

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

Date: 26 March 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 requested legal advice obtained by Brighton and Hove City Council ("the council"). The council withheld the information on the basis that it was covered by legal professional privilege and was therefore either exempt under section 42(1) of the Freedom of Information Act 2000 ("the FOIA") or excepted under regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the council correctly withheld the information using regulation 12(5)(b).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 11 July 2012, the complainant requested information in the following terms:

"A full copy of Counsel's opinion that you have obtained advising yourselves that you are not breaching restrictive covenants".
5. The council responded on the same day. It said that it was unable to supply the information requested. It said that it is exempt because it is covered by legal professional privilege.

6. The complainant replied on 2 August 2012 and expressed dissatisfaction with the refusal.
7. The council replied on 14 August 2012 and cited the exemptions under section 42 and 43 of the FOIA, the exemptions relating to legal professional privilege and commercial interests.
8. The complainant wrote to the council again on 22 August 2012 and said that he wanted the council to review its decision.
9. The council replied on 19 September 2012. It said that it wished to maintain that section 42 applied although the council conceded that it believed the request should have at least in part been considered under the terms of the EIR. The council referred to the course of justice exception under regulation 12(5)(b) of the EIR.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the council had correctly withheld the legal advice. He said that he did not agree that the EIR were relevant.

Reasons for decision

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

Is the information environmental?

11. The council's responses referred to both the FOIA and the EIR. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), 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. The information relates to the construction of two all-weather hockey pitches and claims about restrictive covenants on the land. These issues clearly affect the land. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(5)(b) – Course of justice

12. Under this exception, a public authority can refuse to disclose information to the extent that 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 council provided a copy of the withheld legal advice to the Commissioner. The Commissioner was satisfied that it represents legal advice from a legally qualified person. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice had been shared with third parties to the extent that it had lost its confidential character. Therefore he was satisfied that the information is covered by legal professional privilege.
14. 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 has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
15. 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 would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
16. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant legal advice.

Public interest arguments in favour of disclosing the requested information

17. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. The complainant has alleged in this case that the council may have breached a restrictive covenant. Disclosure of the legal advice would help the public to understand more about the decision-making process in the council relating to this matter and consider the quality of the legal advice relied upon.

Public interest arguments in favour of maintaining the exemption

18. As already indicated, the Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
19. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. 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".
20. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
21. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...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..."

22. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

23. To provide some background to this matter, in February 2010, following negotiations between Brighton and Hove Hockey Club and Blatchington Mill School, a joint submission was made to the English Hockey Board for funding towards the pitches at the school which was successful. It was intended that the pitches would be shared by both the school and club and that the proposed development would provide improved sports facilities for the community.
24. The council is the freeholder of the land in question. Community consultation was completed as part of the planning process and permission was granted for the development on 10 August 2011. The council's Cabinet Committee met on 10 November 2011 and gave permission for a lease to be granted to the club.
25. Some local residents sought to challenge the proposals on a variety of grounds. In particular, it was alleged that the proposed use would amount to a nuisance and that it was in breach of restrictive covenants. The council received a letter threatening legal action which prompted the council to seek the legal advice forming the subject of this particular complaint. Following this, the development went ahead and the pitches were opened in July 2012.
26. The complainant is unhappy about the pitches and he believes that the council may have breached a restrictive covenant associated with his property by allowing the development to take place. He told the Commissioner that he had obtained a copy of the school deeds which he says refer to a restrictive covenant on the playing field, specifying that nothing should be built which may become a nuisance to persons benefiting from the covenant. The complainant says he benefits from the covenant in accordance with his house deeds. The complainant said that he considers he is entitled to see the legal advice because it has been obtained at taxpayer's expense and because it directly affects his property.
27. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure

equals or outweighs the strong public interest in maintaining the council's right to obtain legal advice in confidence.

28. The Commissioner observes that the public interest in maintaining this exception is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the withheld information and consideration of all the circumstances, the Commissioner did not consider that there were any factors that would equal or outweigh the particularly strong public interest inherent in this exception.
29. The Commissioner appreciates that the complainant believes that the council has breached a covenant. However, the legal advice relied upon by the council is simply advice which the council may choose to follow or not follow. It is not a definite statement of the legal position. It is not the Commissioner's role to form a view on whether or not the authority is acting legally in these circumstances. The only way to receive a definite statement on the legal position is through the courts.
30. The Commissioner notes that the legal advice in question dates from November 2011, and is therefore relatively recent. It is clear that the issues connected to the covenant are still on-going and therefore the prejudice caused by any disclosure would still be sufficient to warrant the continued maintenance of the exception. The council was able to point towards correspondence from the complainant in this case stating that this matter would be the subject of future litigation.
31. The Commissioner would also like to add that the way the legal advice was paid for has no particular bearing on the application of the public interest test other than in respect of the general interests in accountability already mentioned. In any event, the council explained that the costs of the legal advice were covered in full by its insurers. Furthermore, the FOIA and the EIR are about the disclosure of information that is in the wider public interest and are not about the private interests of individuals. Clearly, the complainant has a particularly strong private interest in the disclosure of this information because it affects his property, however, the Commissioner's considerations must focus on the wider public interest and he finds that in the circumstances, the arguments for disclosure are not strong enough to equal or outweigh the council's right to consult its lawyers in confidence.

Right of appeal

32. 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

33. 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.
34. 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