

Environmental Information Regulations 2004 (the EIR)

Decision notice

Date: 30 July 2012

Public Authority: London Borough of Barnet
Address: North London Business Park
Oakleigh Road South
London
N11 1NP

Decision (including any steps ordered)

1. The complainant has requested:
'Any and all documents, internal and external, relating to the reconstruction of West Hendon Broadway'.
2. The London Borough of Barnet disclosed some information, withheld other information under regulation 12(5)(b) and stated no further information was held.
3. The Commissioner has decided that the London Borough of Barnet has correctly applied Regulation 12(5)(b) to the information it has withheld on the grounds that disclosure would adversely affect the course of justice. He also finds that the London Borough of Barnet has breached Regulation 5(2) of the EIR but does not require it to take any steps in relation to this breach.
4. The Commissioner has also decided that the London Borough of Barnet has failed to satisfy him, based on a balance of probabilities, that it has disclosed all the recorded information it holds falling within the scope of the complainant's request.
5. The Commissioner therefore requires London Borough of Barnet to take the following steps to ensure compliance with the legislation.
 - Carry out further searches and enquiries (including contacting its Corporate Governance Department) to see whether it holds any additional recorded information falling within the scope of the complainant's request with particular reference to information relating to its legal action against Veolia Water and Virgin Media for

the reconstruction of West Hendon Broadway. If further recorded information is found this should be disclosed to the complainant or a refusal notice issued.

6. The London Borough of Barnet must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

7. This Decision Notice is linked to and should be read in conjunction with the Commissioner's Decision in case bearing the reference FER0417503 where the same complainant requested 'all documents, letters, memos, phone notes, minutes of meetings and all records of any kind, on any media and of any description, regarding any dialogue between the council and Veolia Water (Three Valleys Water) on the reconstruction of West Hendon Broadway'.
8. From mid 2005 to the end of 2007 West Hendon Broadway was subject to a series of water leaks.¹ During this period Three Valleys Water (now Veolia Water) inspected the road and carried out numerous repairs to the water services under it. The council believed that these water leaks caused or contributed to damage to West Hendon Broadway. This was disputed by Three Valleys Water. During the latter part of 2007 the council instructed its agent to repair and reconstruct West Hendon Broadway which cost £128,124.71.
9. The damage to and reinstatement of West Hendon Broadway is a matter of direct interest and relevance to the complainant as it is the road on which he lives.
10. The complainant believes that the water leaks under West Hendon Broadway and the consequential damage to the road was also responsible for cracks to his boundary wall. He therefore commenced legal action against both the council and Three Valleys Water in 2007 for

¹ http://www.allinlondon.co.uk/news/index.php?news_id=1535

the cost of repairing the damage to his wall but subsequently withdrew his claim.^{2, 3}

11. In or about 2010 the council issued proceedings against Veolia Water (previously Three Valleys Water) in the Central London County Court for the cost of reinstating West Hendon Broadway which it alleged was due to its failure to maintain the water pipes under the road. The council also joined Virgin Media to the court proceedings by alleging that the damage to West Hendon Broadway was contributed to by the laying of ductwork (to carry cable television cabling) under the road at the incorrect depth.
12. In or about April 2011 the council concluded its legal claims against Veolia Water and Virgin Media.
13. On 2 April 2011 the complainant made a subject access request and some of the information disclosed to him in relation to this in or about January 2012 was also covered by the scope of his information requests which are dealt with by this Decision Notice and the related one FER0417503.

Request and response

14. On 10 June 2011 the complainant wrote to the council and requested information in the following terms:

'If you have restricted your search under FOIA to only those documents between LBB and Veolia (3VW)⁴ on the reconstruction of West Hendon Broadway, as you have not shown that you have any relevant internal documents, could you expand your search under FOIA to include any and all documents, internal or external, relating to the reconstruction of West Hendon Broadway'.

15. The council responded under the EIR on 5 August 2011 clarifying that the 'reconstruction' referred to was that mentioned in the correspondence it disclosed in response to the complainant's related

² <http://www.times-series.co.uk/news/topstories/4994422.print/>

³ <http://www.times-series.co.uk/news/topstories/9124204.print/>

⁴ 3VW – Three Valleys Water

request dated 2 April 2011 (which is the subject of the Commissioner's Decision Notice FER0417505).

16. In its response dated 5 August 2011 the council stated that it held a large number of hard copy records which it had collated and prepared for disclosure with some redactions for personal data and legally privileged material. However, it added that if the complainant wanted the information posted he would have to pay £18 (for which it issued a fees notice) or alternatively, it said he could collect the information from its offices at no charge.
17. After the complainant agreed to collect the information in person, the council wrote to him again on 16 August 2011 explaining in more detail why it had redacted certain information under regulations 13 (personal data) and 12(5)(b) (adverse affect on the course if justice) of the EIR.

Scope of the case

18. On 18 August 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he said that he was not convinced that the council had disclosed all the recorded information it held falling within the scope of his request.
19. On 23 September 2011 the complainant confirmed to the Commissioner that he did not intend to take issue with the redactions made by the council for third party personal data under Regulation 13 of the EIR. However, he did confirm that he wanted the Commissioner to investigate the council's application of Regulation 12(5)(b).
20. The Commissioner has therefore limited the scope of his investigation to firstly, whether the council has located all the recorded information it holds within the scope of the complainant's request and secondly whether, it can just successfully rely of the exception under Regulation 12(5)(b) of the EIR to withhold some of the information.

Chronology

21. On 30 September 2011 the Commissioner wrote to the council, he reiterated the complainant's belief that it had not identified and disclosed all the recorded information held and invited it to carry out further searches and enquiries. In particular, he asked the council to look for any information relating to a court case concerning Veolia Water (previously known as Three Valley Water) and details of a possible meeting involving council officers that may have taken place in or about

March 2011⁵. The Commissioner also requested a copy of the information withheld by the council under Regulation 12(5)(b) of the EIR.

22. The council responded on 27 October 2011 and provided the Commissioner with copies of two documents it had withheld from the complainant under Regulation 12(5)(b) of the EIR. With regard to information held within the scope of request the council stated that all the information located as a result of its logical and comprehensive searches had been located and either disclosure to the complainant or withheld and considered it highly unlikely that any information within the scope of his request had been mislaid, wilfully destroyed or in any way withheld.
23. The Commissioner wrote to the council again on 27 October and 2 November 2011 and asked various questions with regard to its application of Regulation 12(5)(b) of the EIR to the two documents concerned.
24. The council replied on 7 December 2011 stating that it did not hold any further information falling within the scope of the complainant's request apart from that already disclosed. In relation to the legal action the council suggested that any relevant correspondence with Three Valleys Water would have been undertaken by its external solicitors and therefore not held by it.
25. The Commissioner responded on 12 December 2011 and reminded the council that it had failed address his questions regarding the withheld information.
26. The council responded on 14 December 2011. With regard to the first withheld document the council reiterated that this was covered by Regulation 12(5)(b) of the EIR as the advice was still live and the public interest was balanced against disclosure. With regard to the second withheld document, the council stated that page 2 was not legally privileged and pages 3 to 7 were outside the scope of his request. With regard to the remaining information set out in pages 1 and 8 the council maintained its argument that this was covered by regulation 12(5)(b) of the EIR.

⁵ This was alluded to in a letter from the complainant's MP dated 29 March 2011 in which he said the council's Head of Insurance were scheduled to have a meeting last week to review matters raised by the complainant.

27. The Commissioner replied on 14 December 2011 and pointed out that the withheld legal advice related to the council's prospective claim against Veolia Water (Three Valleys Water). He also pointed out that he was still waiting for the council's response to his request for any recorded information held in relation to its possible meeting with the complainant's MP in March 2011. Finally the Commissioner expressed his concern that the council's searches and enquiries had not identified any further information in relation to its legal action against Veolia Water (Three Valleys Water).
28. The Commissioner spoke to the council by phone on 17 January 2012 and was informed that it did not hold any further recorded information falling within the scope of the complainant's request apart from that already identified and either disclosed to the complainant or withheld/redacted under Regulations 12(5)(b) and 13 of the EIR.
29. On 14 June 2012 the council confirmed to the Commissioner that it represented itself (through its Corporate Governance Department) in its legal action against Veolia Water issued out of the Central London County Court in or about 2010.

Reasons for decision

Environmental Information

Regulation 2 of the EIR

30. The first question for the Commissioner to consider is whether the information requested by the complainant is environmental information as defined by the EIR.
31. Regulation 2(1) of the EIR states 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 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;

32. The information requested in this case, some of which has already been disclosed to the complainant, relates to discussions between the council and Three Valleys Water concerning the repair and reinstatement of damage caused to West Hendon Broadway as a result of water leaks below its surface. It also includes legal advice received by the council in relation to its claim against Veolia Water (formally Three Valleys Water) in relation to the cost of repairing and reinstating the damage caused to West Hendon Broadway.
33. The Commissioner considers that this information falls within Regulation 2(1)(c) of the EIR in that it information on "measures (including administrative measure), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements referred to in Regulation 2(1)(a) namely land and landscape as well as measures or activities designed to protect these elements".
34. The council agrees that the information requested in environmental and has accordingly dealt with the request under the EIR.

Regulation 5 of the EIR

35. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) provides that this information should be made available within 20 working days following receipt of the request. Under regulation 7, a public authority is permitted to extend this period to 40 working days if it considers that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

The Commissioner finds that the council breached Regulation 5(2) of the EIR by failing to respond to the complainant's request as soon as possible and in any event within 20 working days of receipt.

Information held

36. The next question for the Commissioner to consider is whether the council has correctly located and identified all of the recorded information it holds falling within the scope of the complainant's request.

37. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ('Bromley'), the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The standard of proof has been recently confirmed by the Tribunal decisions of *Innes v Information Commissioner* [EA/2009/0046], *Thompson v Information Commissioner* [EA/2011/0144] and *Oates v Information Commissioner* [EA/2011/0138].
38. The Commissioner has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the *Bromley* decision. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information *is* held, including whether it is inherently unlikely that the information so far located represents the total information held.
39. In the decision of *Oates v Information Commissioner* [EA/2011/0138] the Tribunal stated that: 'As a general principle, the (Commissioner) was, in the Tribunal's view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the (Commissioner) with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester'.
40. The Commissioner has applied the test in the *Bromley* and the principal referred to in the *Oates* to this case and has also considered the arguments of both sides.
41. The council has stated that the only recorded information it holds (with the exception of that which it has redacted under Regulation 13 and withheld under Regulation 12(5)(b) of the EIR) is that which it has disclosed to the complainant in August 2011.
42. The council has stated that whatever information it holds in relation the complainant's request (for example, correspondence, reports, photos, emails etcetera) by its various members staff (both past and present) is held in one area of the shared network drive. According to the council

this information is considerable and has been disclosed to the complainant in relation to his various requests both under the EIR and the Data Protection Act 1998. So far as the relevant information in the physical files is concerned the council has stated that this is held in seven separate large A4 lever files spanning a period of eight years.

43. The council has advised the Commissioner on a number of occasions that it has searched the various divisions and departments concerned in a logical and comprehensive manner and disclosed all the information it holds within the scope of the complainant's request. It has therefore concluded it is highly unlikely that any relevant information has been mislaid, wilfully destroyed or in any way withheld from the complainant within the scope of this request save for the information excepted under Regulation 12(5)(b) of the EIR. The latter information is dealt with in the Commissioner's related Decision Notice FER0041704.
44. The complainant does not accept that the council has identified and disclosed all the information it holds. Specifically, he believes that further information should exist in relation to a meeting which took place between the council and Three Valleys Water on 19 July 2007 (such as an agenda, notes, minutes and correspondence). Furthermore, he has provided the Commissioner with evidence that Three Valleys Water instructed a firm of loss adjusters (Crawford and Co) to act on its behalf in relation to the council's claim resulting in correspondence and meetings with the council between 2007 and 2009. However, the council has not produced any recorded information in relation to Crawford and Co. Also, he is surprised that the council has not identified any information in relation to the legal action it took against Veolia Water (formally, Three Valleys Water) for the recovery of the cost of repairing and reinstating West Hendon Broadway. For example, correspondence between the council and Veolia Water indicating the grounds and value of its claim together with its intention to take legal action. A further example in relation to which recorded information might be held is the meeting involving council officers that may have taken place in or about March 2011.

Meeting between the council and Three Valleys Water on 19 July 2007

45. This meeting is referenced in an email written by the council's Principal Engineer dated 24 July 2007 a copy of which was disclosed to the complainant on 17 May 2011. The meeting concerned discussions between the council and Three Valleys Water regarding a claim for the remedial costs to West Hendon Broadway.

46. The question of whether any recorded information is held in relation to this meeting (based on a balance of probabilities test) is also dealt with by the Commissioner's related Decision Notice; FER0417503.
47. Although the council does not dispute that this meeting took place it has stated on a number of occasions that its various searches of the electronic and manual files and enquiries had not revealed any recorded information regarding it. The council has informed the Commissioner that as its Principal Engineer had left its employ it was unable to ask him whether any note or minute was taken of the meeting or indeed if one was made whether it had been subsequently lost or destroyed. Having considered the relevant correspondence around the date of the meeting and taking into account the impression that the Principal Engineer was fastidious in his record keeping, the council has concluded that it was more likely that no notes were ever recorded. With regard to four other council officers who may have been aware of the meeting only one was still employed. When this person was contacted by the council he stated that he did not attend the meeting and had no recollection of being informed of its outcome.
48. The complainant believes that the council should hold some information regarding the meeting as it was an important one where Three Valleys Water made a percentage offer in respect of the costs of rectifying the damage to West Hendon Broadway.
49. The Commissioner has taken into account the enquiries and searches which the council states it has carried out and is satisfied that these were relevant and adequate. While he can understand why the complainant is sceptical that no recorded information is held regarding the meeting in 1997, he has no reason to disregard what the council has stated without any firm evidence to the contrary. The Commissioner has therefore concluded on a balance of probabilities that no recorded information is held by the council in relation to this meeting.

Correspondence and meetings between the council and Crawford and Co

50. It is apparent from the Commissioner's enquiries and information provided by the complainant that Three Valleys Water instructed a firm of loss adjusters in or about July 2007 to correspond and meet with the council in relation to its claim for the repair/reinstatement costs of West Hendon Broadway. However, the council has not produced any recorded information in relation to this although it was able to produce email communications before this date between its Highway's department and Three Valleys Water.

51. The council has already detailed all the searches and enquiries it carried out (as described above) and has confirmed that these failed to reveal any recorded information apart from that already disclosed to the complainant or redacted or withheld under Regulations 13 and 12(5)(b) respectively.
52. The Commissioner has therefore concluded, based on a balance of probabilities, that the council does not hold any further recorded information in relation to its communications and meetings with Three Valleys Water and their loss adjusters (Crawford and Co) in the absence of any evidence to the contrary.

Legal action against Veolia Water (formally, Three Valleys Water) and Virgin Media

53. In or about 2010 the council issued proceedings against Veolia Water (previously Three Valleys Water) in the Central London County Court for the cost of reinstating West Hendon Broadway which it alleged was due to its failure to maintain the water pipes under the road. The council also joined Virgin Media to the court proceedings by alleging that the damage to West Hendon Broadway was contributed to by the laying of ductwork (to carry cable television cabling) under the road at the incorrect depth.
54. In or about April 2011 the council discontinued its legal claims against Veolia Water and Virgin Media.
55. The council has recently confirmed to the Commissioner that it actually represented itself (through its Corporate Governance Department) in its legal action against Veolia Water and Virgin Media. However, this statement would appear to be at odds with the earlier one it made when it said that any correspondence in relation to a claim for the repair/ reinstatement costs would have been between its external solicitors.
56. The complainant therefore believes that there must be some recorded information held by the council in relation to this court action in that it relates to the reinstatement of West Hendon Broadway. For example, correspondence intimating, valuing and submitting a legal claim.
57. The council has not disputed that this information would be within the scope of the complainant's request but it has confirmed that it is not held in a recorded format.
58. The Commissioner has seen evidence (including the claim form and Particulars of Claim) which would support the council's recent statement that it represented itself (through its Corporate Governance Directorate) in relation to its legal action against Veolia Water and Virgin Media.

59. The council has stated that any correspondence in relation to a claim for the reinstatement costs of West Hendon Broadway would have been conducted on its behalf by its external solicitors (Barlow Lyde and Gilbert). However, this statement appears to be based on an erroneous premise as it clear to the Commissioner from his enquiries that the council actually represented itself through it Corporate Governance Directorate. The Commissioner has not been provided with any express evidence that this particular Directorate of the council has been specifically approached in relation to the this request to determine if any information is held. As part of his investigation the Commissioner has been able to clarify that the external solicitors Barlow Clyde and Gilbert actually represented the council in the defence of the claim by the complainant and not its own claim against Veolia Water and Virgin Media. The Commissioner believes that the council may not have specifically approached its Corporate Governance Directorate to search for this information due to its erroneous belief that this claim was being handled by the external solicitors.
60. The Commissioner has therefore concluded, based on a balance of probabilities that the council does hold further recorded information in relation to its legal claim against Veolia Water and Virgin Media which would fall within the scope of the complainant's request for information on repair/reinstatement of West Hendon Broadway.

Meeting involving council officers in March 2011

61. The complainant has referred to a letter he received from his MP dated 29 March 2011 in which it is stated that 'council officers were scheduled to have a meeting at the end of last week to review all the matters *you* have raised'. According to the complainant these matters would have included the damage to and reinstatement of West Hendon Broadway in which he had a real and direct interest for the reasons already mentioned.
62. The Commissioner wrote to the council on three separate occasions, namely 30 September, 27 October and 12 December 2011 to clarify whether a meeting did take place, if it included any discussions regarding the reinstatement of West Hendon Broadway and and if so whether any recorded information (for example, minutes, notes, correspondence) existed in relation to it.
63. The council finally responded on 14 December 2011 stating that a meeting did take place but pointing out that it held no recorded information in relation to it. However, it is clear to the Commissioner from its response that it was referring to the earlier meeting on 19 July 2007 and not the one that may have taken place in March 2011.

64. The Commissioner pointed this out to the council on 14 December 2011 and 6 January 2012. The council responded by phone on 17 January 2012 stating that it did not hold any further recorded information apart from that already disclosed to the complainant or withheld under Regulation 12(5)(b) of the EIR or redacted under Regulation 13.
65. The complainant has not been able to produce any evidence to show that a meeting actually took place in March 2011 and if so that it related to the reconstruction of West Hendon Broadway and furthermore that some recorded information exists in relation to it. The council has confirmed that it does not hold any recorded information and it is therefore the Commissioner's conclusion, based on a balance of probabilities, that this is the case in the absence of any evidence to the contrary.

Exceptions under the EIR

66. The council has cited two exceptions from the EIR to justify its decision to redact and withhold some of the information requested by the complainant. The first is Regulation 13 in respect of some third party personal data and the second is Regulation 12(5)(b) in respect of legally privileged information. As the complainant has said that he does not wish to take issue with the council's application of Regulation 13, the Commissioner has confined his investigation to the council's application of Regulation 12(5)(b) of the EIR.

Regulation 12(1) of the EIR

67. Subject to a presumption in favour of disclosure (in Regulation 12(2) of the EIR), a public authority may refuse to disclose environmental information if an exception under regulation 12(4) or (5) of the EIR applies and the public interest in maintaining that exception outweighs the public interest in disclosure (see Regulation 12(1) EIR).

68. Regulation 12(1) of the Regulations provides that:

'Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

*an exception to disclosure applies under paragraphs (4) to (5);
and*

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'

Regulation 12(5)(b) of the EIR

69. Regulation 12(5)(b) of the EIR provides that:

'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

...(b) 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 disciplinary nature;...'

70. The council has argued that the information requested is legal advice which is subject to legal professional privilege and is therefore exempt from disclosure under Regulation 12(5)(b) of the EIR.
71. There is no specific exception within the EIR referring to information which is subject to legal professional privilege. However, both the Commissioner and the Information Tribunal have previously decided that Regulation 12(5)(b) encompasses such information.
72. In view of the above Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'. He therefore considers that the arguments put forward by the council are relevant to whether Regulation 12(5)(b) of the EIR is engaged or not.

Is Regulation 12(5)(b) of the EIR engaged?

73. The Council have withheld two document under regulation 12(5)(b) both of which have been provided to the Commissioner for the purposes of his investigation.
74. The first is three pages long and comprises an internal note/email from the council's solicitor to its highways department dated 5 March 2008 in which legal advice is given in relation to a prospective claim against Three Valleys Water and Virgin Media for the cost of reinstating West Hendon Broadway.
75. The second is eight pages long. However, the council has now stated that only pages 1 and 8 are within the scope of the complainant's request. The Commissioner agrees with this having seen the information contained in pages 2 to 7 inclusive. The information in page 2 of the document was disclosed to the complainant on 17 May 2011 and is not subject to legal professional privilege. Pages 3, 4 and 5 are selected extracts from the Limitation Act 1980 and pages 6 and 7 are details of a set of barristers' chambers in London including a location map.

76. Page 1 of the second document comprises of a handwritten note summarising the legal advice given at a meeting between the council's solicitor and an external barrister on 13 May 2010 in relation to possible claims against Three Valleys Water and Virgin Media for the cost of reinstating West Hendon Broadway. Page 8 is an internal note/email from the council's solicitor to another department summarising a legal opinion received from a barrister and providing legal advice in relation to possible claims against Three Valleys Water and Virgin Media for the cost of reinstating West Hendon Broadway.
77. The Commissioner has seen both documents and has concluded that as they consist of legal advice (or a summary of it) provided by a lawyer to his client they are subject to legal professional privilege. Legal professional privilege safeguards confidentiality between professional legal advisers and clients to ensure that proper openness can be in place in relation to the preparation and provision of legal advice. See the Tribunal's decision in *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037), especially at paragraph 62.
78. The Commissioner has taken into account the recent Tribunal decisions in the cases of Rudd and the Information Commissioner EA/2008/0020⁶ and Woodford and the Information Commissioner EA/2009/0098⁷ in which it was decided that the exception in Regulation 12(5)(b) was intended to encompass all information subject to legal professional privilege.
79. In view of the above Tribunal Decisions the Commissioner finds that the disclosure of information subject to legal professional privilege would have an adverse effect on the course of justice as stated and referred to on the face of the Regulations. The Commissioner has seen the withheld information and is entirely satisfied that it consists of exchanges generated for the purposes of obtaining legal advice and is therefore subject to legal professional privilege.
80. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20\(EA-2008-0020%20%5BFER0148337%5D\)%20Decision%2029-09-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20(EA-2008-0020%20%5BFER0148337%5D)%20Decision%2029-09-08.pdf)

⁷ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i388/EA-2009-0098%20Woodford%20v%20IC%20-%20Decision%2021-04-10%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i388/EA-2009-0098%20Woodford%20v%20IC%20-%20Decision%2021-04-10%20(w).pdf)

the Information Tribunal, in the case of *Bellamy v the Information Commissioner and the 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 litigation'. (See paragraph 9).

81. 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'. (See paragraph 21).

82. The Commissioner has also noted the views of the Information Tribunal in *Rudd v ICO & The Vederers 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 recognized as an integral part of our adversarial system.' (See paragraph 29).

The Public Interest Test

83. Having concluded that the exemption in Regulation 12(5)(b) is engaged, the Commissioner has applied the public interest balancing test set out in Regulation 12(1)(b) of the EIR. This requires him to decide in all the circumstances of the case whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

84. The Commissioner considers that there is always an underlying public interest in councils being accountable for and transparent in their actions. Consequently he accepts that disclosure could be said to be in the public interest if it adds to the public's understanding of the council's actions.
85. In addition to the presumption in favour of disclosure mentioned above, the Commissioner also accepts the fact that public funds are being spent by the council in relation to this matter is a public interest factor in favour of disclosure of the information. This is because he considers that there is a public interest in knowing whether public funds are being allocated and spent in an appropriate manner.
86. The Commissioner has also taken into account that a number of people (including local traders, residents, council tax payers, pedestrians and motorists) are likely to be affected by the council's decision to take legal action to recover the costs incurred in reinstating a major and busy road in the borough. He considers that it is generally in the public interest for people to be well informed about decisions which affect their lives.

Public interest arguments in favour of maintaining the exception

87. The Commissioner notes and agrees with the Information Tribunal in the case of Bellamy v The Information Commissioner [2006] UKIT EA in which it was stated;

'...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that in certain cases, of which this might have been one were the matter not still live, for example where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'

88. The Commissioner is also mindful of the comments of Mr Justice Wyn Williams in the High Court decision of the Department for Business Enterprise and Regulatory Reform and Dermot O'Brien and the Information Commissioner (EWHC 164 (QB) when he observed that:

'The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight'. (See paragraph 53)

Balance of the public interest arguments

89. The Commissioner has been guided over time by Tribunal decisions considering the weight to be given to the public interest arguments relating to legal professional privilege. He considers that whilst there is an inherent public interest in protecting legally privileged information the weight that both this and the public interest in disclosure should be afforded will vary from case to case depending upon a number of factors including:

- The age of the advice
- Whether the advice remains current
- Whether the advice relates to the rights of individuals
- The amount of money involved
- The number of people affected
- The existing transparency of a public authority's actions

Age of the advice

90. The advice in this case was provided on three separate occasions. Firstly in March 2008, secondly in March 2010 and finally in May 2010. The complainant's information request in June 2011 was made thirteen months after the last legal advice since when legal proceedings had been issued and settled. The council has not argued that the age of the advice was not a determining factor in this case but has pointed out that it is still relevant to the complainant who may wish to take further legal action against the council relating to the damage to and reinstatement of West Hendon Broadway and any affect this may have had on his adjoining property. The Commissioner notes that the advice was provided some time ago but accepts it is still relevant today in view of fact that the complainant may wish to take further action against the council. The Commissioner recognises that the passage of time is one factor in favour of disclosure. However, he has not attached much weight to this in the present case as the advice is still relevant to the issues affecting the complainant.

Whether the advice remains current

91. The Commissioner accepts that the council's argument that the advice was still live at the time of the request and would be relevant to any subsequent action taken by the complainant for the reasons stated above.

92. The Commissioner considers that although the advice was obtained some time ago it still remains relevant today. Accordingly, he has given weight to the public interest argument in allowing a council to obtain free and frank legal advice without fear of intrusion.

Whether the advice relates to the rights of individuals

93. The Commissioner supports the Tribunal's decision in Fuller and the Ministry of Justice (EA/2008/0005) where it was said that the principles behind LPP; "...are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law...". He therefore does not reduce the weight given to the public interest in maintaining the exception simply because the advice has been provided to a public authority rather than a private individual.

The amount of money involved

94. With regard to the amount of money involved, the Commissioner notes that the Information Tribunal in the case of Mersey Tunnel Users Association v the Information Commissioner and Merseytravel - (EA/2007/0052) found that the public interest in disclosure outweighed the public interest in maintaining the exemption for legal professional privilege partly because of the substantial amount of money involved which ran to tens of millions of pounds. In this case the amount of money involved is not insignificant. Not only in respect of the reinstatement costs of West Hendon Broadway which the council was endeavouring to recover from Veolia Water and Virgin Media but also the legal costs for all parties in bringing and defending the legal action. The Commissioner has therefore given some weight to this argument in favour of disclosure.

The number of people affected

95. Similarly with regard to the number of people affected the Commissioner notes that in the Mersey Tunnel case the number of people involved was substantial (i.e. approximately 80,000 people per weekday). Contrasted with this, in the case of Gillingham v the Information Commissioner and the Crown Prosecution Service (EA/2007/0028) the Tribunal indicated that the number of people affected by a decision concerning a public footpath was not a significant factor to be taken into consideration. In this case the people affected would include local traders, residents, council tax payers, pedestrians and motorists. The Commissioner accepts that the numbers involved would not be substantial and in line with the Tribunal's decision in Gillingham, does not believe this to be a significant factor in favour of disclosure. He therefore affords little weight to this argument.

The existing transparency of a public authority's actions

96. In balancing the public interest arguments the Commissioner believes that weight should be given to the accountability and transparency of the council's actions. A number of differently constituted Tribunals have indicated that weight must be attached to a general principle of accountability and transparency. However, the Tribunal in the Foreign and Commonwealth Office case (EA/2007/0092) considered transparency and concluded that the sort of public interest which would be likely to undermine LPP would need to amount to:

"more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."

97. In the present case the Commissioner has not been presented with any evidence to suggest that the legal advice obtained was misrepresented or ignored or indeed that the council pursued a course of action that was bound to fail.

98. The Commissioner accepts that disclosure of the requested information might help the complainant to assess the quality of the council's decision making processes. He has therefore attached some weight to the factor of accountability and transparency but not the substantial weight that would have been afforded if he had been presented with any reasons to believe that the legal advice received was misrepresented or ignored.

99. Having considered all of the above arguments, in particular, the strong in-built public interest in withholding information to which legal professional privilege and taking account of the fact that the advice although not recent is still live and that the underlying issue involves relatively small amounts of money and people, the Commissioner finds that the public interest in maintaining the exception, in all the circumstances of the case, outweighs the public interest in disclosure.

100. The Commissioner therefore concludes that the legal advice is excepted from disclosure on the basis of Regulation 12(5)(b) of the EIR.

Right of appeal

101. 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

102. 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.

103. 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

Rachael Cragg
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