

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

Date: 27 February 2012

Public Authority: New Forest National Park Authority
Address: South Efford House
Milford Road
Everton
Lymington
Hampshire
SO41 0JD

Decision (including any steps ordered)

1. The complainant has requested copies of a legal file on a criminal prosecution which was begun by the New Forest National Park Authority against a company. The NFPNA stated that the information was exempt under Regulations 12(5)(b) (course of justice), 13, (personal data) and 12(4)(e) (internal communications).
2. The Commissioner's decision is that New Forest National Park Authority has correctly applied the exceptions in Regulation 12(5)(b) and regulation 13 to the information. Having found this he has not gone on to consider the application or Regulation 12(4)(e).

Request and response

3. On 28 February 2011 the complainant wrote to New Forest National Park Authority (the 'NFPNA') and requested information in the following terms:

"Access to all files held by your legal department by [name of officer redacted] in the recent criminal prosecution of Heathgate Land and Property Ltd for the unauthorised breach of planning control at the New Forest Activity Centre."

4. The NFNPA responded on 28 March 2011. It stated that the information was exempt because
 - a. its disclosure would have an adverse effect upon the course of justice (Regulation 12(5)(b)),
 - b. the information is internal communications (Regulation 12(4)(e)) and
 - c. the information contains the personal data of third parties (Regulation 13(1) and 13(2)(a)(i)).
5. Following an internal review the NFNPA wrote to the complainant on 6 May 2011. It stated that the information was exempt for the same reasons.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In his view the information should have been disclosed to him.

Reasons for decision

Regulation 12(4)(b)

7. Section 12(4)(b) of EIR states that information can be exempted from disclosure where its disclosure would have an adverse effect upon the course of justice, the right of a person to have a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
8. The requested information is held on a legal enforcement file which relates to the council's attempt to prosecute Heathgate Land & Property Limited ('Heathgate') for erecting unlawful signs on the highway. The prosecution was eventually dropped before it was heard before a court and the signs were taken down by Heathgate.
9. The NFPA argues that much of the correspondence within the file would be subject to legal professional privilege. Legal professional privilege applies to communications between a qualified legal adviser and their client.
10. It was described by the Information Tribunal (in the case of Bellamy v the Information Commissioner and the DTI) 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 [third] * parties if such communication or exchanges come into being for the purpose of preparing for litigation."* (para. 9)

11. In the case of Calland and the Financial Services Authority (EA/2007/0136) the Tribunal confirmed that in-house legal advice or communications between in-house lawyers and external solicitors or barristers can attract legal professional privilege.
12. The Commissioner notes that some of the withheld information is communications with lawyers from Hampshire County Council and the enforcement team at the NFNPA. Lawyers at Hampshire County Council were working with the NFNPA under service level agreements. Other documents were between the planning department and lawyers within the NFNPA's legal department.
13. The council provided a list of the people corresponding in order to demonstrate that they had the necessary qualifications for legal professional privilege to apply. The Commissioner is therefore satisfied that the majority of the information was between legal advisers and their clients.
14. The communications were for the purposes of preparing for litigation against Heathgate. As such the Commissioner is satisfied that the majority of the information is subject to legal professional privilege.
15. Under the EIR where information which is subject to Regulation 12(4)(b) a public interest test is required to determine whether the information should be disclosed in spite of the fact that an exception is engaged. The test is whether the public interest in maintaining the exception outweighs that in withholding the information.
16. Regulation 12(2) also provides a presumption towards disclosure when carrying out this test.

The Public Interest Test

Factors in favour of maintaining the exception

17. Historically it is recognised that there is a very strong public interest in the maintenance of legal professional privilege. In summing up the case of *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023] the Information Tribunal stated (in paragraph 35) that: *"There is a strong element of public interest inbuilt into the privilege*

itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases.

18. The Commissioner does not intend to rehearse the public interest arguments in favour of maintaining legal professional privilege in this decision notice as these have been recited many times previously. In essence however they relate to the chilling effect that such a disclosure might have on the full and frank communications between a client and his legal adviser and the detriment to the public interest such a chilling effect might have. The Commissioner has taken account of these factors when reaching his decision in this case.

Factors in favour of the information being disclosed

19. The Commissioner has considered the public interest in the information being disclosed.
20. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "*where the privilege holder no longer has a recognised interest to protect*". The Tribunal also said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "*a significant group of people*". In the case of *Shipton v Information Commissioner and the National Assembly for Wales* [EA/2006/0028], a differently constituted Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "*when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming*" (paragraph 14b).
21. The community is split regarding the overall aims of the company on the site. One side of the community regards the intended use of the site as detrimental to the local village and to properties neighbouring the site. It argues that the introduction of a visitor attraction to the site will be likely to lead to greater volumes of traffic where the infrastructure of the village is not prepared to take that influx and the character of the village would be detrimentally affected. It also argues that the activities and the visitors are likely to lead to increased noise levels affecting nearby properties. On the other hand others may argue that the introduction of the site will promote greater levels of tourism to the area, and provide a valuable boost to the local economy.

22. Whilst these arguments are relevant to the question of whether the site should be used or expanded as a tourist venue, the Commissioner considers that the information falling within the scope of this request does not relate to that question. These issues and arguments are not therefore particularly relevant to his decision in this case. The information simply addresses the intended prosecution for Heathgate's road signs. Therefore the public interest factors are narrower than they might otherwise have been.
23. Given this, the Commissioner considers that for the most part the interests in favour of disclosure are the private interests of the complainant in this case and the private interests of Heathgate.
24. Having said this, the Commissioner does recognise that there is a wider public interest in information of this sort being open and available from the point of view of transparency surrounding the NFNPA's actions in taking enforcement action against breaches of planning law. Beginning the prosecution process would also have expended public money. The Commissioner would highlight however that as no prosecution took place in this case the question of whether the signs were legal or not has not therefore been properly considered in law.
25. The Information Tribunal in the Bellamy case noted that the public interest in disclosure might be given more weight where the legal advice was stale.
26. The NFNPA withdrew the prosecution and the enforcement file was closed after the signs were removed. In a sense therefore the information which is held is not live as it refers to a prosecution for an offence which has already been considered and withdrawn.
27. However the NFNPA referred to the overall history of the site, and stated that the adverse effect of disclosure would be very likely to apply in respect of any further proceedings by the NFNPA or other local authorities in respect of events at the site in question. It did however clarify that there are no legal issues or enforcement actions ongoing at this time and that it was not aware of any issues in this respect at the site.
28. The NFNPA argues however that the events are very recent as the enforcement file was only closed just over a year ago. It also argues that the issues surrounding the site as a whole are still live. It states that since 2008 the NFNPA has opened a number of enforcement files against the company relating to this site, and in light of this, it suggested that there was a distinct possibility that further action could occur in the future which would be affected by a disclosure of this information.

29. The Commissioner notes that the issue is wider than simply the sign itself. It relates to the companies desire to hold tourist events at the location and various licensing and planning applications which have been applied with that intention in mind.
30. The Commissioner is satisfied that although matters relating to this particular enforcement action have now been resolved there is an ongoing 'friction' over the usage of the site between the parties. There is therefore a distinct possibility that further issues may arise in the future.
31. The Commissioner therefore considers that although the advice is 'stale' in respect of the issues which were being addressed at that time, there is still the potential that that information will become relevant at some point in the future as the final decisions on the site have not yet been made clear by Heathgate.
32. The interests are mostly those of the complainant and Heathgate, and that the matters under consideration could still potentially become live again. The Commissioner is therefore satisfied that the public interest in disclosing the information is outweighed by the public interest in protecting legal professional privilege as regards the information in this case.

Regulation 13

33. The NFNPA also claimed Regulation 13(1) for some of the information concerned. Regulation 13(1) excludes the personal data of third parties from disclosure where its disclosure would breach one of the data protection principles of The Data Protection Act 1998 (the 'DPA').
34. The information in question relates to a council officer and falls within the definition of sensitive personal data provided in section 2 of the DPA.
35. However the majority of the information also pertains to the prosecution hearing and the Commissioner is satisfied that the documents, as they are held, are also subject to the exception in regulation 12(5)(b). As such they are exempt under that exception for the reasons outlined above. The Commissioner has therefore not considered this further.
36. There is one document, (document 15 of the bundle of documents provided to the Commissioner) which the NFNPA did not claim was subject to legal professional privilege. It is however held as part of the bundle of documents on the prosecution file.

The first data protection principle

37. The Commissioner considers the first data protection principle to be the relevant one in this case. This states that:

'Personal data shall be processed fairly and lawfully and in particular shall not be processed unless

a) at least one of the conditions in DPA schedule 2 is met, and

b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met'.

38. As he is satisfied that all of the information pertinent to the request constitutes sensitive personal data, the Commissioner must consider whether any of the criteria in schedule 3 of the DPA can be met in order for sensitive personal data to be disclosed under the Act.
39. Having considered the conditions listed in schedule 3, the Commissioner's decision is that none of these conditions can be met.
40. The most relevant section within schedule 3 states that processing (i.e. in this case disclosing the information)
 - (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
 - (b) is necessary for the purpose of obtaining legal advice, or
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
41. Whilst these arguments potentially hold greater weight in regards to information held within the prosecution file generally, the information in this particular document would not be necessary to bring a claim as the enforcement proceedings had at the time of the request been completed.
42. The Commissioner has decided that a schedule 3 condition for the disclosure of this information cannot be met, and that disclosure would therefore be in breach of the first principle of the DPA. He has therefore not considered whether a schedule 2 condition applies or whether disclosure would be fair or lawful.

Regulation 12(4)(e)

43. Regulation 12(4)(e) relates to internal communications. The Commissioner notes that his acceptance of the application of the exceptions considered above means that he does not need to consider the application of Regulation 12(4)(e) further.

Right of appeal

44. 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

45. 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.
46. 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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