

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 May 2024

Public Authority: South Downs National Park Authority
Address: South Downs Centre
North Street
Midhurst
West Sussex
GU29 9DH

Decision (including any steps ordered)

1. The complainant has requested information relating to legal advice supplied to South Downs National Park Authority (SDNPA) concerning bus re-provision and the local plan. SDNPA refused the request citing section 42 – legal professional privilege.
2. The Commissioner's decision is that SDNPA should have considered the request under the Environmental Information Regulations 2004 (the EIR). The Commissioner also finds that the relevant exception, regulation 12(5)(b) (the course of justice), is engaged and the public interest favours maintaining the exception.
3. The Commissioner does not require any steps as a result of this decision.

Request and response

4. On 27 November 2023, the complainant wrote to SDNPA and requested information in the following terms:

“Under the terms of the Freedom of Information Act please forward to me a copy of the legal advice supplied to the SDNP Planning Authority concerning bus re-provision required as part of planning application SDNP/23/02973/FUL and Policy SD57 of the current SDNPA Local Plan.”
5. SDNPA responded on 12 December 2023, refusing to release the information requested relying on section 42 of FOIA to withhold information in scope of the request.
6. Following an internal review on 26 January 2024, SDNPA upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner on 29 January 2024, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine if SDNPA was entitled to apply section 42 to the withheld information.

Reasons for decision

The appropriate legislation

9. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

“...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;

(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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);”

10. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner’s well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
11. The requested information in this case consists of legal advice relating to SDNPA’s Local Plan and in particular bus re-routing provision. The Commissioner is therefore satisfied that the requested information would fall within the definition at regulation 2(1)(c) and that the request should be considered under the EIR.

Regulation 12(5)(b) – the course of justice

12. Regulation 12(5)(b) of the EIR states that information is exempt if 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. Regulation 12(5)(b) is a broad exception with the course of justice including, but not restricted to

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.

13. SDNPA has said the withheld information consists of legal opinion and advice provided to it by a professional legal adviser. It relates to the matter of the bus station and is still a live and ongoing issue. It is likely that SDNPA will look to use this legal advice in the future.
14. It considers that the disclosure of this information would adversely affect the course of justice as it would undermine the general principle of LPP and there would need to be special or unusual factors in play for this not to be the case. Having considered whether such circumstances apply in this case, SDNPA concluded there were not.
15. The Commissioner is satisfied that the withheld information constitutes confidential legal advice provided by a legal adviser to their client. This means that this information is subject to LPP, and the Commissioner is not aware of any evidence suggesting that this privilege has been waived. The exception provided by regulation 12(5)(b) of the EIR is therefore engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

Public interest test

16. The Commissioner has taken into account the presumption in favour of disclosure required by Regulation 12(2).
17. Additionally, the Commissioner recognises that there will always be a general public interest in transparency and accountability.

Public interest arguments in favour of disclosure

18. The complainant argues the complaint is being made because the public interest in the future of the bus station in Lewes has been underestimated, and the impact of its anticipated loss ignored. Furthermore there is extensive public involvement in how the relevant planning policy of the SDNPA Local Plan was reached.
19. SDNPA has said that there are a variety of public interest reasons for disclosure, including the practice of open government, a need for members of the public to understand the decisions made that affect them and allowing them to scrutinise decisions made by local government as well as consideration given to releasing information to inform the public for them to understand the approach that the Planning Committee may take if given sight of the legal advice.

Public interest arguments in favour of maintaining the exception

20. SDNPA has explained that the planning advice it relates to is ongoing, live, and subject to public debate. It also argued there is an inherent public interest in withholding the information due to the strength of the principle behind LPP to safeguard open communications between a client and their legal adviser to ensure access to full and frank legal advice. Planners must be allowed to take advice in confidence to support them in making decisions. In addition, planning law provides for its own access to appeal and/or remedy and any decision made will be subject to scrutiny. It should also be noted that there has been no loss of LPP by SDNPA and the advice is still confidential.
21. The Commissioner acknowledges the complainant's position that there has been a lack of transparency, and they have the right to the information as the decisions being made affect the local community.
22. However, he must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
23. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has balanced this against information which has already been disclosed in order to keep the public informed, without the need to disclose the advice itself.
24. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exception, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
25. However, in the circumstances of this case, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exception.
26. The Commissioner has therefore concluded that the public interest in maintaining the exception at 12(5)(b) outweighs the public interest in disclosure. It follows that SDNPA is entitled to rely on regulation 12(5)(b) to withhold the requested information in this case.

Right of appeal

27. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF