

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

Decision notice

Date: 26 January 2016

Public Authority: Hampshire County Council
Address: The Castle
Castle Avenue
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant requested information about the creation of a section 106 agreement relating to planning approval on a planning application for a retirement village. The council provided the majority of the information which it holds however it withheld some discussions regarding the section 106 under Regulations 12(5)(b) (course of justice), 12(4)(e) (internal communications) and 12(4)(d) (unfinished documents). The complainant considers that the information should have been disclosed, and that further information must be held in respect of the request.
2. The Commissioner's decision is that the council has correctly applied all 3 exceptions and that the public interest rests in maintaining the exceptions. He has also decided that on a balance of probabilities, no further information is held falling within the scope of the request.
3. The Commissioner does not require the council to take any steps.

Request and response

4. Following an earlier request dated 30 June 2014, the complainant made a request on 17 September 2014 for the following information:

"Please find copies of comments to [name redacted] relating to information supplied at our request under Environmental Information Regulations 2004 as to how the S106 for transport for Bramshott Place Village (Liphook) Ltd was derived specifically clauses 3(m) to 3(p), clause 10 and schedule 4 and schedule 5 which references to the above clauses...

We are asking for full disclosure of ALL information within the meaning of the Environmental Information Regulations 2004 of information appertaining to how and why the above clauses were inserted with said S106."

5. The council responded on 22 December 2015. It provided some information however it withheld other information under Regulation 12(5)(b) (course of justice). It also confirmed that no further information was held beyond that which it had applied the exception to.
6. Following an internal review the council wrote to the complainant on 6 March 2015. It confirmed that the information is exempt under Regulation 12(5)(b) and Regulation 12(4)(e)(internal communications).

Scope of the case

7. The complainant contacted the Commissioner on 29 June 2015 to complain about the way his request for information was handled. Although the initial scope of the complaint was unclear, the Commissioner clarified with the complainant that his investigation would focus on the request of 17 September 2014 as the complainant had informed the council that he did not intend to make a complaint over its response to the first request, and that request was out of time to make a complaint to the Commissioner in any event.
8. The Commissioner therefore considers that the focus of the investigation is the information which the council had withheld under Regulation 12(5)(b) and Regulation 12(4)(e) and whether any further information is held falling within the scope of the request.
9. During the course of the investigation the council also applied Regulation 12(4)(d) (unfinished documents) to one document. The Commissioner has also considered the application of this exception.
10. Part of the complaint also related the council's disclosure of a document, 'The Final Community Travel Plan', which it had not disclosed in response to the complainant's initial request but provided in response to a different, specific request at a later date. The complainant had

subsequently discovered the existence of the document and the complainant had made a separate specific request for this.

11. The complainant asked the council to explain why it had failed to provide this in response to his initial request. The Commissioner has considered this matter separately as it relates to the first request rather than the request of 17 September 2015. He will write to the complainant clarifying his view on this part of the complaint separately. It is not therefore considered further within this decision notice.

Reasons for decision

Background to decision notice

12. The council had previously approved a developers planning application to develop and build a retirement village. In doing so it had obtained a section 106 agreement requiring the developer to agree certain matters in order for the development to be approved. Part of this agreement was outlined in a document 'the Framework Community Travel Plan' which included a term stating that a mini bus service would be provided 'free of charge' by the developer, or its successors in title, for the benefit of residents, to allow residents and staff to get to shops, the railway station etc. A bond was also agreed requiring the maintenance of the bus service for the life of the retirement village. Although the grounds in which this bond would be paid are arguable, it was related to the provision of the bus service.
13. The complainant made a complaint to the council on behalf of the residents, arguing that the management organisation running the village on behalf of the developers was charging residents for the service via the management fee each resident pays. He argued that as the section 106 agreement referred to the service as 'free of charge' residents should not have be required to pay any fee for this through the management fee. The complainant asked the council to enforce against the developer for a failure to abide by the requirements of the section 106 agreement as regards the free bus service.
14. The council agreed to look into the issue, and its initial correspondence was clearly sympathetic and supportive of the complainant's position. However it subsequently informed the complainant that it had no grounds upon which it could take successful enforcement action. It outlined that it had no direct contractual relationship with the developer under which it could enforce that the bus service was provided 'free of charge' to residents. It also said that it was unclear from the wording of the agreement whether the term 'free of charge' referred to residents

not having to pay for the service, or whether it referred to the service being provided 'free of charge' to the council. The complainant expressed his opinion that it was clearly intended for the benefit of residents and provided evidence that that was the case.

15. Compounding the issue further, the section 106 referred to a Community Travel Plan as providing the provisions which 'filled out' the requirements of the section 106 insofar as the bus service was concerned. There are 2 versions of this, one of which is unclear, however the complainant argues that the later version, 'The Final Community Travel Plan' does provide further evidence that the service was intended to be free to residents and paid for by the developer. This document was not initially provided to the complainant in response to his requests, however it subsequently became clear to the complainant and residents that it existed and it was provided by the council in response to a specific request for it. The complainant argues that this was deliberately withheld from him as (he considers) it provides further proof that the 'free of charge' term refers to being at no cost to residents, however the council clarified that the document was drafted at some point after the section 106 had been agreed and so fell outside of the terms of his previous request.
16. Following further correspondence the complainant submitted the FOI request outlined in paragraph 4 above. The council responded by supplying some information but applied Regulation 12(5)(b), and 12(4)(e) to other information.
17. As regards the application of Regulation 12(5)(b) the council argues that the relevant information is subject to legal professional privilege. It also reiterated its position as regards the earlier request, that there was no further information held on the initial discussions surrounding the term 'free of charge' being introduced within the section 106 beyond that already provided to the complainant in response to the first request and the second part of this request.

Regulation 12(5)(b)

18. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that is disclosure would adversely affect –

"the course of justice, 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."

19. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met; (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on one or more of the factors cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.
20. Regulation 12(5)(b) of the EIR, specifically the reference to the 'course of justice', and section 42 of FOIA share common ground in that both may cover information that attracts legal professional privilege. However, in contrast to section 42 of FOIA, a public authority seeking to apply regulation 12(5)(b) of the EIR is required to take the additional step of demonstrating that disclosure would adversely affect the course of justice.
21. The council argues that the information is subject to legal professional privilege, and that its disclosure would have an adverse effect upon the course of justice.

Is the information subject to legal professional privilege?

22. The Commissioner notes that withheld information relates to communications between the Council's legal service and highways development control team and are comprised of a client seeking and receiving legal advice. The dominant purpose of those communications was to obtain or provide legal advice.
23. In addition to legal advice relating to issues raised by the complainant the emails also contain legal advice in respect of a potential variation of the s106 Agreement. The Council again contends that the relevant emails consist of communications between lawyer and client for the dominant purpose of seeking and providing legal advice.
24. Having considered the information the Commissioner is satisfied that the information is subject to legal professional privilege.

Would a disclosure of the information have an adverse effect upon the course of justice?

25. The Commissioner is satisfied that in the case of information which is subject to legal professional privilege a disclosure of such information will have an adverse effect upon the course of justice generally. It will undermine the confidence which legal professionals and their clients have that the advice will be retained in confidence. The risk is therefore that a chilling effect might occur where lawyers and their clients may not feel able to seek frank and robust advice, and where any weaknesses in

a legal argument are not discussed fully for fear that they may disclosed and damage the clients legal position.

26. The council argues that the advice relates to matters which are still under discussions, and where there remains a possibility that litigation may take place over the issue. In evidence of this it advances letters from the complainant which suggests that action may be taken against the council if it does not enforce the s106 requirements.
27. The council argues that disclosing the withheld information would effectively be disclosing the legal advice it has received from its lawyers regarding the council's understanding of each party's legal obligations. It considers that if legal action is taken against it it would need to rely upon that advice to defend its position. In any event, its current policy/decisions on this issue are driven by the advice contained within the privileged information.
28. The Commissioner is satisfied on the basis of these arguments that a disclosure of the information would have an adverse effect upon the course of justice.

The public interest

29. Regulation 12(1)(a) provides that where Regulation 12(5)(b) is engaged then a public interest test is carried out. The test is whether, in all of the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) provides a presumption towards the disclosure of the information.

The public interest in the information being disclosed

30. The central public interest in the information being disclosed lies in creating greater transparency on the actions of the council when approving the planning application with the section 106 agreement, and the legal obligations of the respective parties following this.
31. As stated, the resultant situation is that residents of the village currently contract to pay a fee via the management fee for transport to be provided to them. The residents argue that this should be free of charge to them, whilst the developer argues that there is no obligation on it to provide a free bus service to residents. It argues that each resident has agreed to pay a fee for the bus service as part of their management fee, and that it is complying with the terms of the section 106 as it is providing a bus service at no cost to the council.

32. The council's initial stance appeared sympathetic to the views of residents, however it subsequently wrote stating that it had no legal basis to take action to enforce the provisions of the section 106. Greater clarity via a disclosure of the withheld information may aid residents in establishing the legal situation more clearly and clarify any potential legal grounds to further their cause with either the developer or the council.
33. There is a wider public interest within this than simply clarifying the terms of the 106 agreement. The bond, which was set up to ensure the continuance of the mini bus service, is paid back in instalments to the developer as the service is continued at specific periods. The complainant argues that the service is not being run in accordance with the section 106, and therefore the bond should be retained by the council.

The public interest in the exception being maintained

34. 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*".
35. 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.
36. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, 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..."
37. This 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.

38. 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 legal advice be subject to routine or even occasional public disclosure without strong 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.

39. 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."

40. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly, and that it acts on robust advice when making decisions. 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. This would unbalance the position in any litigation that followed.

41. The public interest in maintaining legal professional privilege is inherently strong. To outweigh this requires circumstances where there are substantial amounts of public money 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. None of these factors appear relevant within this case.

Balance of the public interest arguments

42. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make. In this case, the initial stance of the council has seemingly been reversed based upon the advice it received from its legal representatives. There is a public interest in the advice being disclosed therefore, particularly as it may appear that the issues relate entirely to the drafting of the section 106 agreement and its associated documents. The Commissioner must also bear in mind however that the residents to may have a course of action open to them to take the case to the Local Government Ombudsman for potential maladministration if they believe that the fault lies with the council in this respect. If residents were to

take a further action on this matter there is a strong possibility that the council would need to rely upon the legal advice in order to defend its position.

43. Whilst the Commissioner empathises with the plight of the residents in this situation he must bear in mind the very strong inherent public interest in legal professional privilege being maintained. Having considered the withheld information in the wider context of this case, the Commissioner has decided that the public interest in favour of maintaining the exception outweighs the public interest in the disclosure of the information.
44. The Commissioner's decision is that the council has correctly applied Regulation 12(5)(b) to the information it has withheld under this exception.

Regulation 12(4)(e)

45. Regulation 12(4)(e) provides that information may be exempted from disclosure where the request involves the disclosure of internal communications.
46. The council has applied the exemption to a small amount of information, several emails with between highways development control officers, which do not involve seeking or provision of legal advice. The council said that the emails involved internal thinking space and was necessary in order to consider the best way forward in light of the legal advice provided and to consider whether further legal advice was required. The Commissioner notes that the dominant purpose of emails is not to address the section 106 agreement but to consider how best to respond to the complainant's questions.
47. The Commissioner has considered the emails and is satisfied that they are internal communications. The exception in Regulation 12(4)(e) has therefore been engaged.
48. Regulation 12(1)(b) provides that where Regulation 12(4)(e) is engaged then a public interest test is carried out. The test is whether, in all of the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Again Regulation 12(2) provides a presumption towards the disclosure of the information.

The public interests in the exception being maintained

49. The public interest considerations relating to regulation 12(4)(e) relate to the protection of thinking space, and the ability to have full and frank discussions without fear that such discussions will be disclosed.
50. In this case the council asserts that the protection of thinking space is particularly important, as the information relates to the discussions of legal advice, whether further advice might be needed and what to do in light of the advice that has been received.
51. It argues that there is public interest in preserving a safe space to seek and consider legal advice provided without external interference or oversight. The issue was live at the time the emails were sent and remains live to date as the matter has not been resolved and threats made by the complainant to take action against the Council including potential legal action have not been withdrawn.
52. The Commissioner has considered the withheld information. Regulation 12(4)(e) has only been applied to a very small number of emails which do not relate to the construction of the section 106 agreement or the variation order directly. The redactions are extremely minimal.

Public interest in the information being disclosed

53. The Commissioner considers that the public interest in a disclosure of this information would be extremely minimal at best – it relates more to how the council handled the questions of the complainant rather than any legal consideration of the section 106.
54. The Commissioner recognises, and has taken into account the general public interest in demonstrating greater transparency and allowing scrutiny as to how the council took action to seek to resolve the issue.
55. The Commissioner considers however that a disclosure would be of very limited value (if any) to the complainant's interests in the construction and definition of the section 106 himself. It would also therefore not be of any greater public interest to the public as a whole, other than through a general public interest in creating greater transparency on council actions and issues. A disclosure would not however aid in understanding the intentions behind the clause 'free of charge' nor would it aid in understanding the council's approach to the definition. More widely than the private interests of residents, the public interest in the disclosure of the information would be limited to that concerning greater transparency.

56. The Commissioner has balanced the relatively weak arguments in favour of disclosure against the stronger arguments for allowing internal thinking space and full and frank deliberation. His decision is that the public interest rests in the information being withheld in this instance. The council was therefore correct to apply Regulation 12(4)(e).

Regulation 12(4)(d)

57. The council also applied Regulation 12(4)(d) to a draft variation order. It mentioned the fact that it was looking at a variation order to the complainant in correspondence previously, and in its earlier correspondence it suggested that it might seek to re-address the provision for the bus service with the developer via this agreement.
58. The variation order was not however signed or agreed and status at the time of the request remained uncertain. The council has therefore applied Regulation 12(4)(d) to this information on the basis that it is an unfinished document. The council has said however that negotiations may re-open at some point in the future regarding the variation order.
59. The Commissioner accepts that the document remains in draft and therefore that the exception is engaged. Again Regulation 12(1)(b) requires a public interest test to be carried out under the same terms.

The public interest in the information being disclosed

60. The central public interest in the disclosure of this documents surrounds greater transparency on the issue of the section 106 agreement and how the developer and the council are considering (or at least, have considered) varying its requirements.
61. There is also a public interest as it would, to an extent, shed further light on the issue of the free bus service, the potential amendments which were being considered and potentially why that was being considered (although the complainant is already aware of this to an extent).

The public interest in the exception being maintained

62. The council argued that the draft document contains information which has been the subject of legal negotiations in the past and may be further negotiated in the future if the matter is pursued again at a later date between the Council and developers. It said that it is not unusual for variation agreements to be entered into a considerable amount of time after the original agreement and while it is usual practice for agreements to be publicly available once completed, thereby providing

transparency, it would not be in the public interest for earlier drafts to be in the public domain before the matter is finally completed as this would remove the availability of a safe space in which negotiations could take place.

63. The Commissioner has considered this argument and agrees that whilst there remains the potential for further negotiation over the issues there is a strong public interest in protecting the safe space within which the parties to the agreement can discuss, negotiate and seek to agree terms.
64. The Commissioner therefore considers that the council was correct to apply Regulation 12(4)(d) to this information.

Is any further information held

65. Part of the complainant's main issues with the council's response is its failure to find any further information specifically discussing the inclusion of the 'free of charge' term within the section 106. The council carried out searches in respect of the first request and provided the information which it did hold, and reiterated that no further information is held in respect of the second request.
66. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
67. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
68. In response to the Commissioner's initial inquiries the council reiterated that after exhaustive searches it could confirm that no further information was held. The Commissioner therefore asked the council to confirm what searches it had carried out in order to establish that no further information is held.
69. The council confirmed that it had carried out extensive searches over the course of both requests and disclosed all of the relevant information which was not exempt to the complainant.
 - It confirmed that no information relevant to the request has been destroyed. The legal files have been retained, and where officers

have left the authority the information they held has also been retained.

- It confirmed that it had asked the solicitors company who had drafted the s106 for any relevant information and had considered this and disclosed it where it fell within the scope of the request and no exemptions applied.
 - It confirmed that it had searched the county council legal files.
 - It confirmed also that it had carried out searches of both manual and electronic files in the Environment Department.
 - It confirmed that it had carried out searches of information in respect of instructions, negotiations, or discussions in respect of the section 106, and provided the information which it had located other than where it had applied an exemption. This information included a copy of the instructions sent to the solicitors and also a version of the agreement with tracked changes. It has also supplied a considerable number of relevant emails and documents previously.
 - It confirmed that officers who had first-hand knowledge of the matter carried out searches in light of their prior involvement. This also involved a search of a shared email account where emails from an officer who has since left the authority were retained in order that they could be located if necessary.
 - It confirmed finally that it had established that the firm of solicitors who drafted the section 106 were not instructed after 2013 and that no correspondence exists or existed with these after that point that could be relevant to the request.
70. Given the clear descriptions of the extensive searches which the council has carried out over the course of the requests the Commissioner is satisfied that on a balance of probabilities no further information is held by the council falling within the scope of the request.

Right of appeal

71. 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

72. 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.

73. 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