

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

Decision notice

Date: 24 June 2015

Public Authority: Wrexham County Borough Council
Address: Guildhall
Wrexham
LL11 1AY

Decision (including any steps ordered)

1. The complainant requested information relating to a particular footpath. Wrexham County Borough Council ('the Council') provided some information but withheld other information under regulation 12(5)(b) of the EIR. The Commissioner's decision is that the Council has correctly withheld the information on the basis of regulation 12(5)(b). The Commissioner does not require any steps to be taken.

Request and response

2. On 14 December 2014, the complainant wrote to Council and requested information in the following terms:

"Can I request copies of the following information which all relates to Footpath 19 in Gwersyllt.

1. *Copies of any records, notes or other form of information relating to intervention in the above subject by Councillor [name redacted].*
2. *As above for [name redacted] MP.*

3. *Copies of any correspondence between Wrexham CBC and [name and address of individual redacted], relating to the opening of Footpath 19 at [address redacted].*
4. *Copies of correspondence between WCBC Rights of Way officers and solicitors for the authority relating to the most recent application to divert Footpath 19".*
3. The Council responded on 5 February 2015 and provided some information relevant to the request but withheld information relating to part 4 of the request under regulation 12(5)(b) of the EIR.
4. On 9 February 2015 the complainant requested an internal review of the Council's handling of the request. He queried the absence of information provided relating to part 3 of the request and the Council's refusal to disclose information relating to part 4 of the request.
5. The Council provided the outcome of its internal review on 26 February 2015. It confirmed that it had provided all the recorded information held relevant to the request, with the exception of information relating to part 4 of the request. The Council upheld its decision that information held relating to part 4 of the request was exempt under regulation 12(5)(b) of the EIR

Scope of the case

6. The complainant contacted the Commissioner on 5 March 2015 to complain about the way his request for information had been handled. He expressed dissatisfaction with the Council's decision to withhold information relevant to his request under regulation 12(5)(b).
7. The scope of the Commissioner's investigation is to determine whether the Council should disclose the information held relevant to part 4 of the request, or whether it was correct in relying on regulation 12(5)(b) of the EIR as the basis to withhold the information.

Reasons for decision

Background information

8. The Council provided the Commissioner with some background information relating to the subject matter of this request ie the footpath in question.

9. The Council explained that it is both a "highway authority" under the Highways Act 1980 ('the 1980 Act') and a "surveying authority" under the Wildlife and Countryside Act 1981 ('the 1981 Act').
10. Section 53 the 1981 Act provides that the Council is required to keep a definitive map and statement of public rights of way within its county. The footpath in question is designated on the definitive map and statement for Gwersyllt. Persons may make applications under section 53(5) for modifications of the definitive map. Persons can also apply to divert footpaths. Where any person is aggrieved with a decision of the Council, an appeal can be made to the Planning Inspectorate under Schedule 14 of the 1981 Act.
11. Under the 1980 Act, the Council has certain powers and duties in respect of highways (a term which includes footpaths) including under section 130, an obligation "to assert and protect the rights of the public to the use and enjoyment of any highway". Section 130A of the 1980 Act provides individuals with the ability to serve notice on the Council, requiring the Council to exercise its duty to clear an obstruction of a footpath. Section 119 of the 1980 Act also provides the Council with the power to divert public paths where it is in the interests of the owner and/or the public.
12. The subject matter of this request relates to actions proposed by the Council to require the removal of an obstructing wall which is currently blocking access to the footpath, as well as an application received by the Council to divert the footpath around the obstruction in question. The footpath sits on land owned by private individuals who have been disputing the Council's involvement in relation to the footpath. The complainant is also disputing the Council's actions in respect of the footpath.
13. During the course of the dispute the Council advised that there has been a threat of judicial review action, following its decision to refuse diversion of the footpath. The Council has maintained its decision to refuse diversion of the footpath and the dispute, which has been going on since 1995, remains unresolved. The Council provided the Commissioner with a timeline of events from 1995 to 2015 relating to the footpath to demonstrate the long-running and contentious nature of the dispute.

Regulation 12(5)(b) – Legal professional privilege

14. 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 ('LPP').

15. The success, or not, of an application of regulation 12(5)(b) in terms of LPP will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

16. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Legal advice 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.
17. In order to attract LPP, 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 withheld information in this case comprises consists of legal advice requests and responses between the Council and its in house legal advisers. The Council considers the information attracts legal advice privilege. It also considers that the information is also potentially capable of being covered by litigation privilege. The Council provided the Commissioner with evidence to demonstrate that there was a threat of litigation made in September 2013, prior to the creation of the withheld information in this case.

19. The Commissioner is satisfied that the withheld information consists of communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice. Therefore, the Commissioner is satisfied that the withheld information is subject to legal professional privilege.
20. Information will only be privileged so long as it is held confidentially. The Council confirmed that the withheld information had only been shared with a small group of client officers within the relevant department dealing with matters relating to the footpath in question and had not been disclosed to the public or any third party. Based on the Council's representations the Commissioner is satisfied that the information was not publicly known at the time of the request, and there is therefore no suggestion that privilege has been lost.

Would disclosure have an adverse effect on the course of justice?

21. 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.
22. The Council asserts that there is a very real likelihood that disclosure would have an adverse effect on the Council and its position in the dispute surrounding the footpath in question. Disclosure could provide a potential advantage to any prospective claimant if a claim was made against the Council in the civil courts. The Council pointed out that a claim of legal action has previously been threatened and it considers that there is still a real likelihood that such a claim will be brought against the Council. The Council re-iterated that matters relating to the footpath have yet to be concluded and the legal advice remains relevant to the ongoing dispute. The Council considers non-disclosure is necessary to safeguard the openness of communications between a client and their lawyer to ensure the Council has access to full and frank legal advice.
23. In consideration of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the withheld information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld

information. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

24. The Council accepts that disclosure of the information would increase public awareness of matters relating to the footpath. It appreciates that disclosure would “contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and eventually, to a better environment”.
25. The Council acknowledges that public rights of way are an issue of public interest. The footpath in question has been the subject of recent media attention and local Councillors are actively involved in matters relating to the footpath.
26. The Council also accepts that there is an inherent public interest in ensuring that public authorities act in accordance with the law.
27. In correspondence to the Commissioner, the complainant indicated that the land owner intended to continue to pursue the matter through the Courts and other routes. He considers that disclosure of the legal advice is necessary to assess the legitimacy of the Council’s decisions relating to the footpath. The complainant is of the view that the land owners in this case will be prevented from getting a fair trial should the matter go to court, unless the requested information is disclosed.

Public interest arguments in favour of maintaining the exception

28. In this case, in relation to the public interest in favour of maintaining the exception, the Council put forward the following arguments:
 - The importance of maintaining the principle behind LPP in safeguarding the confidential relationship between a client and his legal adviser. Decisions made by public authorities must be taken in a fully informed context.
 - Disclosure could expose the legal position of the Council in any future proceedings or litigation which would adversely affect the Council’s ability to protect and defend its legal interest.
 - The legal advice is considered to be ‘live’ in that matters relating to the footpath have not been concluded and there is a possibility that legal action against the Council will be pursued. The legal advice will be likely to have an effect on any future litigation.
 - The importance of clients being able to seek and be given legal advice in a free and frank manner without fear of those communications being disclosed into the public domain.

- The Council is obliged to take action in relation to obstructions on a public highway. It is of the view that disclosure of legal advice relating to its powers in a contentious case could adversely affect its ability to pursue its duties in this case. These statutory functions are conducted in the public interest of ensuring access and enjoyment of public rights of way.
29. The Council accept that the EIR contain a presumption in favour of disclosure and there are strong public interest factors in terms of transparency and accountability. However, it is of the view that there is a strong public interest in safeguarding the principle and effectiveness of LPP, particularly where issues remain contested as in this particular case. The Council also considers that:

"...if advice was made public in such a case which is really a fairly private dispute between a landowner and a local authority then that principle would be shattered and disclosure would lead to such a live dispute being aired in the public domain with potential consequences for the public authority and its ability to make objective decisions in line with the relevant statutory framework"

In all the circumstances of the case, the Council concluded that the public interest in maintaining the exception outweighs the public interest in disclosure.

Balance of the public interest arguments

30. 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; namely safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
31. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. A disclosure of the withheld information in this case would provide a degree of transparency and reassurance in relation to the Council's decisions regarding the footpath. The Commissioner notes that there is also a general public interest in matters associated with the site as a result of its historical significance for the area.

32. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner believes it is important that the Council should be able to consult freely and frankly with its legal advisors and that its ability to defend itself fairly in the future is not compromised. The Commissioner considers that disclosure of the information would be unfair since parties seeking to challenge the Council's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the Council's ability to defend its legal position in current and future legal appeals/challenges. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
33. The Commissioner also considers that the timing of the request in this case weighs heavily in favour of maintaining the exception given the fact that matters relating to the footpath had not been concluded at the time of the request and there is a possibility of future litigation about the subject matter.
34. The Commissioner notes 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 large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the Council had misrepresented any legal advice it had received or evidence of a significant lack of transparency.
35. The Commissioner is satisfied that, in this case, the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Right of appeal

36. 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

37. 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.
38. 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

Anne Jones
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