

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

Decision notice

Date: 16 February 2015

Public Authority: West Sussex County Council

Address: County Hall, West Street Chichester PO19 1RQ

Decision (including any steps ordered)

1. The complainant has requested information about communications between West Sussex County Council ('WSCC') and Steyning Parish Council. The Council disclosed some information and withheld the remainder. It said some information (items 1, 2, 3, 4 and 5) was exempt from disclosure under regulation 12(5)(f) (adversely affects a person's interests). At internal review, WSSC said regulation 12(5)(b) (adversely affects the course of justice) could also be applied to this information. During the Commissioner's investigation, WSCC sought to rely on regulation 12(5)(d) (confidentiality of proceedings) as a basis to withhold these same elements of the requested information.
2. WSCC also initially withheld the remainder of the requested information (items 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18) under regulation 12(5)(b). At internal review WSCC said regulation 12(4)(e) (internal communications) could also be applied to this information.
3. The Commissioner's decision is that WSCC has:
 - correctly applied regulation 12(5)(d) to items 1, 2, 3, 4 and 5; and
 - correctly applied regulation 12(5)(b) to items 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.
4. The Commissioner does not require the public authority to take any further steps.

Request and response

5. On 23 July 2014, the complainant wrote to West Sussex County Council and requested information in the following terms:

"It is known that Steyning Parish Council has been in discussion with WSCC officers about the Steyning Memorial Playing Field village greens number VG65 and VG93 and that it has also been in discussion about the public footpath 2717 which crosses the same area.

Please could you let me have copies of all emails, letters, file notes of telephone conversations, and memoranda etc. both passing between officers and between them and Steyning Parish Council relating to these three topics and produced between January 2013 and now."

6. WSCC responded on 18 August. It provided some information within the scope of the request and withheld the remainder. It cited regulation 12(5)(f) and regulation 12(5)(b) as its basis for doing so.
7. Following an internal review WSCC wrote to the complainant on 9 September. It maintained its position and said it could also have applied regulation 12(4)(e) to some of the withheld information. The complainant initially accepted WSCC's application of regulation 12(4)(e) to this information, which would have removed this aspect of WSCC's response from the complaint. However, they subsequently withdrew this concession.

Background

8. The complainant represents the Friends of Memorial Playing Field (FoMPF), a group formed to oppose a Steyning Parish Council (SPC) plan to build a skate-park on the Memorial Playing Field (MPF) in Steyning.
9. Since 1974, half of the playing field has been registered as a village green and SPC identified the remaining area of the MPF for the skate-park. However, FoMPF then submitted an application to WSCC for this area to also be registered as a village green and, in February 2013, this application was successful. Village green status would be likely to prevent planning consent for the skate-park being given.
10. At the time of the request, in July 2014, SPC had been in contact with WSCC regarding the second village green application and, separately to this, had also resolved to obtain legal advice with a view to removing ('rectifying') the two village green registrations from the MPF.

11. In December 2014, during the course of the Commissioner's investigation, SPC announced that it is no longer seeking to rectify MPF's village green status and that it has abandoned its plan for a skate-park.

Scope of the case

12. The complainant had contacted the Commissioner on 29 October 2014 to complain about the way their request for information had been handled. They disputed assertions WSCC had made in its response and at internal review. Their concerns included relevant parties' expectations of confidentiality, the public status of the asset in question and the parties involved, insufficiency of weight given to the presumption of disclosure, and the fact that no planning application or court proceedings were now pending.
13. The Commissioner has taken account of the comprehensive arguments the complainant has made to support their position that the information should be disclosed. It appears to him, however, that their arguments have, to a degree, been made on the basis of assumptions about the content of the information in question that may not be correct.
14. Nonetheless, during the Commissioner's investigation the complainant confirmed that they are concerned that WSCC may be improperly withholding information that it is in the public interest to disclose because it relates to a public asset (ie the playing field/village green).
15. Also during the course of the Commissioner's investigation, WSCC queried whether, on reflection, items 7, 17 and 18 are covered by the request at all. In the Commissioner's view, although their content appears insignificant and administrative in nature, they could still be said to be covered by the request more broadly and consequently he has included them in his considerations.
16. The Commissioner has therefore focussed his investigation on WSCC's application of regulation 12(5)(f), 12(5)(b) and 12(5)(d) to the information it has withheld. If necessary, he has also been prepared to consider whether 12(4)(e) could also be applied to some of the withheld information.

Reasons for decision

Is the request for environmental information?

17. The Environmental Information Regulations 2004 provide public access to environmental information, specifically, that is held by public authorities.
18. Regulation 2(1) of the EIR defines 'environmental information' as:
'any information...on
(c) measures..., such as policies, legislation, plans, programmes...likely to affect the elements and factors referred to in (a) and (b) [such as air, water, soil, land, energy, noise, waste] as well as measures or activities designed to protect those elements.'
19. Regulation 12(2) says that a public authority should apply a presumption in favour of disclosing environmental information.
20. The information that the complainant has requested concerns information related to village greens and a public footpath. The Commissioner considers that this information concerns the state of the elements of the environment under EIR 2(1)(a), namely land.
21. The Commissioner therefore considers that WSCC was correct to handle this request under the Environmental Information Regulations.

ITEMS 1 – 5 OF THE WITHHELD INFORMATION

22. Items 1, 2, 3, 4 and 5 of the requested information are outlined in the confidential annex. It concerns email correspondence from April to July 2014 between Steyning Parish Council and WSCC regarding the village green application, and a request for information. With respect to this particular information, WSCC is first relying on **regulation 12 (5)(f)** in order to withhold it. It has clarified that Steyning Parish Council is the third party whose interests would be harmed.
23. Where disclosing information would harm the interests of the person that provided it (and the other requirements within the exception are met), the public authority will owe that person a duty of confidence and can rely on the provision under regulation 12(5)(f) to withhold the information.

24. Regulation 12(5)(f) is a qualified exception which means that even if the exception is engaged, the authority must go on to apply the public interest test set out in regulation 12(1)(b). It can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
25. The exception can be broken down into a five-stage test, as recognised by the Information Rights Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012):
 - (i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - (ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - (iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - (iv) Has the person supplying the information consented to its disclosure?
 - (v) Does the public interest in maintaining the exception outweigh that in disclosure?
26. The Commissioner's starting point in this case has been to consider whether disclosure would adversely affect the interests of Steyning Parish Council.
27. WSCC repeated to the Commissioner the brief argument it had provided to the complainant in its response of 18 August, and in its internal review. This was that disclosing the information would adversely affect SPC because, at the time of the request, the complainant had submitted a number of challenges to SPC regarding decisions it had made about the skate-park. WSCC has told the Commissioner that, consequently, SPC maintains that disclosing the information would impact on SPC's ability to conduct legal challenges if necessary; to consider the merits of any legal challenge through the courts or other statutory routes.
28. The Commissioner has seen the information in question and notes that it broadly concerns the new village green application; an application that WSCC processed. He notes the circumstances and context behind this correspondence and the references by SPC to possible legal action/litigation against WSCC relating to the village green application, and a possible complaint against WSCC regarding the FOI request.

29. The Commissioner's guidance on regulation 12 (5)(f) says that in considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm. The public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
30. The Commissioner notes WSCC's argument at paragraph 27 and is prepared to accept that this might be a valid argument in cases where specific legal action is underway at the time of the request. It appears to the Commissioner however, that while some form of legal action may have been a possibility at the time of the request, no specific legal action was in progress. Perhaps as a consequence, WSCC's justification of its application of regulation 12(5)(b) is brief and lacks specific detail on any causal link between disclosure and an adverse effect.
31. Without this evidence, the Commissioner considers that any harm to Steyning Parish Council from disclosing the information could not be said to be 'real', 'actual' and 'of substance'. His conclusion is therefore that, on the balance of probabilities, disclosing this part of the information will not cause an adverse effect to SPC.
32. The Commissioner also notes regulation 12(2) which says that a public authority shall apply a presumption in favour of disclosure. Having therefore carefully considered the contents of the correspondence and all the circumstances of WSCC's application of 12(5)(f) to this information, the Commissioner's decision is that this regulation cannot be applied to items 1 - 5.
33. Because the Commissioner does not consider that disclosing the information would have an adverse effect on Steyning Parish Council, and that regulation 12(5)(f) consequently does not apply, he has not gone on to consider whether the tests at subsections (ii) to (iv) in paragraph 25, or the public interest test at (v) are satisfied.
34. The Commissioner has noted the complainant's arguments for disclosure in relation to this regulation. However, given that he is satisfied that the regulation cannot be applied, it has not been necessary to discuss those arguments in this notice.
35. The Commissioner has gone on to consider the two other regulations that WSCC says could be applied to this information.

36. **Regulation 12(5)(b)** provides that information is exempt from disclosure if disclosure would have an adverse effect on 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.
37. Both the presumption in favour of disclosure, and the public interest test apply to this regulation.
38. WSCC says in its internal review and its submission to the Commissioner that disclosing this information would have an adverse effect on the course of justice.
39. As with regulation 12(5)(f), 'adversely affect' means there must be an identified harm to, or negative impact on, the interests identified in the exception.
40. The Commissioner's guidance on 12(5)(b) says that 'course of justice' has a wide meaning and includes material covered by legal professional privilege (LPP), information about law enforcement investigations or proceedings and records of courts, tribunals and inquiries. Its remit encompasses any adverse effect on the course of justice. In *Rudd v the Information Commissioner & the Verderers of the New Forest* (EA/2008/0020, 29 September 2008), the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'".
41. The information in question here is contained in correspondence between SPC and WSCC. For different reasons SPC and the complainant were dissatisfied with the situation regarding the MPF. SPC's dissatisfaction led it to contact WSCC, with the ensuing correspondence covered by items 1 – 5 of this request.
42. As discussed at paragraph 10, Steyning Parish Council had also resolved to obtain legal advice with a view to rectifying the two village green registrations from the MPF. However, as far as the Commissioner is aware, and as at paragraph 30, neither SPC nor WSCC were formally engaged in any formal legal actions against each other at the time of the request. Neither was either of these parties engaged in any formal legal action against the complainant.
43. Such legal actions could be covered by the 'course of justice' provision in this regulation. WSCC had sought legal advice in 2013 (discussed in paragraphs 79 – 103 and covered by the LPP provision within this regulation) but this did not develop into a formal legal action against a third party. The Commissioner is consequently not satisfied that

disclosing the information would have an adverse effect on the course of justice for the reason WSCC has given. This is because, at the time of the request, there was no litigation in progress.

44. However, as mentioned at paragraph 40, 'course of justice' also includes legal professional privilege.
45. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. Communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
46. Since litigation was in contemplation at the time of the correspondence, the Commissioner has considered whether items 1 – 5 attract litigation privilege.
47. If the only litigation in contemplation was between SPC and WSCC litigation privilege would not apply to the correspondence, which WSCC entered into with the other party to the dispute (ie SPC). Litigation privilege is intended to protect from disclosure correspondence made for the dominant purpose of use by one party in its dispute with the other party in the dispute. It cannot be used to protect information that has already been shared by one party to the litigation with the other party, as in this case where the correspondence is between the two parties.
48. WSCC has also confirmed that no formal litigation was in progress between SPC and the complainant at the time of the correspondence. The situation was such, however, that litigation was a possibility – in contemplation - between SPC and the complainant. Had this specifically prompted the correspondence between SPC and WSCC, the information may have attracted litigation privilege because it could be argued that the correspondence was for the dominant purpose of use in potential litigation between SPC and the complainant.
49. Having viewed the correspondence in question, the Commissioner is not convinced that it was directly prompted by any potential litigation between the complainant and SPC. It appears to him to concern a separate, although not unrelated, grievance SPC has with WSCC. As such the Commissioner is satisfied that the information is not covered by the LPP element of 'course of justice' as outlined at paragraph 40.

50. To conclude his consideration of this exception, in the Commissioner's view, the information in question does not concern the 'course of justice' because there was no litigation in progress at the time of the request and because the information does not attract legal professional privilege. Since the information cannot therefore be said to relate to the course of justice, even as defined more generically as the 'smooth running of the wheels of justice', then disclosing it cannot adversely affect the course of justice. His decision is therefore that the exception at 12(5)(b) cannot be applied to items 1 – 5 of the withheld information. It has not therefore been necessary to consider any public interest arguments or the arguments for disclosure that the complainant has provided.
51. Finally, the Commissioner has considered WSCC's application of regulation 12(5)(d) to items 1 – 5.
52. **Regulation 12(5)(d)** of the EIR says that:
- "... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;"*
53. In cases where regulation 12(5)(d) is engaged, the public authority must then carry out the public interest test under regulation 12(1)(b); the information can only be withheld if the, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Regulation 12(2) of the EIR also says that the public authority shall apply a presumption in favour of disclosure.
54. To form a decision on whether WSCC correctly applied regulation 12(5)(d) to this information, the Commissioner considered the proceedings in question, and whether:
- the confidentiality of those proceedings is provided by law
 - disclosing the information would adversely affect that confidentiality; and
 - in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
55. The Commissioner has first considered whether the information in question can be considered 'proceedings'.

Is the information 'proceedings'?

56. The Commissioner's guidance on regulation 12(5)(d) defines 'proceedings' as the means to formally consider an issue and reach a decision, including formal meetings, situations where an authority is exercising its statutory decision making powers, and legal proceedings.
57. The Commissioner considers that the word implies some formality and in each of the cases above, the proceedings are a means to formally consider an issue and reach a decision.
58. As already discussed, the information in question is contained in correspondence between SPC and WSCC and broadly concerns WSCC's processing of the village green application, and a request for information. Having had sight of the correspondence (detailed in the confidential annex) the Commissioner is satisfied it is formal in nature. He is prepared to accept that, through the correspondence, an issue is being considered, a course of action justified, and WSCC is exercising its statutory powers to broadly reach a decision.
59. He has also noted WSCC's argument that the information can be categorised as proceedings because it is pre-action communications regarding possible Judicial Review proceedings, with an allegation of maladministration contained in item 3 and the matter of a potential Judicial Review at the close of item 5.
60. Given paragraph 58, together with WSCC's argument above, the Commissioner is prepared to accept that the information contained in items 1 - 5 can be considered to be 'proceedings'. The Commissioner has then gone on to consider whether the confidentiality of these proceedings is provided by law.

Is the confidentiality of the proceedings provided by law?

61. The exception refers to the confidentiality of *proceedings*, not the confidentiality of the *information*, and that confidentiality must be "provided by law". The confidentiality may be provided in statute or derived from common law.
62. As mentioned above, WSCC has categorised this information as pre-litigation correspondence because, at that time, litigation (a Judicial Review) was in contemplation. In the course of his investigation, WSCC has told the Commissioner that common law provides pre-litigation correspondence with confidentiality. When pressed, WSCC said that section 32(2) of the Local Government Act 1974 provides a statutory prohibition on the disclosure of any information that was obtained in the course of, or for the purposes of, an investigation by the Local Government Ombudsman (LGO).

63. WSCC maintains that SPC was setting out information and seeking responses 'for the purposes of' putting a case to the LGO. It accepts that a claim was not with the High Court but argues that pre action discussions and negotiations form an important and necessary part of the proceedings. WSCC cited a Pre-Action Protocol for Judicial Review and said this encourages parties to exchange information at an early stage; WSCC considers it is logical that the confidentiality of proceedings should extend to cover the preliminary steps required by the Protocol. The Commissioner has reviewed the Ministry of Justice's Pre-Action Protocol¹. He has been unable to find a specific reference to the early exchange of information, but notes that this Protocol encourages parties to resolve disputes without litigation where possible.
64. However, the Commissioner's own guidance says that a common law duty of confidence would also apply to proceedings where they involve negotiations with another party, or information obtained from another party. The information thus obtained must have the quality of confidence; this means it must not be in the public domain already and it must be of importance to the confider and not trivial. There must also be an expectation that it would not be disclosed.
65. The correspondence in question certainly involves negotiations with another party ie SPC. The Commissioner has gone on to consider whether the information has the quality of confidence as outlined above. The Commissioner is satisfied that the information has not been placed in the public domain. That SPC has not consented to its disclosure implies that it considers the information important and not trivial. In addition, SPC has marked some – but not all – of the information as 'Confidential'. Since the correspondence marked 'Confidential' follows from earlier correspondence in the exchange and concerns the same matter, the Commissioner is inclined to the view that SPC would not expect any of this correspondence to be disclosed.
66. Having considered WSCC's arguments, and his own guidance, the Commissioner is satisfied that the confidentiality of the proceedings in question is provided by common law.

¹ https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv#IDATB1HC

Would disclosing the information adversely affect that confidentiality?

67. Disclosure under the FOIA in effect means disclosure to the world at large. WSCC has argued that the confidentiality of the proceedings in this case would be adversely affected if the information were to be disclosed because that confidentiality would, of course, be completely lost. The Commissioner accepts that this is the case and is mindful of his conclusion that the confidentiality of the information in question has been provided by law.

Public interest test

68. As regulation 12(5)(d) is subject to a public interest test, the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

69. Regulation 12(1)(d) requires that, where the exception in regulation 12(5)(d) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in maintaining the exception

70. WSCC argues against disclosure for the reason that it undermines the principle of confidentiality and undermines the ability of public bodies to make legal challenges against each other in contemplation of litigation.

Public interest in disclosing the information

71. Here, WSCC has acknowledged the EIR's presumption of disclosure under exception 12(2), and the general public interest in transparency and accountability around planning matters to ensure the public participates effectively in matters affecting the environment.

72. WSCC applied this exception during the Commissioner's investigation and as a result, the complainant has not provided any arguments for disclosure that are specific to this exception. However, the Commissioner has noted the comprehensive arguments that they have provided in relation to the other exceptions. He considers them to be broadly relevant, and has taken them into consideration here.

Balance of the public interest

73. The Commissioner's guidance notes that there is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law. The guidance says:

"For this reason, the grounds on which confidences can be breached are normally limited ... while in common law there may be a public interest defence to a breach of confidence."

74. The complainant considers that an exchange between two public bodies would attract a lower expectation of confidentiality. However, the Commissioner considers the obligation of confidence applies even, as in this case, when the parties involved are both public authorities.

75. The guidance goes on to say that the fact that the confidentiality is 'provided by law' also implies that there is a public interest in protecting it. Even where the confidentiality is not provided by statute, it may stem from a common law duty of confidence. So, where the exception is engaged there is always some inherent public interest in maintaining it.

76. The Commissioner agrees with WSCC that there is always a general public interest in public bodies being transparent and accountable and the weight of this general public interest argument is considerable.

77. The complainant has not, however, suggested any wrong-doing or maladministration on the part of WSCC or SPC, and the Commissioner does not see evidence of any in the requested information. Such evidence would strengthen the argument for disclosing this information. In line with his guidance, the Commissioner has also asked himself how far disclosing *this* information would add to public understanding and has concluded that it would not substantially. He appreciates it is of some interest to the members of Friends of Memorial Playing Field but considers it is of limited wider public interest.

78. In conclusion, having given both the presumption of disclosure at regulation 12(2) and the public interest arguments careful consideration, the Commissioner has nonetheless concluded that the public interest in maintaining the confidentiality of the communications between WSCC and SPC, provided by law, carries greater weight than the public interest in disclosing the information, in this case. He is consequently satisfied that the balance of the public interest favours maintaining the exception under 12(5)(d).

ITEMS 6 – 18 OF THE WITHHELD INFORMATION

79. Items 6 to 18 of the requested information are also summarised in the confidential annex.
80. WSCC withheld this element of the information – email correspondence from February 2013 – citing regulation 12(5)(b) as its basis for doing so. It has categorised the information as being covered by legal professional privilege (LPP). At internal review WSCC said that the exception at regulation 12(4)(e) could also be applied to it.
81. **Regulation 12(5)(b)** provides that information is exempt from disclosure if disclosure would have an adverse effect on the course of justice. The concept of 'course of justice' as described at paragraph 40 includes legal professional privilege (LPP).
82. Prior to this information being generated, WSCC had processed the village green application that FoMPF had submitted, and was considering its potential response to an objection that had been raised regarding this application. The correspondence in question concerns this response at an early stage.
83. The first question for the Commissioner to decide is therefore whether the information is subject to legal professional privilege. He must then decide if disclosing the information would have an adverse effect on the course of justice.
84. Legal professional privilege exists to ensure complete fairness in legal proceedings. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. Communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice. WSCC has suggested that the withheld information attracts litigation privilege.
85. The Commissioner has had sight of the information and notes that it broadly comprises email exchanges between WSCC and its legal advisers. Litigation was contemplated at this time, but not in progress. He is therefore satisfied that items 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 are confidential communications for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation and that it attracts litigation privilege. WSCC has confirmed to the Commissioner that these items have not been shared with any external third party, so their confidentiality remains

intact. Since he is satisfied that, more broadly, the information relates to the course of justice, as described at paragraph 40, the Commissioner has gone on to consider whether this would be adversely affected by disclosure.

Would the disclosure of privileged information adversely affect the course of justice?

86. For regulation 12(5)(b) to apply to the contents of a document, the council must demonstrate that disclosure of the requested information would have an adverse effect on the course of justice.
87. The Upper Tribunal has, in the past, decided that an adverse effect on the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. The Upper Tribunal also accepted that it was not a foregone conclusion that disclosing privileged information would adversely affect the course of justice, although it suggested that there would need to be special or unusual factors in play for this not to be the case.
88. WSCC maintains that disclosing this element of the information would adversely affect WSCC's ability to further its inquiry into the matter that is the subject of the correspondence, which was ongoing at the time of the complainant's request. Disclosure would undermine the integrity of the 'safe space' - ie the confidentiality - which it needs to discuss the matter with its legal advisers.
89. The Commissioner has considered the specific contents of the email exchanges in question and its context in relation to the matters on which advice was sought.
90. It does not appear to the Commissioner that the information is especially sensitive and almost two years have passed since it was generated. However, the prospect of legal proceedings was still a live issue at the time of the request. Consequently, the Commissioner is prepared to accept that disclosing this set of emails would have adversely affected the course of justice if it were to have been disclosed, for the reason WSCC provided at paragraph 88. He is satisfied, therefore, that regulation 12(5)(b) is engaged with respect to items 6 to 18 of the requested information in their entirety.

Public interest test

91. Finally, as regulation 12(5)(b) is also subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining this exception outweighs the public interest in disclosure.

92. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest in maintaining the exception

93. WSCC argues that disclosing this information would undermine the principle of confidentiality that legal professional privilege attracts and therefore the ability of public bodies to make legal challenges in contemplation of litigation.

Public interest in disclosing the information

94. WSCC accepts the presumption of disclosure under regulation 12(2) of the EIR – there is a public interest in transparency and accountability around planning matters to make sure the public participates in decisions affecting the environment.
95. The complainant argues that this information should be disclosed because there are now no legal proceedings underway, and may never be. They have not, however, suggested any maladministration on the part of WSCC.
96. The Commissioner has also considered the presumption of disclosure that the EIR provides at regulation 12(2).

Balance of the public interest

97. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice. Decisions by the Commissioner and the Information Tribunal have reinforced the position that disclosing information that is subject to LPP would adversely affect the course of justice by weakening this general principle of confidentiality upon which LPP rests.
98. Given the background to this complaint and the documents and correspondence that he has seen, it appears to the Commissioner that the actions of Steyning Parish Council may be the main interest behind the complainant's overall request to WSCC. While the Commissioner acknowledges that the complainant's personal interest in accessing

these items of the information, which concern WSCC deliberations, he is mindful that, in the context of the EIR, the 'public interest' refers to the broader public interest, rather than the interests of individuals. He accepts however, that these interests can sometimes intersect.

99. As noted at paragraph 77, the complainant has not suggested or provided evidence of any maladministration on the part of WSCC. Furthermore, having inspected the information, the Commissioner can see no obvious sign of unlawful activity or evidence of a significant lack of transparency where it would have been appropriate. Such evidence – the special or unusual factors discussed at paragraph 87 - might strengthen the argument for disclosing the information.
100. Irrespective of the fact that there are now no legal proceedings underway, the Commissioner has to consider the circumstances as at the time of the request and notes that the issues to which the legal advice relates were live at the time of the request. He therefore considers that this factor carries considerable weight in favour of maintaining the exception. Furthermore, he considers that disclosure would result in an adverse effect to the course of justice by revealing WSCC's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner's view, this carries some considerable weight in the balance of the public interest test.
101. Whilst he therefore accepts there is a public interest in authorities being held accountable for decisions, the Commissioner does not consider that disclosing the information in this case would serve the broader public interest to the extent that the disclosure of information subject to LPP would be warranted in this case.
102. The Commissioner has concluded that, notwithstanding the presumption of disclosure at regulation 12(2), the balance of the public interest favours maintaining the exception. He has, therefore, concluded that WSCC has correctly applied the exception at 12(5)(b) to items 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the withheld information.
103. WSCC says that regulation 12(4)(e) can also be applied to items 6 to 18. Since the Commissioner is satisfied that these items are excepted from disclosure under regulation 12(5)(b), he has not gone on to consider this exception.

Right of appeal

104. 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

105. 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.

106. 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

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