

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 16 June 2016

**Public Authority:** South Gloucestershire Council

**Address:** Council Offices  
Castle Street  
Thornbury  
South Gloucestershire  
BS35 1HF

#### **Decision (including any steps ordered)**

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1. The complainant has made a request to South Gloucestershire Council ("the council") for information about a specific planning application. The council disclosed information in response and also withheld some under the exception provided by regulation 12(5)(b) of the Environmental Information Regulations ("the EIR"). The complainant contested the council's application of the exception and whether all relevant information had otherwise been disclosed.
2. The Commissioner's decision is that the council has correctly applied regulation 12(5)(b), and that no further relevant information is likely to be held. However the council failed to provide its refusal notice within 20 working days following the date of receipt of the request and therefore breached regulation 14(2).
3. He does not require any steps to be taken.

#### **Request and response**

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4. On 27 March 2015 the complainant wrote to the council and requested information in the following terms:

*At present as part of planning application PK04/1965/O works have been proposed to the course of the Folly Brook Tributary south of Howsmoor Lane alongside Vale wood, land registry title plan GR 331385. Amended proposals regarding this part of the Folly brook, termed an alternative treatment, were forwarded to the council by*

*the developer in late 2013 and 2014 which I understand the council rejected.*

- 1) I request copies of the alternative plans submitted to the council and any supporting documentation sent with the plan. Confirm when these documents were received by the council.*
- 2) I request copies of all correspondence sent to or received from the developer his agents and subcontractors dealing with the alternative plan submitted to the council. Including letters, e-mails, texts, and faxes. I request copies of any additional supporting documentation received subsequently to the initial plan being lodged.*
- 3) I request copies of all South Gloucestershire Council internal correspondence regarding the Folly brook, alternative treatment. Including letters, e-mails, texts, faxes and memos. I request a list of all meetings and attendees where the Folly brook, alternative treatment was an agenda item or arose in the discussion of other issues. I request copies of the minutes of these meetings and any action items arising from them.*

*If any documents concerning the alternative treatment of Folly brook have been withheld from this request list them and provide the reason they have been withheld.*

*How I would like the information:*

*Pdf and or word file e-mailed  
Posted paper report.*

5. The council responded on 30 April 2015 and disclosed held information.
6. The complainant requested an internal review on 15 May 2015.
7. Following an internal review the council wrote to the complainant on 1 July 2015 and advised that its initial response was not complete, and that a further response would be issued.
8. The council proceeded to issue a further response on 10 September 2015. In this it confirmed that no additional information was held in relation to parts 1 and 2 of the request. The council also advised that it intended to speak with a specific council officer in order to clarify whether further information was held in relation to part 3. That council officer wrote further to the complainant on 28 September 2015 and confirmed they were not aware of any further held information, but alluded to the possibility of information being held by Legal Services.

## Scope of the case

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9. The complainant initially contacted the Commissioner on 21 July 2015 to complain about the way his request for information had been handled, and specifically that the council's disclosure was incomplete.
10. During the course of the Commissioner's investigation the council was asked to clarify its position in respect of whether further information was held by Legal Services. The council subsequently identified further held information which it sought to withhold under regulation 12(5)(b). The complainant then confirmed that he disputed the application of this exception.
11. The Commissioner considers the scope of this case to be the determination of whether the council has correctly withheld information under regulation 12(5)(b), and whether the council is likely to hold further recorded information relevant to the request.

## Reasons for decision

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### Is the information environmental?

12. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(c), any measures that will affect, or be likely to affect, the elements referred to in 2(1)(a), will be environmental information. The requested information relates to the ownership and development of land. The Commissioner therefore considers that the request should be dealt with under the terms of the EIR.

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

13. Under this exception a public authority can refuse to disclose information on the basis 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.
14. The council provided a copy of the withheld information to the Commissioner. The Commissioner has identified that it represents various communications (both requesting and providing legal advice) between solicitors employed by the council, external solicitors, specific

council officers, and a council member. On this basis the Commissioner accepts that the withheld information represents communications that are subject to legal professional privilege.

15. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
16. 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 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.
17. In the circumstances of this case the Commissioner understands that the council (in its role of Local Planning Authority) is party to, and enforcing authority of, a Section 106 agreement with Taylor Wimpey ("the developer") and other third parties, and that the legal advice relates to a boundary dispute that has developed between the developer and the complainant (who is not a party to the Section 106 agreement). The council has elaborated that it would not typically become involved in a private dispute, but that the council's need to ensure the deliverability and enforceability of the Section 106 agreement has required the council to seek legal advice on the matter.
18. The council considers that the matter has the possibility of resulting in litigation to which it is conceivable the council could be joined as a party. The council also considers that privilege has not been lost through the information being disclosed to any third parties.
19. Having considered the above, the Commissioner recognises that the information is subject to legal advice privilege, and that its disclosure would affect the council's ability to defend itself if faced a legal challenge in connection with the matter. The council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.

20. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

The public interest test

21. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, 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 is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

*The public interest in disclosure*

22. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
23. In the circumstances of this case, the complainant has explained to the Commissioner that the information sought relates to an ongoing land boundary dispute with the developer. The boundary is based upon a watercourse named 'Folly Brook', and the exact siting of the boundary (which has been complicated by prior inaccurate mapping) has significant implications for both the complainant and the developer in relation to how the watercourse will be managed.
24. The complainant also argues that because the dispute relates to a planning application, there is an expectation that correspondence relating to it (including that subject to legal professional privilege) should be published as a matter of routine. In addition to this, the complainant has raised a number of concerns including that the planning permission granted to the developer is invalid, and that the council has failed to adhere to its varied responsibilities as a Local Planning Authority. The complainant also considers that the prior disclosure (to the developer) of a letter authored by the council and addressed to himself on the matter represents a 'double standard', and that the disclosure of the withheld information would therefore provide him with the same advantage as the developer.

*The public interest in maintaining the exception*

25. As already indicated, the Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an

adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.

26. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges, and may deter public authorities from seeking legal advice. The Commissioner's published guidance<sup>1</sup> on regulation 12(5)(b) states the following:

*In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.*

27. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without needing to disclose its legal advice in advance. This would provide an unfair advantage to opposing parties, who would not be likewise constrained by having their legal arguments known in advance.
28. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

*...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...*

29. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect, as described above.
30. The council has confirmed in its submission that the withheld information represents the council's position in respect of ongoing

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

negotiations between the complainant and the developer regarding the disputed boundary. The council states that it is necessary for it to consider its position regarding the matter because it must ascertain whether it can support (as the Local Planning Authority) any proposals made by the developer. The disclosure of the information would undermine the council's right to consider its legal position and may additionally expose the council to a claim of breach of confidentiality in relation to its own negotiations with the developer.

31. It is evident to the Commissioner that the dispute remains live and unresolved, and that the withheld information represents the council's legal position. As the matter may still be referred to the courts it is reasonable for the Commissioner to accept that disclosure would disadvantage the council by making its legal arguments publically known in advance.

*Balance of the public interest*

32. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the council.
33. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions. However, having appraised the withheld information itself, and the wider circumstances of the matter, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the council's right to obtain legal advice in confidence.
34. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
35. Having considered the context of the request, the Commissioner recognises that the complainant has a private interest in the information, as it relates to a private dispute with the developer. This dispute is the subject of ongoing negotiations, and it is reasonable for the Commissioner to consider that should the matter remain unresolved it may be referred to the courts. In such a scenario it is not the purpose of the EIR to circumvent any due legal remedies, and having considered that this dispute may have implications for the associated Section 106 agreement between the developer and the council, the Commissioner



perceives that there is a public interest in ensuring that the course of justice is not adversely affected in the resolution of this matter.

36. Whilst the Commissioner has noted the complainant's position that the information relates to a flawed planning process, there is no immediate evidence to the Commissioner that suggests the council has acted inappropriately in its role of Local Planning Authority. It is also reasonable for the Commissioner to consider that wider concerns about the Section 106 agreement and attached planning permission would need to be referred to the relevant public authority.
37. Having considered the above Commissioner is satisfied that the public interest favours maintaining the exception, and that the council has correctly applied regulation 12(5)(b).

### **Regulation 5(1) – Duty to make information available on request**

38. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions that may apply.

#### *The complainant's position*

39. The complainant has advised the Commissioner that he considers it plausible that further information is held, including correspondence undertaken between the council and the developer, and internal records predating the council's discussion of the subject matter during meetings (of which the Commissioner understands minutes have already been disclosed).

#### *The council's position*

40. The council has informed the Commissioner that no further information has been identified that has not already been disclosed or else withheld under regulation 12(5)(b).
41. The council considers that all information relevant to the request would be held as electronic records, either in the form of email correspondence or else held as documents in shared folders on the council's network. These records have been searched using keywords including the name of the complainant, the name of the developer's representative, as well as the name ascribed to the area of land.
42. The council considers that the request is specific enough to allow a definitive response, particularly in that the subject matter means that all relevant held information is familiar to the planning officer responsible for overseeing the Section 106 agreement.



43. On the basis of the above the council does not consider further information to be held.

*The Commissioner's conclusion*

44. The Commissioner must decide on the balance of probabilities whether further information is held by the council that would fall within the scope of the request.
45. In the circumstances of this case it has already been identified by the Commissioner that at that date of the complaint being made, the council's position in respect of the request remained unclear, and it is reasonable for the Commissioner to consider that this has contributed to the complainant's concerns about the completeness of the disclosed information.
46. As part of the ICO's investigation, further information has been identified and subsequently considered by the Commissioner under regulation 12(5)(b). In addition to this the Commissioner has also identified that logical searches have been undertaken by the planning officer responsible for the substantive matter, and that these have not identified other held information. Although the Commissioner has noted the complainant's arguments, no definite evidence that conflicts with the council's position has been presented. On this basis the Commissioner has reached the decision that no further information is likely to be held.

**Regulation 14(2) – Refusal of a request**

47. Regulation 14(2) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
48. In the circumstances of this case the council applied the exemption provided by regulation 12(5)(b) at a late stage in the ICO's investigation. The Commissioner must therefore find a breach of regulation 14(2).

**Other matters**

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49. In the circumstances of this request and initial investigation by the ICO, the council repeatedly referred to the possible existence of held information, but seemingly failed to access it and consider under the terms of the EIR. The failure to do this subsequently impacted on the length of the ICO's investigation.

50. The Commissioner would refer the council to its responsibilities under the EIR, including the requirement to provide a clear and comprehensive response that complies with regulation 5(1) and regulation 5(2).

## Right of appeal

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51. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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**