

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

**Date:** 28 October 2020

**Public Authority:** Snowdonia National Park Authority

**Address:** [Bethan.Hughes@snowdonia.gov.wales](mailto:Bethan.Hughes@snowdonia.gov.wales)

**Decision (including any steps ordered)**

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1. The complainant requested a copy of legal advice relating to a specific planning application. Snowdonia National Park Authority ('the Authority') withheld the information under the exception for the course of justice – regulation 12(5)(b) of the EIR. The Commissioner's decision is that the Authority has correctly applied regulation 12(5)(b) to the withheld information. The Commissioner does not require any steps to be taken.

**Request and response**

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2. On 19 May 2020, the complainant wrote to Authority and requested information in the following terms:

*"Please provide me with the legal advice received to date by the Snowdonia National Park Authority relating to planning application NP5/62/399 and also details of to whom the advice has been distributed".*

3. The Authority responded on 16 June 2020. It provided details of who the legal advice had been circulated to, but withheld the legal advice itself under regulation 12(5)(b) of the EIR.

4. On 18 June 2020 the complainant requested an internal review of the Authority's decision to withhold the legal advice.
5. The Authority provided the outcome of its internal review on 3 July 2020 and upheld its decision that the legal advice was exempt under regulation 12(5)(b) of the EIR.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 9 July 2020 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation is to determine whether the Authority should disclose the legal advice which has been requested.

### **Reasons for decision**

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### **Background information**

8. The request in this case relates to a planning application for the construction of a new road, approximately 1.5km long, to the west of the village of Llanbedr to ease congestion along the A496 through Llanbedr. The Commissioner understands that the plan to build the new road has prompted significant debate in the local community, both in favour of, and against it.
9. The planning application was initially considered by Authority's Planning and Access Committee on 5 September 2018, at which time the application was approved, subject to conditions. However, the planning decision was later challenged by an individual who sought a judicial review on the basis that due process has not been followed in respect of the Habitat Regulation Assessment. The Authority did not contest this and agreed to quash the planning approval, the consequence of which was that the application remained undetermined.
10. Following provision of further information from the planning applicant, the application was subsequently approved in March 2020, subject to a number of planning conditions.

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

11. 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’).
12. 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?
13. 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.
14. 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.
15. The withheld information in this case comprises a report commissioned by Eversheds Sutherland (International) LPP in response to instructions given to it by the Authority and a letter from Eversheds providing further

advice on a specific legal point. The Authority advised that the sole purpose of the report was to provide a technical peer review on whether the Environmental Statement produced for the development in question complied with the requirements of the Environmental Impact Assessment Regulations. Eversheds commissioned Ove Arup & Partners to produce the report as it did not have the required in-house technical expertise to conduct the initial review itself. Eversheds then relied on the report to identify issues and provide legal advice to the Authority, in a series of teleconferences. The Authority advised that the legal advice provided during the teleconferences was not documented "*due to the fluidity of the fast changing situation, and the immediate action required following receipt of the legal advice during conference*".

16. The Authority advised that the identification of strengths and weaknesses within an environmental statement is a very sensitive matter which can potentially be subject to legal challenge. The legal advice in this case was produced on the clear understanding that it would be kept confidential. At the time it was produced litigation in the form of a judicial review was a strong possibility. As litigation is no longer in prospect, the Authority is no longer claiming litigation privilege in respect of the information and instead is relying on legal advice privilege. The Authority also confirmed that it does not consider privilege has been lost in respect of the information as only three officers have had sight of it and it has not been disclosed outside the Authority.
17. The Commissioner has had sight of the withheld information and she is satisfied that the correspondence comprises confidential communications between client and lawyer, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
18. Having considered the Authority's representations, as far as the Commissioner has been able to establish, the withheld information was not publicly known at the time of the request and there is therefore no suggestion that confidence has been lost. As such, the Commissioner is satisfied that the withheld information is subject to LPP.
19. In order to engage the exception under regulation 12(5)(b) it must be established that disclosure of the information in question would adversely affect the course of justice.
20. The Authority acknowledged that the planning application in which the legal advice is based has now been decided, it considers the case to still be 'live' as development has not yet started. Until development has been completed, the Authority will need to monitor progress to ensure

that there are no adverse environmental impacts due to breaches of planning, for example, if development is not undertaken in accordance with the various planning conditions. Disclosure of the withheld information would hamper the Authority's ability to effectively conduct any future investigation into breaches of planning and environmental regulations. This would in turn have an adverse effect on the course of justice. In addition, the Authority considers that the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR.

21. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR.
22. The Commissioner notes that although planning permission had been granted at the time of the request, the development had not yet commenced. She also notes that the Authority will need to monitor development throughout the life of the project and the legal advice may be relied on should any investigation need to be undertaken or if there be any further legal challenges. As such, the Commissioner agrees that the legal advice was live at the time of the request.
23. Based on the above, 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 Authority accepts that there is a public interest in public authorities being accountable for the quality of their decision making, part of this accountability involves ensuring decisions are made on the basis of quality legal advice. Disclosure of the withheld information in this case would demonstrate transparency in the decision making process relating to this contentious planning application. The Authority also acknowledges that there is a public interest in knowing whether it followed the legal advice which it received.
25. The Authority also accepts that there is public interest in a disclosure of information that would promote debate in respect of proposals affecting their community. Releasing the advice in this case would go some way towards furthering the understanding and insight of the public into the approach the Authority took with this planning application.

26. The complainant is of the view that, as a publicly funded body, it is important that the Authority is both above suspicion and seen to be acting fairly and responsibly. He pointed out that the planning application is a controversial one and considers that the refusal to provide the information is designed to *"frustrate transparency for little benefit and could be interpreted as a move to avoid embarrassment if the advice turns out to be contrary to published information"*. If the withheld information shows that advice is consistent with published information, the complainant considers it would be to the Authority's 'advantage' to disclose it.

### **Public interest arguments in favour of maintaining the exception**

27. The Authority pointed out that there is a significant public interest in maintaining the principle behind LPP in terms of safeguarding openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. The Authority considers LPP to be *"a fundamental condition on which the administration of justice as a whole rests"*.
28. The Authority is of the view that disclosure of the legal advice would erode the concept of LPP. This in turn would result in future legal advice being less effective as a result of the prospect of it being made public. In support of its position, the Authority referred to previous decisions made by the Commissioner and the Information Tribunal who both expressed the view that disclosure of information 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"*.
29. The Authority considers it essential for a legal adviser to be able to present the full picture to his or her clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. If a legal adviser is unable to provide this comprehensive advice because of the fear of subsequent disclosure, the quality of decision making will be adversely affected. This would not be in the public interest at any level.
30. The Authority again pointed out that whilst the planning application in question had been determined, it was still very much a live matter. Work on the project has yet to commence and the Authority will need to monitor the progress of the development, until it is completed, to ensure there are no breaches of planning or any adverse environmental impacts. There are complex conditions attached to the planning permission which could be challenged by the developer once any groundworks commence. The Authority contends that the *"legal advice*

*concerning surrounding various complex environmental factors relating to these conditions will be paramount here and will need to be relied on".*

31. The Authority also explained that there are fundamental principles contained within the legal advice which would be relevant to similar planning applications in the future. As such, it may need to refer to or rely on the legal advice for future developments of this nature.
32. The Authority referred to the fact that the Upper Tribunal had previously accepted that, whilst it was not a foregone conclusion that information subject to LPP would adversely affect the course of justice, it suggested that there would need to be special or unusual factors involved for this to not to be the case. The Authority also referred to the Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)* where the Tribunal noted that:

*"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".*

33. The Authority accepts that the complainant has a genuine interest in, and concerns about decisions made in respect of this planning application. However, it does not consider this, in itself, to be a compelling rationale for disclosure. The Authority believes that there would need to be specific arguments or evidence that would demonstrate an equivalent or greater public interest would be served through disclosure, for example, misuse of public funds or exposing maladministration. The Authority pointed out there is no such suggestion in this case. In its internal review response, the Authority disputed the complainant's suggestion that it was seeking to withhold the information because it was embarrassing or contrary to published information. The Authority contends that whilst disclosure would prove this to be the case, *"there is not sufficient public interest arguments in favour of releasing this information which would outweigh the strength of argument in maintaining LPP, which remains a fundamental cornerstone of the administration of justice in the UK".*

### **Balance of the public interest test**

34. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, she has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases



where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.

35. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. She believes that this is especially the case where the public authority's actions have a direct effect on the environment. Disclosure of the withheld information in this case would provide a degree of transparency and reassurance in relation to the probity of the planning decision in this case. The Commissioner notes that the planning application to which the legal advice relates has been a controversial one, and subject to previous legal action.
36. The Commissioner acknowledges 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 her inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the Council had misrepresented any legal advice it has received or evidence of a significant lack of transparency. Whilst the Commissioner accepts that the decision in this particular case has the potential to affect a fairly significant number of people, she does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exception.
37. 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 also considers that the timing of the request in this case weighs heavily in favour of maintaining the exception given that work on the project has yet to commence and the Authority will need to monitor progress of the development until completion. The Commissioner accepts that disclosure of the withheld information could adversely affect the Authority's ability to undertake any future investigation into a breach of planning or environmental regulations.



38. Whilst the Commissioner considers that the arguments in favour of disclosure have weight, in her view in this case there are stronger public interest arguments in favour of maintaining the exception. The Commissioner accepts that if disclosure were ordered, it would undermine the Authority's ability to obtain legal advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. This would lead to advice that is not informed by all the relevant facts and could result in poorer decisions being made because the Authority would not have the benefit of thorough legal advice.
39. In summary, the Commissioner has 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

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40. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

41. 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.
42. 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** .....

**Joanne Edwards**  
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**Information Commissioner's Office**  
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