

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

Date: 4 November 2013

Public Authority: Runnymede Borough Council
Address: Runnymede Civic Centre
Station Road
Addlestone
Surrey
KT15 2AH

Decision (including any steps ordered)

1. The complainant requested a copy of the legal advice Runnymede Borough Council (the Council) had received regarding the legal status of the Green in Englefield Green. The Council refused to disclose this advice on the basis of section 42 of FOIA, the legal professional privilege exemption. The Commissioner has concluded that the Council should have considered the request under the EIR given that the requested information constitutes 'environmental information'. However, the Commissioner has also concluded that the requested information is exempt from disclosure on the basis of the exception contained at regulation 12(5)(b) of the EIR, the course of justice exception, and the public interest favours maintaining this exception.

Background

2. Englefield Green ('the Green') is a piece of open land in a village also known as Englefield Green. The Green is owned by the Crown and managed by the Council.
3. A Council committee, the Englefield Green Committee, takes decisions regarding the management of the Green. The Committee comprises six Councillors and two residents' representatives.
4. This complaint focuses on legal advice sought by the Council regarding the legal status of the Green and Council's role in its management.

Request and response

5. On 21 March 2013 the complainant wrote to the Council and requested information in the following terms:

'Under the terms of the Freedom of Information Act, would you be good enough to supply me with a copy of the complete Opinion obtained from Counsel regarding the above [i.e. The Green, Englefield Green].'
6. The Council responded on 11 April 2013 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of section 42(1) of FOIA.
7. The complainant contacted the Council on 17 April 2013 in order to ask for an internal review of this decision.
8. The Council informed him of the outcome of the internal review on 17 May 2013. The review concluded that the requested information was exempt from disclosure on the basis of section 42(1) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 5 June 2013 to complain about the way his request for information had been handled. He suggested that as part of the requested Counsel's opinion could be considered to be in the public domain it may be the case that such a disclosure could nullify the Council's reliance on section 42. In any event the complainant argued that the public interest favoured disclosure of the withheld information. The complainant provided the Commissioner

with submissions to support both lines of argument and these are referred to in the analysis below.

10. For reasons explained below, in the Commissioner's opinion the Council should have considered this request under the EIR rather than under FOIA. Therefore, rather than consider whether the withheld information is exempt from disclosure under FOIA, the Commissioner has considered whether the information is exempt under the equivalent exception in the EIR. This is regulation 12(5)(b) which states that information is exempt if its disclosure would adversely affect, amongst other things, 'the course of justice'.

Reasons for decision

The applicable legislation

11. Regulation 2(1) of the EIR provide a definition of environmental information. Regulations 2(1)(a) and 2(1)(c) state that environmental information is information 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;' and

'(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;'

12. In light of subject matter of the requested information, the Commissioner is satisfied that it falls within the definition of environmental information set out at regulation 2(1)(c). This is because the Counsel's opinion that the complainant requested concerns the legal provisions regarding the status of the Green and these provisions could be correctly described as measures in the context of regulation 2(1)(c). Furthermore, these legal provisions are likely to affect the state of the elements listed in regulation 2(1)(a) of the EIR, specifically in determining how the Green will be used.

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

13. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information if 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.

14. The Council argued that the withheld information was subject to legal professional privilege. The Commissioner accepts that legal professional privilege is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason the Commissioner has found in previous cases that regulation 12(5)(b) will be relevant to information which attracts legal professional privilege.
15. In order to reach a view as to whether or not the exception is engaged, the Commissioner must first consider whether the withheld information is subject to legal professional privilege. He must then decide whether the disclosure of that information into the public domain would have an adverse effect on the course of justice.
16. There are two categories of legal professional privilege: advice privilege and litigation privilege.
17. In this case the category of privilege the Council is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
18. The requested information consists of Counsel's opinion (in two parts) to the Council in respect of the matter of the Green. The Commissioner is satisfied that the dominant purpose of the advice was clearly the provision of legal advice.

19. However, the complainant referred the Commissioner to the agenda of the Englefield Green Committee meeting of 19 February 2013.¹ The complainant noted that the requested Counsel's opinion was used in these minutes as the basis of a number of 'questions and answers'. He suggested that this disclosure of parts of the Counsel's opinion may nullify the Council's claim that privilege is applicable.
20. For its part, the Council argued that although there was a brief reference to Counsel's conclusions on the issue of 'roping off the wicket' in the report and minutes of the meeting of 19 February 2013, such disclosures did not reveal the full advice or anything approaching it, or quote directly from it, or reveal any other options considered so the quality of confidence of opinion remained.
21. In the Commissioner's view if only part of a piece of legal advice is disclosed outside litigation, and without restrictions, it is possible for the remaining information to still attract legal professional privilege if the disclosure did not reveal the content or substance of the remaining information. The Commissioner has examined both the papers associated with the Englefield Green Committee meeting of 19 February 2013 and the withheld information carefully. He is satisfied that although the information contained in the relevant agenda is reasonably detailed, particularly in respect of Englefield Green Cricket Club, it does not reveal the complete content, or indeed reveal the total substance, of the advice. Therefore, the Commissioner is satisfied that the withheld information has not lost its quality of confidence as a result of the information contained in the publically available agenda of the Englefield Green Committee meeting of 19 February 2013.
22. Consequently, the Commissioner is satisfied that the withheld information attracts legal professional privilege.
23. 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 the legal advice would undermine the important common law principle of legal professional privilege. This

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http://www.runnymede.gov.uk/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/RBC%2520Portal/Council%2520Diary/2013/February/committees/EG_190213.pdf - See agenda item 4, 'ENGLEFIELD GREEN – LEGAL STATUS'

would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

24. In light of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice and is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information.

Public interest test

25. Regulation 12(5)(b) is a qualified exception and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of maintaining the exception

26. The Council noted that there was a very strong inherent public interest in protecting the long established principle of legal professional privilege so that a body seeking access to legal advice is able to communicate freely with legal advisors in confidence and to receive advice in confidence. The confidential nature of such discussions ensures that such advice includes a full assessment of all aspects of the issue, which may include arguments for and against a conclusion. Publication of such information may undermine public confidence in decision making and furthermore without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.
27. The Council emphasised that such arguments were material to the present circumstances which focus on the proper conduct of a Local Authority in administering and managing its leasehold interest for the benefit of the wider community and securing proper legal advice for this. The Council noted that the matter remained a current and ongoing issue. It also argued that a degree of transparency was given by the Council dealing with and taking decisions following from the advice in open Council committee meetings.

Public interest in favour of disclosing the requested information

28. The complainant explained that, six years ago, after the completion of new cricket pitches, the pitches were surrounded with locked steel posts and chains. He explained that at the time he raised his concerns with the Council because he believed that this act was illegal as it prevented freedom for the general public to play cricket on ground set aside by the Council for that purpose. In addition the complainant argued that this

infringement became permanent from then onwards thus infringing the public right to traverse the Green without obstruction as set out in the Egham Inclosure Act 1814.

29. The complainant explained that his concerns were ignored by the Council and as a result in his view the pitches became the sole preserve of the Englefield Green Cricket Club (EGCC). The complainant noted that public were informed that keys to unlock the padlocks were obtainable from Council offices, when open, or from EGCC. However, as result, the pitches became 'hallowed ground' and people came to believe only the cricket club could play there.
30. The complainant explained that he raised his concerns with senior officers of the Council, enlisting the help of the Open Spaces Society, but he considered his concerns to have been 'brushed aside' by the Council. However, the complainant understood that in order to apparently clarify the legal position surrounding the Green, the Council sought external legal advice from Counsel. The complainant suggested that this advice found that the barrier around the pitches was indeed illegal and should be removed.²
31. In summary, the complainant argued that he was mindful of the pleasure denied to residents of the village (some 10,000) by being able to freely use a public facility since the barriers around the pitches had been erected 6 years ago. He argued that public interest favoured disclosure of the Counsel's opinion as the public have a right to know, one way or another, whether the Green is being properly managed or if their rights are being infringed.

Balance of the public interest test

32. Although the Commissioner accepts that there is a strong element of public interest inbuilt into LPP, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

² The Commissioner notes that paragraph 3.3 of the agenda for the 19 February 2013 meeting of the Englefield Green Committee includes the following summary of Counsel's advice on this point: '*roping off the wicket is technically a breach of the duty to keep the Green open but a rope placed on the ground around the wicket and polite notices to keep off the cricket wicket would not be breach of the duty to keep the Green open*'.

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

33. Consequently, although there will always be an initial weighting in terms of maintaining this exception if the course of justice would be harmed by disclosing information which attracts legal professional privilege, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case here, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:
- how recent the advice is; and
 - whether it is still live.
34. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
- the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
35. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
36. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
37. In the circumstances of this case the Commissioner is satisfied the advice can be correctly described as recent given that it dates from October and November 2012 and the request was submitted in March 2013. Further, as the Council itself has noted, issues regarding the management of the Green remained ongoing at the time of the request

and thus the Commissioner accepts that the advice could still be considered to be live at the time of the request. In light of these findings the Commissioner believes that there is a significant and weighty public interest in upholding the exception.

38. With regard to the public interest in disclosing the withheld information, the Commissioner believes that the discussion of the advice and the decisions which flow from the advice in open meetings of the Englefield Green Committee has resulted in a notable level of transparency by the Council in relation to this matter. For example, the agenda of 19 February 2013 explains the reasons why Counsel concluded that in his opinion the 1955 Scheme under which the Council had managed the Green was invalid; summarises Counsel's view on the risks of action being taken against the Council in respect of the existing structures, roads and access ways on the Green; addresses a number of specific questions regarding the use of the cricket pitches; and summarises the nature of the Council's discussions with the Crown in January 2013 in light of Counsel's advice. As a result of this, in the Commissioner's opinion, based on this agenda, the public would have a reasonably sound understanding of the conclusions reached by Counsel and the decisions taken by the Council as a result of this advice.
39. However, the Commissioner also recognises that the advice contains a much more detailed discussion of the legal status of the Green and the position regarding particular aspects of the Council's management of it than that which is included either in the agenda or available elsewhere in the public domain. Indeed this must be the case otherwise the Council's claims – and the Commissioner's acceptance of such claims – that the advice remained confidential despite the summary provided in the agenda of 19 February would be undermined. In the Commissioner's view disclosure of the advice would provide the public with a much more detailed understanding of the legal status of the Green and the ongoing issues surrounding the Council's management of it. Furthermore, in the Commissioner's opinion the need for such additional transparency should not be underestimated given the fact that as is now clear that the basis upon which the Green has been managed by the Council since 1955 is considered invalid and, moreover, the specific areas of concern raised by interested residents, such as those highlighted by the complainant and his concerns regarding the use and management of the cricket pitches.
40. Nevertheless, despite this weighty public interest in disclosure of the withheld information, in light of the strong inherent public interest in maintaining legal professional privilege and the fact that the advice is both recent and still being relied upon, the Commissioner has concluded that the public interest favours – albeit only very narrowly – maintaining the exception.

Right of appeal

41. 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

42. 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.
43. 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

Alexander Ganotis
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