

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 April 2015

Public Authority: Ash Parish Council

Address: Ash Centre
Ash Hill Road
Ash
Surrey
GU12 5DP

Decision (including any steps ordered)

1. The complainant has requested recorded information from Ash Parish Council ("the Council") which relates to its judicial review of the decision by Guildford Borough Council to grant permission to build 400 houses on land south of Ash Lodge Drive – Reference 12/P/10973. The Council provided the complainant with a letter it received from Ash Residents' Association, but withheld other information in reliance on the exception to disclosure provided by Regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that the Ash Parish Council has properly applied Regulation 12(5)(b) to the withheld information.
3. The Commissioner does not require the Council to take the any further action in this matter.

Request and response

4. On 14 October 2014, the complainant wrote to Ash Parish Council to ask for recorded information in the following terms:

"All information relating to Ash Parish Council's Judicial Review against Guildford Borough Council. I would expect this to include, any correspondence with Ash Residents Association and any council minutes currently withheld from the public record."

5. The Council responded to the complainant's request on 7 November 2014. The Council chose to respond in two parts:

Part 1 – any correspondence with Ash Residents Association

The Council provided the complainant with a copy of a letter which it received from the Ash Residents Association, This letter is dated 17 November.

Part 2 – any council minutes currently withheld from the public record

The Council refused to supply copies of minutes relating to unspecified meetings. The Council cited section 1(2) of the Public Bodies (Admission to Meetings) Act 1960 and stated that the 'relevant minutes are still covered by the resolution', and that they 'contain information to which legal professional privilege applies. Accordingly, the information is exempt from disclosure by section 42(1) of the Freedom of Information Act 2000'.

6. The Commissioner has noted that the Council was asked to undertake an internal review of its decision.
7. The Council was unable to carry out an internal review due to its small size and not being able to supply another qualified officer. This being the case, the Council informed the complainant that he could complain directly to the Information Commissioner about its decision.

Scope of the case

8. The complainant contacted the Commissioner on 24 December 2014 to complain about the way his request for information had been handled. The complainant asserted that:

'the Council failed to follow the proper FOIA process and reduced the scope of my request, possibly deliberately to try and reduce the resulting disclosure. That it failed to declare or disclose relevant material. Also that it [withheld] material in full, rather than redacting potentially exempt portions.'

9. The complainant has not complained about the extent of the information which the Council sent to him in respect of its correspondence with the Ash Residents' Association. The Commissioner has therefore limited his investigation, and this decision, to the question of whether Ash Parish Council is entitled to withhold the remaining information it holds in respect of the judicial review referred to by the complainant. This

includes the minutes of the Council's meetings where the public was not permitted to be present.

Reasons for decision

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

Is the requested information 'environmental information'?

10. The Council initially responded to the complainant's request under the terms of the Freedom of Information Act. It now accepts that the request falls to be considered under the Environmental Information Regulations 2004. This is because the judicial review associated with this request concerns a planning decision, made by Guildford Borough Council, in respect of a 400 house development. The Court dealing with the judicial review found that the matter fell within the terms of the Aarhus Convention and the European Union Directive 2003/4/EU which implements that Convention.
11. The Commissioner has examined the information the Council has withheld from the complainant. He is satisfied that the information is environmental information and that the request should be considered under the provisions of the EIR.

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

12. 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.
13. The Commissioner has reviewed all of the withheld information. He finds that it that consists of the following:
 - a. Documents/email records of legal advice provided by properly qualified persons, in respect of Ash Parish Council's judicial review action against Guildford Borough Council;
 - b. information consisting of minutes of the Council's meetings at which the legal advice and the Council's position is discussed in the absence of the public and press; and

- c. representations made to the Council, for the purpose of its judicial review action, by a party or parties who would be detrimentally affected by the proposed housing development.
14. The Council has assured the Commissioner that, at the time the request for information was made, the withheld information had not been made available to any third party or to the public. It therefore maintains the position that the legal professional privilege attached to the withheld information had not been lost.
 15. The Commissioner has seen no evidence which contradicts the Council's assurance.
 16. At the time the complainant made his request the judicial review process had started and no decision had been made.
 17. At the time of this decision notice the Council has initiated an appeal of the judicial review decision and it has advised the Commissioner that the matter continues to be 'live'. This being the case, the Commissioner finds that the withheld information remains privileged and its confidential character has not been lost.
 18. The Commissioner is also mindful of the Information Tribunal's decision in *Burgess v Information Commissioner* (EA/2006/0091), in which the tribunal held that Regulation 12(5)(b) was engaged after the conclusion of proceedings.
 19. 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".
 20. 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.
 21. 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.

22. The Commissioner accepts that the matter of the judicial review remains current, being the subject of an appeal which is still to be heard. He also accepts that the matter may be the subject of potential litigation in the future.
23. 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.
24. 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

25. 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. In turn this fosters trust in public authorities and may allow greater public participation in the decision making process.
26. 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 its judicial review action against Guildford Borough Council. Disclosure 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

27. 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.
28. 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."

29. Where a public authority is engaged in any form of legal action of its own initiation, 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.
30. 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..."

31. 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

32. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
33. However, having considered the content of the withheld information, 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.
34. 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.

35. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
36. The Commissioner has decided that the council has properly applied regulation 12(5)(d) to the information sought by the complainant.

Right of appeal

37. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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