous figures published were an 'interim' measure, and not its final calculation. In addition, the Commissioner understands that interested parties are provided with a formal opportunity to scrutinise and submit appeals at the various stages of the planning process, should they be dissatisfied with any of the council's proposals.
83. As stated above, the Commissioner considers that the timing of the request to be an important factor. Once a decision has been taken, the

private thinking space which is required is diminished and the sensitivity of the information is reduced.

84. In this case, the Commissioner is satisfied that the issue was, at the time of the request, live and ongoing (and this still appears to be the case).
85. Having considered the particular information in question and the specific circumstances of this case, the Commissioner is satisfied that the disclosure of the relevant information could reduce the council's thinking space and its ability to have full and frank discussions without fear that the information would be disclosed. This could be detrimental to the decision making process and she has therefore given the safe space argument significant weight.
86. She finds that the public interest in maintaining the exception is not outweighed by the public interest in disclosure in this case.

### **Procedural matters**

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#### **Regulation 5-the duty to make environmental information available on request**

87. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies in accordance with regulation 5(2).
88. In this instance, certain information contained within emails held by the council were only identified and provided to the complainant following the intervention of the Commissioner and the time taken to provide this information comfortably exceeded the prescribed 20 working days.
89. Whilst the council has now provided the relevant information its failure to do so within the timescales stated in paragraph 87 of this notice represents a breach of regulation 5(2) of the EIR.
90. With regard to the complainant's assertion that the information that has now been provided to them indicates that further data is held relevant to the request, the Commissioner is satisfied that this may be information that has been withheld under regulation 12(4)(e) and 12(5)(b).
91. The Commissioner has been unable to find reference to any other information within the documents supplied to the complainant. She has therefore concluded that, based on the current information available,

there is no substantive evidence to indicate that the council holds any additional information to note that would be of relevance to the request.

92. Whilst the council did not provide sufficient consideration to the scope of the request in the early stages, the Commissioner is satisfied that on the balance of probabilities, all that information relevant to the request has now been considered and disclosed where appropriate and that the council has now complied with regulation 5(1).
93. She therefore does not require any steps to be taken with this regard.

### **Regulation 14(1) and 14(2) -Refusal to disclose information**

94. Regulation 14(1) of the EIR requires a public authority that refuses a request for information to provide a refusal notice in writing and in accordance with the provisions of this regulation. Regulation 14(2) requires the refusal notice to be issued within 20 working days of receipt of the request.
95. In this case the Commissioner has found that whilst the council originally dealt with this request under the FOIA, it was the EIR that was the correct access regime.
96. Since in this case the council failed to identify the requested information as environmental information, it follows that the council initially erred in issuing a refusal notice under the FOIA rather than the EIR.
97. In addition to this, the council identified additional information during the Commissioner's investigation which it considered was subject to further exceptions under the EIR but it failed to issue a refusal notice in this regard.
98. As a result, the Commissioner concludes that it is appropriate for her to find that the council has breached regulation 14(1) and 14(2) of the EIR.

### **Other matters**

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99. The complainant has raised concerns with the Commissioner about the fact that the council initially responded to advise that, aside from that information which it had advised was to be withheld as it was exempt from disclosure, no additional information was held relevant to the request. However, following the involvement of the Commissioner the council confirmed additional information relevant to the request was held.

100. The complainant is also concerned that certain information was redacted following the council's review of the case and was then only supplied as a result of further intervention by the Commissioner.
101. The complainant also believes that there is still additional information held that has not been provided. They go on to say that they believe that the Commissioner should have considered this matter under section 77 of the FOIA, stating that the council '*regularly fail to provide the access to information which the law allows*'.
102. The complainant states that the Commissioner has failed to have regard to section 77 of the FOIA and believes that she has not discharged its duty correctly. They also state that the redaction of names and the concealment or destruction of reports would fall within the scope of section 77 of the FOIA.
103. The Commissioner is satisfied that the council has considered that information held that is relevant to the request. She accepts that the council did not originally identify certain information relevant to the request and then withheld information that it chose subsequently to disclose. However, the Commissioner does not consider that the way in which this case was handled indicates any wilful, or deliberate action to conceal information, or that there was any criminal intent.
104. Moving forward, the Commissioner would hope that the council would be mindful of the lessons learned in this case in order to improve its handling of requests in the future.
105. Given the above, the Commissioner does not agree with the complainant the circumstances of this case warrant further consideration under section 77 of the FOIA.

## Right of appeal

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106. 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)

107. 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.

108. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**



**Annex 1-Decision Notice FER0662407**

**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)**

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109. 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.

110. 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**

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111. 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."*

112. 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.

113. 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**

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114. 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.

115. 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

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

116. 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?**

117. 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.

118. 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).

119. 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.

120. 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**

121. 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'"*.
122. 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.
123. 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.

124. 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.
125. 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.
126. 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.
127. 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.
128. The Commissioner must therefore consider the public interest test.

### **Public interest in disclosure**

129. 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."*

130. 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.

131. 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.

132. 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**

133. 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.*

134. 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.

135. 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.

136. 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.

137. 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**

138. 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.



139. 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.
140. 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.
141. 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).