

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

Decision notice

Date: 7 September 2015

Public Authority: Chorley Borough Council
Address: Civic Offices
Union Street
Chorley
Lancashire
PR7 1AL

Decision (including any steps ordered)

1. The complainant has requested various items of information in respect of the Chorley Local Plan 2012-2026 – Gypsy and Traveller and Travelling Showpeople Preferred Options. Chorley Borough Council initially refused the request by virtue of section 42 of the FOIA, however, following the Commissioner's intervention, the Council accepted that it should have considered this request under the EIR and confirmed that it was relying on regulation 12(5)(b) to refuse the request.
2. The Commissioner's decision is that Chorley Borough Council incorrectly considered this request under the FOIA, however was justified in its subsequent reliance on regulation 12(5)(b) of the EIR to refuse this request.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 14 October 2014, the complainant wrote to the Council and requested the following information in respect of the Chorley Local Plan 2012-2026 – Gypsy and Traveller and Travelling Showpeople Preferred Options:

"...copies of all Legal Advice (including formal Legal Opinions, emails and meeting minutes) provided in respect of the GTTA settled traveller site preferred options from 1st September 2012 up to and including 8th September 2014 to;

- *Councillors from Council Officer or other parties*
- *Council Officers"*

5. The Council responded on 11 November 2014. It stated that such information is subject to legal professional privilege and refused the request by virtue of section 42 of the FOIA.
6. Following the Commissioner's intervention, the Council undertook an internal review and wrote to the complainant on 8 January 2015. It confirmed that it was continuing to rely on section 42 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner 9 January 2015 to complain about the way his request for information had been handled. He confirmed that as far as he is aware, there is no on-going legal process in respect of the information, therefore he does not accept the Council's contention that there is a legitimate public interest in maintaining the exemption.
8. During the course of the Commissioner's investigation, it became evident that the complainant was in receipt of some information falling within the scope of this request, including a redacted copy of the Chorley Local Plan 2012-2026 dated 3 June 2014, which the Council informed the Commissioner it was refusing by virtue of regulation 13 on the basis that it constituted personal information. However, as the Commissioner considered this information did not engage regulation 13 of the EIR, he was able to agree the disclosure of an unredacted copy of the report. An analysis of regulation 13 of the EIR does not therefore form part of the scope of this notice.
9. Having considered the withheld information, the Commissioner was able to secure the disclosure of additional documents or links to documents from the Council. These documents do not therefore fall within the scope of this notice.
10. The Commissioner has first investigated whether the Council has considered this request under the appropriate legislation and then gone on to consider the Council's reliance on regulation 12(5)(b) of the EIR.

11. During the course of the Commissioner's investigation, the Council also confirmed that it is relying on regulations 12(4)(d), 12(4)(e) and 12(5)(e) of the EIR in respect of this information. However, as the Commissioner has concluded that regulation 12(5)(b) is engaged in respect of this information, he has not gone on to consider these further exceptions.

Reasons for decision

The appropriate legislation

12. The Commissioner notes that the Council considered this request under the FOIA. However, the Commissioner considers that the information is environmental, as defined by regulation 2 of the EIR.
13. Regulation 2(1) of the EIR defines what 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form 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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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...'

14. The information requested relates to the land and its potential change of use, which constitutes a 'measure' affecting the land. The Commissioner is therefore satisfied that the information is environmental as defined by regulation 2(c) of the EIR.
15. https://ico.org.uk/media/for-organisations/documents/1641/guide_to_environmental_information_regulations.pdf

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

16. Regulation 12(5)(b) of the FOIA states that information is exempt if 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 or a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
17. In this case, the Council has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP.
18. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test for adversely affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."

19. Consideration of the specific circumstances is however required when addressing the public interest test.
20. Regulation 12(5)(b) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
21. There are two types of privilege - litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
22. The Council is relying on litigation privilege as it has stated the advice was given at a time when litigation was very much a possibility as it was a very controversial issue. It further confirmed that there was already a history of litigation over the issue.
23. The Commissioner has viewed the withheld information and is satisfied the information represents confidential communications between a client

and legal advisor acting in their professional capacity, and made for the sole purpose of obtaining legal advice. The Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of this information and has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

24. The EIR clearly state under regulation 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
25. The Commissioner would point out that there is also a general public interest in favour of transparency and accountability in allowing scrutiny of how public money is spent and ensuring value for money when purchasing goods and services including the procurement process.
26. The Commissioner also recognises that disclosure may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions and is mindful that the issue is controversial in nature and that this inevitably means there is a strong public interest in disclosure of the information.

Public interest arguments in favour of maintaining the exception

27. The Council has highlighted that the general public interest in maintaining the exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice.
28. This is consistent with the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023) that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
29. This was further reinforced in the case of *DCLG v Information Commissioner & WR* [2012] UKUT (AAC) (28 March 2012) which concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.

30. The timing of the advice is also a significant factor and the Commissioner notes that the advice both at the time of the request, and to date, remains relatively recent having been provided between 2012 and 2014.
31. In this particular case, the Council has argued that the issue remained live at the time of the request with a legal challenge to the Local Plan, and in particular, the preferred site a real possibility.
32. It further argued that the public interest favours equality between the parties, yet noted that there is no equivalent option for the Council to obtain legal advice from a challenger. It stressed the unfairness of such an unequal scenario where the challenger is able to obtain the legal advice of its opponent via the EIR, whilst there is no such avenue open to the Council, and argued that this was a further factor in maintaining the exception.

The balance of public interest test

33. As stated in paragraphs 24 to 26 of this notice, the Commissioner acknowledges the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR, and appreciates the general public interest in transparency and accountability in relation to the decisions made by public authorities. The Commissioner has also accepted that the controversial nature of this issue means that there will be a strong public interest in disclosure.
34. However, the Commissioner is also mindful that at the time of the request, the advice was recent and the issue live. Additionally, given the particularly strong public interest in safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, there would need to be particularly strong public interest factors in favour of disclosure of the information.
35. This would usually include factors 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. The Commissioner's investigation of this case, has provided no obvious signs that these factors were present to tip the balance in favour of disclosure.
36. The Commissioner has therefore concluded that the balance of public interest is weighted in favour of maintaining the exception and consequently, that the Council was justified in its reliance on regulation 12(5)(b) of the EIR.

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