

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

**Date:** 19 October 2018

**Public Authority:** Warwick District Council  
**Address:** Riverside House  
Milverton Hill  
Leamington Spa  
Warwickshire  
CV32 5HZ

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of legal advice which the council holds relating to Warwick Racecourse. The council provided a redacted copy of the advice to the complainant however the majority of the advice was redacted on the basis that the exception in Regulation 12(5)(b) applied.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to the advice.
3. The Commissioner does not require the council to take any steps.

**Request and response**

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4. On 14 November 2017, the complainant wrote to the council and requested information in the following terms:

*"I request under the Freedom of Information Act 2000 to see a copy of the official signed legal opinion which is referred to under 3.9 of the Executive Report dated 31st August 2017 as follows:-*

*Members will need to be aware of the 'interesting' legal situation regarding the leases applying to St Mary's Lands arising from the Warwick District Council Act 1984. A summary of the situation is set out at Appendix 2. It will be against this legal background that discussions with the Jockey Club and the market at large will need to be conducted."*

5. The council initially provided an incorrect response to the complainant on 21 December 2017 in which it applied Regulation 12(4)(e) (internal communications) to withhold the information in its entirety.
6. It subsequently responded to the complainant's request for review on 21 June 2018. It confirmed that its initial response had been in error and provided a redacted copy of the advice to the complainant. However it withheld the majority of the advice applying the exception in Regulation 12(5)(b) (course of justice) to withhold the information. It also argued that the majority of the legal advice fell outside the scope of the complainant's request for information.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 9 January 2018 to complain about the way her request for information had been handled.
8. She believes that the information which she requested should have been disclosed to her and that the council was not correct to apply Regulation 12(5)(b) to withhold the information.

### **Reasons for decision**

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#### Does the redacted section of the advice fall within the scope of the request?

9. The Commissioner has considered the argument initially stated by the council in its review response that the majority of the advice fell outside the scope of the complainant's request.
10. Having considered the wording of the request the Commissioner is satisfied that the request was for the whole of the legal advice referred to in the council briefing. Although the complainant sought to identify which advice she was referring to in her request she did not narrow the scope of this request to information only relevant to the council briefing note.

Regulation 12(5)(b)

11. Regulation 12(5)(b) provides that *"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*

*(b) 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;"*

12. The council claims that the information is subject to legal professional privilege. The First-tier tribunal has accepted that the question of the disclosure of environmental information which is subject to legal professional privilege may fall within the scope of Regulation 12(5)(b) to be considered. In *Kirkaldie v Information Commissioner & Thanet District Council (EA/2006/0001, 4 July 2006)* the Tribunal 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".*

13. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'.
14. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse affect on the course of justice. The Commissioner notes however that even where withheld information is not specifically covered by privilege if its disclosure would have an adverse effect upon the course of justice then the exception in Regulation 12(5)(b) may still apply.
15. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the First-tier Tribunal ("the Tribunal") in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* 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, and even exchanges between the clients and*

*their parties if such communication or exchanges come into being for the purpose of preparing for litigation."*

16. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be 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 will apply where no litigation is in progress or being contemplated.
17. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
18. In this case the council has confirmed that it considers the withheld information to be subject to advice privilege. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.

Is the information subject to advice privilege?

19. The Commissioner notes that the legal advice was provided to the council by a professional barrister in response to a legal advice request made by the council relating to Warwick Racecourse. The request was made for the dominant purpose of seeking legal advice and the advice was provided by the barrister in his professional capacity. The advice was provided in confidence to the council.
20. The Commissioner is therefore satisfied that the information has the necessary qualities for legal professional privilege to be applicable.
21. The complainant argues that the substance of the advice is already within the public domain due to a council briefing note which was provided to councillors under section 3.9 of the Executive Report dated 31st August 2017. This briefing note was published by the council and is in the public domain.
22. Having considered the advice, the Commissioner is satisfied that the council's disclosure of the unredacted sections of the legal advice covers the information which is already within the public domain. The remainder of the withheld sections of advice are not publicly known outside of the council.
23. The Commissioner is therefore satisfied that the exception in Regulation 12(5)(b) is engaged by the information.

The public interest

24. Regulation 12(5)(b) is subject to a public interest test, required by Regulation 12(1)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
25. When carrying out this test Regulation 12(2) provides a presumption towards the disclosure of the information concerned.

The public interest in the information being disclosed

26. The council said that it took the following factors into account in favour of a disclosure of the information:
  - The general principle of transparency to enable a free exchange of views and more effective participation by the public in environmental decision-making;
  - The public interest in the issue and information, i.e. the impact the issues has on the public and to enable the public to debate further on the issue. In addition, disclosing the advice would increase the public's knowledge of the issues around the development of the land and if it fits within the Council's obligations of its management;
  - The public understanding the reasons for the Council's decisions and to remove any suspicion of manipulating the facts, and to provide a coherent picture to help the public understand;
27. The Commissioner agrees with the councils views in this respect. There is an inherent public interest in general openness and transparency with regard to decisions made by public authorities. In this case the issue in question relates to a racecourse used widely by the public, and to the controversial plan for a new hotel to be placed on land owned by the council.
28. The complainant argues that there is a very strong public interest in the disclosure of this information, however she has not provided further arguments outlining why she considers that to be the case. The Commissioner notes however that the wider issue relates to the controversial development of the hotel. This development is cited as being important to the area of Warwick. There is therefore a public interest in the disclosure of any information which can shed greater light on this and on the council's actions and decisions regarding this.

The public interest in the exception being maintained.

29. The council submitted the following public interest arguments in favour of the information being withheld:
- The likelihood of an adverse effect to the interests of the council and to the concept of legal professional privilege as a whole;
  - The topic and sensitivity of the issues are still very much live issues and have not diminished since Counsel's opinion was provided;
  - The redacted information does not show the clarification of the District Council's powers and duties under the 1984 Act in the context of the on-going controversy over hotel proposals and its disclosure would not enable an understanding about this.
  - The council argues that the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice
30. The Commissioner accepts that the council's arguments in this respect have merit.

The balance of the public interest

31. The Commissioner considers that some weight must always be given to the principles of accountability and transparency through the disclosure of information held by public authorities. Disclosure of official information can help the public understand how public authorities reach decisions, which in turn can help build trust in public authorities and may also allow greater public participation in the decision making process. Conversely, withholding information can at times fuel distrust and make it harder for members of the public to understand the reasoning behind decisions affecting their lives.
32. The Commissioner accepts that there is public interest in openness and accountability on how decisions are taken in order to ensure that these are proportionate and fair in the particular circumstances of a case. However, legal professional privilege is a fundamental principle of law, and the Courts and Tribunals have found that there is a strong public interest in the protection of information subject to legal professional privilege in the past.
33. A disclosure of the information at the time of the request would have had the effect of unbalancing the 'level playing field' between parties during negotiations which were ongoing between the council and a third party.

34. It is the Commissioner's view that there is a strong inherent public interest in maintaining the integrity of legal professional privilege and therefore in maintaining the application of the exemption in this case. There is a need to protect confidential advice provided for the purposes of ensuring that the council is acting legally and fully informed of its legal position during its negotiations with the third party.
35. Whilst she recognises that there is a wider public interest present in creating greater transparency over the council's management and the land and its decisions regarding the potential development, she does not consider that this outweighs the public interest in protecting legal professional privilege in these circumstances.
36. Finally the Commissioner has seen no evidence suggesting that there may have been any misrepresentation by the council and no suggestion that it is acting improperly in making the decisions it has taken. Whilst she considers that the nature of the proposed development is likely to affect a large number of people, she does not consider that in this case this overrides the public interest in maintaining privilege for this information, particularly as the advice is still live and relevant to the council during its negotiations.
37. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception.
38. The Commissioner's decision is therefore that the council was therefore correct to apply Regulation 12(5)(b) in this case.

## Right of appeal

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39. 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)

40. 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.
41. 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**