

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

Decision notice

Date: 24 October 2013

Public Authority: Brighton and Hove City Council
Address: King's House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant has requested details of the restrictive covenants which Brighton and Hove City Council considered applied to Blatchington Mill School in respect of the development of two all-weather hockey pitches at the school. He also requested correspondence relating to the restrictive covenants.
2. The Commissioner's decision is that Brighton and Hove City Council has correctly withheld the information in reliance of regulation 12(5)(b).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 25 September 2012, the complainant wrote to Brighton and Hove City Council ("the Council") and requested information in the following terms:

"Referring to your paragraph 5 [the council's letter to the complainant dated 14 July 2012] you state that

'The existence of various restrictive covenants was brought to the attention of the School and the Hockey Club at the outset of the project.'

May I please have the full details of all the restrictive covenants which you consider applied to this development, including (presumably) copies of such correspondence to both parties concerned."

5. The council responded to the complainant on 21 November 2012. It stated that:

"Although the requested information is held by the Council I am satisfied that it is exempt from disclosure under Section 42 of the FOIA (Legal professional privilege) and/or Regulation 5(b) of the EIR [Environmental Information Regulations 2004] (Adverse effect on the course of justice or conduct of inquiries).

6. Following an internal review the Council wrote to the complainant on 20 December 2012. The Council informed the complainant that it remains the Council's position that the communications opining on the applicability of legal covenants are of a legally privileged nature'. The Council therefore held to its original decision not to disclose the requested information in reliance of Section 42 of the FOIA and Regulation 5(b) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner on 7 February 2013 to complain about the way his request for information had been handled.
8. The Commissioner has investigated whether the Council has properly relied on the provisions of Section 42 of the FOIA and Regulation 5(b) of the EIR to withhold the information requested by the complainant.

Reasons for decision

Regulation 12(5)(b) – The course of justice

Is the requested information 'environmental information'?

9. The council's responses to the complainant referred to both the FOIA and the EIR.
10. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.

11. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
12. The Commissioner has examined the information the council has withheld from the complainant. He is satisfied that the information is environmental information as it relates to the construction of two all-weather hockey pitches at Blatchington Mill School and claims about restrictive covenants relating to the proposed site. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(5)(b) – the course of justice

13. Regulation 12(5)(b) provides an exception from the duty to disclose information where the disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
14. Having reviewed the withheld information the Commissioner is satisfied that it attracts legal professional privilege. The information may be characterised as being information which constitutes requests for legal advice or the provision of legal advice from a properly qualified person, or communications which discuss issues associated with that legal advice.
15. The Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.
16. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an “adverse” effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word “would” as being “more probable than not”.
17. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) the Information Tribunal described legal professional privilege as, “a fundamental condition on which the administration of justice as a whole rests”. The Commissioner accepts that disclosure of legal advice would undermine this important

common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

18. In this case, the Commissioner considers that disclosure of the legal advice would adversely affect the council's ability to defend itself should it be faced with a legal challenge in connection with this issue. The Council has advised the Commissioner that the matter is still current and remains the subject of threatened litigation.
19. The Commissioner considers that the council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.
20. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest

Arguments in favour of disclosing the requested information

21. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
22. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the council in respect of the development of the two all-weather hockey pitches at the Blatchington Mill School. It would also allow the public to consider the quality of the legal advice which was sought and received by the council.

Arguments in favour of maintaining the exception

23. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.

24. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

25. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
26. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

27. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

28. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
29. However, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure. He is satisfied that the public interest is best served in this case by

maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.

30. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
31. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
32. The Commissioner has decided that the council has properly applied regulation 12(5)(d) to the information sought by the complainant.

Right of appeal

33. 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

34. 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.
35. 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