

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

Decision notice

Date: 15 March 2018

Public Authority: Warwickshire County Council

Address: Shire Hall
Warwick
CV34 4RL

Decision (including any steps ordered)

1. The complainant requested information with regards to an application to register a piece of land as a new town or village green. Warwickshire County Council (the council) provided the information it held but redacted one email relying on 12(5)(b) of the EIR as it considered that the information was subject to a claim of legal professional privilege (LPP).
2. The Commissioner's decision is that the council is able to rely on regulation 12(5)(b) of the EIR to redact the email.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 2 October 2017 the complainant requested the following information from the council in relation to Rokeby playing fields:

"All instructions and communications (including by email) to and from the Inspector from the council in relation to the application to register the land as a new town or village green (including on the issue of timing). If there have been any verbal

communications and/or instructions then we would also ask for a summary of those or an undertaking that there have been none.

All communications from commons registration officers to other officers of the Council in relation to the application to register the land as a new town or village green (including on the issue of timing). If there have been any verbal communications and/or instructions then we would also ask for a summary of those or an undertaking that there have been none.

A list of all commons registration authority officers and confirmation of whether they have had any involvement with any matter connected to the development of the land.”

5. The council responded on the 30 October 2017 providing 181 pages of information, redacting one paragraph from page 162 as it considered it to be legally privileged and exempt under regulation 12(5)(b) of the EIR. This redacted information being an email dated 31 July 2017.
6. With regards to the part of the complainant’s request asking for a summary of any verbal communications, the council advised that this has not been provided as the EIR does not require the council to create recorded information to satisfy a request.
7. On 26 November 2017 the complainant requested an internal review in relation to the redacted email as she considered it should be provided.
8. The council provided its internal review response on the 12 December 2017 upholding its original response.

Scope of the case

9. The complainant contacted the Commissioner the Commissioner on the 14 December 2017 complain about the council redacting the email.
10. The Commissioner considers the scope of the case is to determine whether the council can rely on regulation 12(5)(b) of the EIR to redact the email dated 31 July 2017.

Reasons for decision

Regulation 12(5)(b) of the EIR – Course of justice

11. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information if its 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 enquiry of a criminal or disciplinary nature.

12. The council argued that this exception is relevant because the withheld information was subject to LPP. The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason, the Commissioner has found in previous cases that regulation 12(5)(b) will be relevant to information which attracts LPP.
13. In order to reach a view as to whether or not the exception is engaged, the Commissioner must first consider whether the withheld information is subject to LPP. She must decide whether the disclosure of the information into the public domain would have an adverse effect on the course of justice as claimed by the council.
14. The council has advised the Commissioner that the redacted email is an internal email between Warwickshire Legal Services. The lawyers being a Warwickshire Legal Service planning and litigation solicitor employed by the council and an intermediate manager, who is the Warwickshire Legal Services Corporate Legal Service Manager, also employed by the council.
15. The Commissioner has inspected the withheld information in this case and she is satisfied that it is communications between two legal representatives created for the purposes of providing legal advice.
16. The Commissioner is also satisfied that there is no evidence to indicate that the legal advice has been shared with a third party for it to have lost its confidential character.

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

17. The council argues that disclosure would have an adverse effect on the course of justice because it would undermine the general principles of legal professional privilege and the administration of justice. It also states that there are no special factors in this case sufficient to think that disclosure of the information would not undermine the general principle of lawyer/ client confidentiality.
18. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (ES/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.

19. In consideration 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 is therefore satisfied that regulation 12(5)(b) of the EIR is engaged in respect of the withheld information.

The public interest

20. 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 her assessment of the public interest, 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.

Public interest arguments in favour of disclosure

21. The council has told the Commissioner that it recognises the importance of ensuring that it is seen to be transparent, fair and accountable to the public.
22. It considers it has tried to do this in this case by disclosing all but the one paragraph in the email from 181 pages of information that fell within the scope of the request.
23. The complainant considers that in terms of the Nolan Principles, the fifth principle about openness says "*Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.*"
24. The complaint also questions what is the point in being able to view information held by public authorities if it can be withheld at their will? She states that the public interest in releasing the information outweighs any reasons for withholding it as she considers that it is more likely that the council does not want to release the redacted comments in the email because those comments are damaging to it.

Public interest arguments in favour of maintaining the exception

25. The council considers that it should be able to protect its position with the ability to seek confidential legal advice in relation to any of its functions.

26. It gave considerable weight to the difficulties the council would face if its officers could not freely seek and its legal advisors could not freely give legal advice. It considers the public interest is in the council receiving full and frank advice in relation to public decision making processes, noting that in this case the council has a duty to be fair to the applicant and objector and should be properly advised in order to do so.
27. It also has stated to the Commissioner that the advice was recent and still live and that, should proceedings be commenced in relation to this case, it would place the council in an unfair position of having to disclose its own legal advice without any such disadvantage to its opponents.
28. As already discussed, the Commissioner and Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice would have an adverse effect of the course of justice through weakening of the general principle behind LPP.
29. 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, from the result of disclosure, could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on LPP The course of justice and inquiries exception (12)(b)¹ 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."
30. 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 the other side being put at an advantage by not having to disclose its own legal advice in advance.
31. In light of the above, there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

"...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..."

32. 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 as described above.
33. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. He also accepts there is a strong public interest where those decisions concern activities that could have significant impacts on the environment and in relation to this request.
34. The Commissioner notes that the council has provided all 181 pages of information falling within the scope of the request, other than the redacted part of the 31 July 2017 email.
35. Having considered the above, it is the Commissioner's view that the council's right to obtain legal advice in confidence is not outweighed by or equal to the public interest in disclosure.
36. The Commissioner is satisfied that disclosure would likely affect the candour of future exchanges between the council and its legal advisers and that this could lead to advice that is not informed by all the relevant facts. In turn this would likely result in poorer decisions made by the council because it would not have the benefit of thorough legal advice.
37. The Commissioner is therefore satisfied, in this case, that the inherent public interest in protecting the established convention of LPP is not countered by at least equally strong arguments in favour of disclosure.
38. She has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure.

Right of appeal

39. 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

40. 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.
41. 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
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