

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

Decision notice

Date: 10 January 2013

Public Authority: Homes & Communities Agency
Address: Arpley House
110 Birchwood Boulevard
Birchwood
Warrington
WA3 7QH

Decision (including any steps ordered)

1. The complainant requested legal advice relating to a development agreement regarding the former Odeon cinema in Bradford. The Homes and Communities Agency ('HCA') refused the request under section 42 of the FOIA as the information attracted legal professional privilege. At the time of the internal review HCA considered that the request may fall under the provisions of the EIR and sought to also apply regulation 12(5)(d) of the EIR. During the course of the Commissioner's investigation HCA also sought to rely on regulation 12(5)(b) as the basis to refuse the request. The Commissioner's decision is that the correct access regime is the EIR and HCA correctly applied regulation 12(5)(b) to withhold the information. The Commissioner does not require any steps to be taken.

Request and response

2. On 14 May 2012, the complainant wrote to HCA and requested information in the following terms:

"I require full and unredacted copies of any written legal advice that the Homes & Communities Agency has received regarding the enforceability of the development agreement regarding the former Odeon cinema in Bradford".

3. HCA responded on 25 May 2012 and confirmed that it held information relevant to the request, but it considered the information to be exempt under section 42 of the FOIA.
4. On 5 June 2012, the complainant requested an internal review of HCA's refusal to disclose the information requested.
5. HCA provided the outcome of its internal review on 4 July 2012. It upheld its position that the requested information was exempt under section 42 of the FOIA. It also advised that, should the request fall under the provisions of the EIR as opposed to the FOIA, it considered that regulation 12(5)(d) applied as the information was considered to attract Legal Professional Privilege.

Scope of the case

6. The complainant contacted the Commissioner on 13 July 2012 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether HCA had correctly withheld the information, and whether the public interest favours disclosure.

Reasons for decision

Background

7. According to information on HCA's website:

"The former Bradford Odeon cinema transferred to the Homes and Communities Agency (HCA) in September 2011, as part of the portfolio of assets from the former Regional Development Agency, Yorkshire Forward. With ownership came a number of legal duties to the HCA.

Along with the building, we inherited a development agreement signed between the previous owner and a developer, Langtree Artisan, for a plan that involved demolishing the building and replacing it with a 'New Victoria Place' development of offices, a hotel and apartments."

Correct Access Regime

8. HCA originally processed the complainant's request for information under the FOIA. At the internal review stage, HCA stated that it considered FOIA to be the correct access regime, but if it was determined that the request should have been handled under the EIR, it considered regulation 12(5)(d) to apply. During the course of the

Commissioner's investigation HCA maintained its position that FOIA was the correct access regime but considered the "safest" approach was to consider the request under both access regimes. It also introduced its reliance on regulation 12(5)(b) of the EIR during the Commissioner's investigation.

9. The Commissioner considers that the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR. The Commissioner has determined that the requested information falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

"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 on—

(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."

10. The withheld information comprises a "Legal Options Appraisal" outlining HCA's options for the redevelopment of the site, in connection with the development agreement it inherited from Yorkshire Forward. HCA's position is that although the development agreement relates to the development of property, the legal advice concerns matters of a commercial nature and legal risk rather than development of land.
11. The Commissioner considers that the phrase "any informationon" should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
12. The Commissioner has viewed a redacted copy of the agreement between Yorkshire Forward and Langtree Artisan as it was disclosed by HCA on 30 January 2012 in response to a separate information request. It is clear that the agreement contains a number of conditions, including a resolution to grant planning permission for the New Victoria Place scheme. Planning permission was granted by Bradford Council in September 2009. Langtree Artisans' proposals for New Victoria Place include demolition of the existing building. The Commissioner is satisfied

that the agreement constitutes environmental information, as defined by Regulation 2(1)(c). This is because it is information on (concerning, relating to, or about) a measure (the development) which is likely to affect the elements of the environment.

13. The legal advice outlines the options available to HCA in respect of development of the site and the agreement in question. The Commissioner is satisfied that the withheld information (the legal advice) comprises information that can be linked back to the agreement. As such, the Commissioner considers it would constitute information on a measure (the development of the land) likely to affect the elements of the environment as set out in regulation 2(1)(a), in particular land and landscape.

Regulation 12(5)(b) – Legal professional privilege

14. HCA consider that regulation 12(5)(b) and 12(5)(d) apply to the withheld information. The Commissioner has first considered its application of regulation 12(5)(b).
15. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”. The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
16. The success, or not, of an application of regulation 12(5)(b) will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

17. There are two types of 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. Advice privilege will apply where no litigation is in progress or being contemplated. In both 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. HCA argues that the withheld information is exempt under regulation 12(5)(b) as the information attracts legal advice privilege and disclosure would adversely affect the course of justice.
19. Having considered the withheld information the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice. The Commissioner is therefore satisfied that the withheld information is therefore subject to LPP.
20. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which mean that the information in question can no longer be said to be confidential.
21. The complainant has referred to statements which the HCA has made in relation to the site where it has indicated that it has received independent legal advice indicating that it had no option other than to proceed with the plans to demolish the cinema. The complainant believes that it is unreasonable for HCA to make a publicly accountable decision based on legal advice that it is unwilling to disclose.
22. HCA has confirmed that, in its opinion privilege has not been lost as the legal advice has only been circulated to a limited number of individuals at HCA and has not been widely distributed or made readily available internally or externally.
23. The Commissioner has considered media statements which HCA has released regarding the subject matter¹. He notes that there are a number of references to HCA having obtained legal advice regarding the agreement, such as:

“All legal contracts can be broken but there are usually significant financial penalties. Legal experts examined the development agreement and advised us that it couldn't be terminated without the HCA exposed

¹ <http://www.homesandcommunities.co.uk/bradford-odeon-media-statements>

to litigation and potentially incurring significant costs. At all times, the HCA must act reasonably”

“We took legal advice on a number of aspects of the contractual agreement we inherited from Yorkshire Forward. On the basis of this advice and our own experience of commercial development, the development agreement between Yorkshire Forward and Langtree still stood and therefore was legally binding”.

24. The Commissioner’s view is that a mere reference to or a brief summary of the advice will not be sufficient to constitute a loss of privilege, whether full or partial. In this case the Commissioner considers that the statements made by HCA in relation to the legal advice it obtained does not amount to loss of privilege. The Commissioner is therefore satisfied that the information can still be said to be confidential and therefore is subject to LPP.

Would disclosure have an adverse effect on the course of justice?

25. HCA argues that disclosure would have an adverse effect on the course of justice because the principle of LPP would be weakened if information subject to LPP were to be disclosed on a regular basis. The legal advice was received on 21 May 2012, a week after the request was made. At the time of the request, the HCA was considering options in respect of the development agreement and the legal advice formed an important and confidential part of this process.
26. It is the Commissioner’s view that any disclosure of information subject to LPP will have an adverse effect on the course of justice simply through the weakening of the doctrine. This would, in turn, undermine a legal adviser’s capacity to give full and frank legal advice and would have the effect of discouraging parties from seeking legal advice.
27. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a prejudicial effect and that, as a result, regulation 12(5)(b) is engaged. He has therefore gone on to consider the public interest test.

The public interest test

28. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, 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 his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the information

29. The complaint argues that the subject of the Bradford Odeon cinema is one of significant public interest. Members of the public trying to save the building believe they have found clauses within the development agreement that they believe mean that, contrary to statements made by HCA, that its hands are not "tied" in respect of carrying out the unpopular redevelopment scheme. HCA has publicly stated that it has received legal advice stating it has no option but to proceed with the current plan, which involves demolition of the Bradford Odeon. The complainant believes it unreasonable for HCA to make such statements based on legal advice it is unwilling to disclose and it is for HCA to demonstrate the validity of its statements. The complainant is of the view that these issues clearly favour disclosure of the legal advice.
30. HCA recognises that disclosure of information held by a public authority especially that which informs or affects the way in which decisions are made and public funds are spent, is central to the effective operation of information access legislation. Disclosure would enhance the public understanding of the decision making process and permit interrogation and scrutiny.
31. HCA acknowledges that there has been significant local interest in the scheme in question and the progression of the development. These concerns relate not just to the future of the site in question but the propriety of the commercial and legal decisions facilitating the development. HCA appreciates that these matters are of legitimate concern and the public would be interested in disclosure of the legal advice which informed its approach to the subject matter.
32. HCA accept that disclosure of the legal advice would assist the public in understanding its legal position and, in turn, gain an understanding as to why certain decisions have been made or actions taken. Disclosure would help more fully empower those individuals engaged in the debate on future development of the site, so that they are more fully informed of HCA's position and the options available to it.

Public interest arguments in favour of maintaining the exemption

33. In this case, in relation to the public interest in favour of maintaining the exception, HCA put forward the following arguments:
 - There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts. Any party wishing to procure legal advice should be able to do so on the understanding that the advice will not be undermined by inappropriate disclosure.

- The legal advice was received a week after the request was received and before the refusal notice was issued. The withheld information provides HCA with a detailed assessment of the various options available to in respect of the development and the development agreement. At the time of the request HCA was considering its options in respect of the development agreement and the legal advice formed part of these considerations. The withheld information was therefore very much “live” at the time of the request. HCA argues that disclosure has the potential to protract and complicate ongoing negotiations on the project.
- Disclosure would have the potential to prejudice HCA’s ability to pursue any of the options in the legal advice and undermine its ability to mount a robust defence should the matter become litigious. Disclosure would prejudice HCA’s ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by “diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour”. The risk of litigation has increased since the request was submitted. In September 2012, HCA notified Langtree Artisan Ltd that it was terminating the development agreement for the scheme after the developer failed to comply with its terms and sign the Section 106 Agreement.
- It is the nature of legal advice that it often sets out arguments both for and against a particular view, weighing up their relative merits. The legal advice received sets out the perceived weaknesses of HCA’s position and should it be disclosed, would prejudice its commercial interest in achieving value for money for the public purse.
- Disclosure may discourage officers from obtaining frank legal advice in the future which would mean that the quality of HCA’s decision making would be reduced because it would not be fully informed.

Balance of the public interest arguments

34. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, he has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless ‘in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information’. The threshold to justify non-disclosure is consequently high.

35. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to matters such as this involving large scale developments affecting a significant amount of people. The Commissioner also believes there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He believes that this is especially the case where the public authority's actions have a direct effect on the environment. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance to interested parties that HCA's actions were in the best interests of the community and may assist the public in understanding the legal basis for the actions and decisions taken by HCA.
36. The Commissioner considers that another factor in favour of disclosing information is the number of people who may be affected by the subject matter. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. The Commissioner notes that there has been strong opposition to the development from members of the public, including the setting up of a campaign group - Bradford Odeon Rescue Group. It is therefore clear that the subject matter of this request does have the potential to affect a fairly significant group of people and there is significant interest in the subject matter. Whilst the Commissioner accepts that the development which is the subject of this request has the potential to affect a fairly significant number of people, he does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exception.
37. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner believes it is important that HCA should be able to consult freely and frankly with its legal advisors in relation to such questions and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
38. The Commissioner considers that the timing of the request means that significant weight should be attributed to the "live" nature of the legal advice. The advice was obtained a week after the request was made and

at the time of the request it was very much live, in that HCA was considering its options in respect of the agreement and the legal advice formed a part of these considerations.

39. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between HCA and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice. In reaching a decision in this case, the Commissioner has given significant weight to the general public interest in preserving the principle of LPP, the "live" nature of the advice and the timing of the request.
40. Whilst the Commissioner considers that the arguments in favour of disclosure have weight he 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).
41. Having established that the requested information is exempt from disclosure by virtue of regulation 12(5)(b), the Commissioner has not gone on to consider HCA's application of regulation 12(5)(d)

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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

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