

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 September 2011

Public Authority: Horsham District Council
Address: Park North, North Street
Horsham
West Sussex
RH12 1RL

Decision

1. The complainant has requested the following information:

- Full copies of legal opinions obtained by Horsham District Council in relation to these planning applications.

Horsham District Council (the "Council") provided the complainant with a copy of one piece of legal advice but explained that it was withholding other relevant legal advice because its disclosure would adversely affect the course of justice.

2. The Commissioner's decision is that the Council has dealt with the following elements of the request in accordance with the requirements of the EIR:

- The Council was correct to apply regulation 12(5)(b) of the EIR to the requested information.

3. The Commissioner requires no steps to be taken.

Request and response

4. On 16 May 2011, the complainant wrote to the Council and requested information in the following terms:

- Full copies of legal opinions obtained by Horsham District Council in relation to these planning applications.
- Other information which the complainant did not pursue at the internal review stage.

5. The Council responded on 31 May 2011 and provided one piece of legal advice but withheld other advice under regulation 12(5)(b), which provides an exception where disclosure would adversely affect the course of justice. In withholding information, the Council determined that the public interest favoured upholding the use of the exception.
6. Following an internal review the Council wrote to the complainant on 7 July 2011. It stated that it was upholding its original decision in relation to its refusal to provide the requested information.

Scope of the case

7. On 17 July 2011 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. In their request for internal review the complainant asked the Council to reconsider its decision in relation to their request for copies of legal opinions obtained by the Council. The Commissioner has, therefore, confined the scope of his investigation to the question of whether the Council's decision to withhold this information was correct.

Reasons for decision

9. Regulation 12(5)(b) of EIR states that:

"(...a public authority may refuse to disclose information to the extent that its 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."

Is the exception engaged?

10. In reaching a decision as to whether the Council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] 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".

11. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

12. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [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 litigation¹".
13. There are two types of privilege – legal advice privilege and litigation 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.
14. In this case, the Council considers the withheld information is subject to LPP and release of the withheld information would adversely affect the course of justice. The Council has claimed litigation privilege in relation to the withheld information, on the basis that the withheld information was created for the dominant purpose of conducting or giving advice in relation to litigation. The Council has argued that disclosure would prejudice the Council's prospects of successfully pursuing and defending any litigation in relation to contentious planning applications.
15. From the content of the withheld information, it is clear to the Commissioner that there was a real prospect of litigation at the time the document was created. The document itself makes reference to other legal advice produced by a pressure group which opposes the planning applications in question and which states that the Council's decision with

¹ EA/2005/0023, para 9

regard to the applications could be "...challenged by judicial review in the High Court".

16. After considering the arguments presented to him by the Council and having reviewed the withheld information, the Commissioner is satisfied that litigation privilege applies in this case. Having assessed the information the Commissioner has concluded that the Council is the party entitled to LPP and that this advice has not lost the quality of confidentiality. He has therefore gone on to consider whether disclosure would have an adverse affect on the course of justice, with particular reference to LPP.

Adverse Affect

17. The Council has argued that disclosure would adversely affect the course of justice because:
 - It would jeopardise the Council's ability to receive legal advice and support to enable it to make informed decisions in relation to planning matters;
 - it would jeopardise the Council's ability to seek advice to enable it to make informed decisions in relation to the risks of litigation arising from contentious planning applications;
 - the legal advice in question was obtained in relation to prospective litigation in response to legal advice sent to the Council by a group opposed to the relevant planning applications.
18. In their request for internal review, the complainant argued that the fact that a decision had now been made with regard to the planning applications meant that the advice no longer attracted LPP. However, as will be shown below, it is advice specifically in relation to the prospect of litigation which attracts LPP in this instance. As the prospect of litigation remains a live issue, the advice retains the quality of confidence.
19. In reaching a view on the Council's arguments in relation to the adverse effect of disclosure the Commissioner has noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], in which the Tribunal considered whether the disclosure of legal advice obtained by the public authority would have an adverse effect on the course of justice. In that case the public authority argued that:
 - It was currently engaged in litigation where the subject of the legal advice had been raised. Disclosure would adversely affect its ability to defend its legal rights by disclosing advice that was the subject of current and potential future litigation.

- It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.
 - It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
 - Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.
 - Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.
 - Disclosure would prejudice the public authority's prospects of successfully pursuing and defending litigation as these issues remain live.
20. After considering these arguments the Tribunal was satisfied that these matters related to the course of justice and that disclosure would have an adverse affect upon them².
21. The Commissioner has noted the views of the Tribunal, and the similarities in the arguments presented by the public authorities in those cases and this one. Although the subject matter of this request has not reached the Courts, the Council considers that disclosure of the requested information would be prejudicial to it in any future legal disputes.
22. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. He considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
23. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

² EA/2008/0020, paras 33-34

The public interest test

24. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

25. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.
26. In their request for internal review, the complainant argued that disclosure would promote public understanding of the legal basis for the Council's planning decision.
27. The Council provided the following factors, which it took into account in favour of disclosing the requested information:
- There is a strong public interest in disclosing as disclosure would promote accountability and transparency by the Council;
 - disclosure would allow individuals to understand the legal arguments used and this would enable them to question or challenge this;
 - disclosure would contribute to public understanding and aid participation in a debate of local importance.

Public interest arguments in favour of maintaining the exception

28. The Council provided the following factors, which it took into account in favour of withholding the requested information:
- The Tribunal and the High Court have confirmed that there is a strong public interest in upholding legal professional privilege;
 - public authorities should be able to communicate candidly and freely with legal advisers in order to obtain fully informed advice and make decisions on the basis of such advice;
 - the advice is 'live' and to disclose it would disadvantage the Council in any legal proceedings.

29. The Commissioner considers that the preservation of the Council's general ability to seek and obtain legal advice, and the protection of the Council's ability to communicate freely with its legal advisors are relevant in this case. The Commissioner also notes the strong element of public interest inbuilt in legal professional privilege, which has long been recognised by the courts.

Balance of the public interest arguments

30. In considering the opposing factors in this case, the Commissioner is mindful of the overriding presumption in favour of disclosure. Even in cases where an exception applies, the information must still be disclosed unless "in all 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.
31. In deciding the weight to attribute to each of the factors on the competing sides of the public interest test and determining where the overall balance lies the Commissioner has considered the circumstances of this particular case and the content of the withheld information.
32. The Commissioner has also taken into account that, at the time of the request, the advice was still 'live' and it was likely that the Council might have to rely upon it in relation to prospective litigation. It is important that the Council should be able to consult freely and frankly with its lawyers 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.
33. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council 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.
34. The Commissioner has given significant weight to the general public interest in preserving the principle of LPP, particularly the breaching of a trust between parties that may go on to undermine the possibility of frank and candid discussions.
35. Whilst the Commissioner considers that the arguments in favour of disclosure have significant 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).

Right of appeal

36. 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

37. 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.
38. 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