

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

Decision notice

Date: 25 September 2014

Public Authority: Horsham District Council

Address: Park North
North Street
Horsham
West Sussex
RH12 1RL

Decision (including any steps ordered)

1. The complainant has requested a recording of a presentation provided by a QC to members and planning officers at the council. The council refused the request on the grounds that the Regulation 12(5)(b) and Regulation 12(5)(f) apply.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b). As such he has not considered the application of Regulation 12(5)(f) further.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 25 March 2014 the complainant wrote to the council and requested information in the following terms:

"Is it possible please to have a copy of the video recording that was made for members of the planning seminar on 18th March addressed by a QC?"

5. The council responded on 1 April 2014. It stated that the information was subject to legal professional privilege and exempt under Regulation

12(5)(b). It also applied Regulation 12(5)(f) which relates to the voluntary supply of information.

6. Following an internal review the council wrote to the complainant on 28 April 2014. It upheld its initial decision.

Scope of the case

7. The complainant contacted the Commissioner on 15 May 2014 to complain about the way his request for information had been handled. He considered that the information was not legal advice which would normally be subject to legal professional privilege as there was no litigation involved. He also considers that the advice is of importance to the community. Its disclosure would allow it to understand the background to the council's decisions on its planning framework.
8. The Commissioner considers that the complaint is of the view that the information should have been disclosed in response to the request.

Reasons for decision

Regulation 12(5)(b)

9. Regulation 12(5)(b) of the EIR provides that information is exempt from disclosure if the information would have an adverse effect upon 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.
10. The Upper Tribunal has in the past decided that an adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice.
11. The Upper Tribunal also accepted that it was not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; but suggested that there would need to be special or unusual factors in play for this not to be the case.
12. The first question for the Commissioner to decide is therefore whether the information is subject to legal professional privilege. He must then decide if a disclosure of the information would have an adverse effect upon the course of justice, bearing in mind the views of the Upper Tribunal as noted above.

13. The complainant states that the advice was not advice which would normally be able to receive the protection of legal professional privilege. He says that it did not relate to any ongoing or intended legal proceedings. It was simply a legal briefing on planning issues followed by a question and answer session.
14. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
15. The category of privilege the council is relying on to withhold the information is advice privilege.
16. The council has confirmed that the presentation took place for the sole purpose of providing legal advice to councillors regarding the future planning policies of the council. The advice relates to the development of a new planning framework at the council which would contain the planning policies for the district and would be used to help decide what future development could take place and where.
17. The council has forwarded correspondence from the QC. He confirms that the presentation was, in his opinion, legal advice in its entirety which is all subject to legal professional privilege.
18. The legal adviser was a leading QC on planning law; the client was the council in the form of councillors and relevant planning officers who were responsible for making decisions on future planning policy. The QC confirmed that the advice was provided in his professional capacity as a QC and as an expert on planning laws.
19. The council said that the presentation was recorded in order that councillors and relevant planning officers who could not attend the meeting could be fully briefed on the issues at a later time. These individuals were required to sign a document to state that they had arranged access to the recording via the council's development manager. This is because it was determined that the advice must be treated as privileged since it related to a contentious matter.
20. The recording was therefore retained by the council and was not disclosed to any parties outside of those individuals who would ultimately use the advice to assist in the development of the framework and future planning policy decisions. The council therefore confirmed

that confidence has not been lost and that access to the recordings was restricted to those within the council who needed to know the information in order to carry out their functions.

21. The Commissioner accepts that the recording is subject to legal professional privilege. The general adverse effect which would occur on the disclosure of information which is subject to legal professional privilege was recognised by the Tribunal as noted above. This adverse effect involves the inability of the parties to seek legal advice in confidence and on a full and frank basis. It also concerns the unbalancing of the level playing field in any adversarial legal proceedings if one party is able to access the privileged legal advice received by the other party. Both of these factors are relevant to this case. Although there is no current likelihood of legal proceedings taking place the framework is likely to be controversial given that it revolves around the placement of new housing in the area – a contentious matter which may well result ultimately in some form of litigation taking place.
22. The Commissioner is therefore satisfied that that the information falls within the scope of the exception contained at Regulation 12(5)(b). This is because the dominant purpose of the documents was the provision of legal advice by a professional legal adviser to his client, the council and a disclosure of the information would have an adverse effect upon the course of justice.
23. Regulation 12(1)(b) requires that a public interest test is carried out where the exception is engaged. The test is in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
24. Regulation 12(2) provides a presumption towards the disclosure of the information.

The public interest in the disclosure of the information

25. The council identified the following factors in favour of the information being disclosed:
 - The requested information forms environmental information, for which there is a presumption in favour of disclosure;
 - There are arguments in favour of openness and transparency and that disclosing the withheld information could support clarity and fairness in decision making;

- Releasing the information would promote accountability and transparency and allow the public to better understand the basis of the council's decision and its legal justification for a particular course of action;
 - The matter is contentious and the public would want to know information about how the Council makes its decision on such matters that would affect the local area; and
 - Some parties might consider the information would assist in any proposal to take action against the Council.
26. The Commissioner agrees with the above points. The complainant also provided the Commissioner with a copy of a newspaper article where the council leader advised that the QC had left councillors with "*no doubt that until the council agrees a new Planning Framework we remain totally vulnerable to developers winning appeals almost wherever they choose*" (West Sussex County Times, 3 April 2014).
27. The council leader has therefore sought to rely upon the advice in order to justify his support for a contentious building application in the local area. There is therefore a public interest in allowing access to the advice to confirm that the above statement was appropriate and based upon the advice which was received.

The public interest in the exception being maintained

28. The council put forward the following arguments in favour of the exception being maintained:
- The requested information is wholly subject to legal professional privilege, and disclosure would weaken the confidence in the efficacy of legal professional privilege generally, particularly since this is a current matter;
 - It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice;
 - Parties to any legal proceedings will be made aware of the Council's legal position during those stages, and disclosure to the public would result in an adverse effect on the Council's ability to 'defend' its position;
 - Some parties might consider the information would assist in any proposal to take action against the Council; and

- Disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information when the case is still 'live'.
- Disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.

29. Additionally the QC provided further points which are relevant to these arguments. He said that it was his understanding at the time that he agreed to give the presentation that it would be to a limited audience of relevant officers and members at the council. He said that if he had been aware that this information may subsequently be disclosed he could not have been so forthright, frank or full in the advice which he provided to the council. He said that he may therefore have considered refusing to allow the presentation to be recorded, or in the alternative may not have agreed to provide the advice to the council. He said that if this information were to be disclosed in response to this request he would be unlikely to agree to the recording of presentations in the future.

30. These arguments are strong evidence that a chilling effect would be likely if the information were to be disclosed. A chilling effect would have an effect on the course of justice as relevant officers or members would not attend presentations would not be able to view them at a later date and would therefore be likely to be less informed when making decisions, and therefore more likely to make errors of judgement.

Balance of the public interest test

31. In considering the balance of the public interest, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. However, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.

32. The Commissioner considers that there is a strong public interest in promoting openness, transparency and accountability in a public authority's decision making processes. In this particular case, disclosure of the legal advice would provide a greater degree of transparency in relation to the future planning policies of the council, which it has identified as potentially contentious. The Commissioner agrees that planning decisions affect local communities and in the case of the

development of areas of new housing it can often prove to be highly contentious.

33. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
34. In this case the advice is still current and live. The meeting took place on 18 March 2014, and at the time that the request was received the planning framework had not been submitted to the planning inspectorate for approval. Many of the planning decisions which ultimately rely upon the advice provided are therefore likely to occur in the future.
35. Having considered the above the Commissioner is satisfied that the public interest rests in the exception being maintained in this instance.

Regulation 12(5)(f)

36. The council also sought to apply Regulation 12(5)(f) to the information. Broadly speaking, Regulation 12(5)(f) relates to information which has been supplied voluntarily to an authority, where it could not otherwise have required that information to be supplied to it.
37. Given that the Commissioner has decided that Regulation 12(5)(b) is applicable the Commissioner has not considered the application of this exception further.

Right of appeal

38. 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

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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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