

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

Decision notice

Date: 14 August 2012

Public Authority: Stroud District Council
Address: Council Offices
Ebley Mill
Stroud
Gloucestershire
GL5 4UB

Decision (including any steps ordered)

1. The complainant requested information regarding planning enforcement issues. Stroud District Council ("the council") initially relied on the exemption under section 30 of the Freedom of Information Act 2000 ("the FOIA"), the exemption relating to investigations and section 12(1), an exclusion relating to costs. Following the Commissioner's involvement, the council decided to disclose information to the complainant. The only outstanding issue concerned some information that had been withheld using regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR"), the exception relating to legal professional privilege, and an allegation made by the complainant that more information may be held.
2. The Commissioner's decision is that the council correctly withheld information using regulation 12(5)(b). On the balance of probabilities, no more information was held.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 7 December 2011, the complainant requested information from the council in the following terms:

"I am making the following request under the FOI Act would you please supply me with the following;

- 1. All reports/updates made by Stroud District Council officers regarding the breaches of conditions/Enforcement Notices on the Ashton Down Site.*
 - 2. All recommendations made by officers and councillor's regarding the breaches of conditions/Enforcement Notice's on the Ashton Down Site.*
 - 3. All recommendations made by officers and councillor's as to what action should be taken regarding the breaches of conditions/Enforcement Notice's on the Ashton Down site.*
 - 4. All reports/updates made by the specialist team set up by S.D.C to provide legal, planning and environmental and health expertise regarding the Ashton Down Site.*
 - 5. All correspondence between S.D.C officers or councillors and Leda Properties/Pension Fund its agents or tenants with regards to the breaches of conditions/enforcement notice on the Ashton Down site from the 14th October 2011 to date of this email".*
5. The council responded on 7 December 2011 and it cited the exemption under section 30 of the FOIA.
 6. On 19 December 2011, the complainant requested an internal review.
 7. The council wrote to the complainant on 20 January 2012 asking whether the complainant could be more precise about what information he was interested in. The council said that in its current form, it would refuse to comply with the request, relying on section 12(1) of the FOIA.
 8. The complainant complained to the Commissioner. It became clear that he had not received the letter of 20 January 2012. This was forwarded on to him for a response.
 9. The complainant replied on 24 April 2012 saying that he was willing to amend his original request so that it covered only "breaches of condition" in respect of the site. The council decided that it could respond to this request.
 10. The council identified that the only item of information that it held relating to the narrowed request was a file note. It sent a copy of this to the complainant directly, with redactions made under section 40(2), the exemption relating to personal data, and section 43(2), the exemption relating to commercial interests.
 11. The complainant did not contest those redactions but continued to

engage with the council because he considered further information was held relating to the breaches of conditions. Following several telephone calls, the complainant indicated that he wished to return to the wording of his original request, but would be willing to limit the time frame involved. He said that he wanted the council to look for information dating back to September 2011.

12. The council agreed to comply with the complainant's request. It wrote further to the complainant on 31 May 2012, enclosing information that had been located. It made some redactions, this time using regulation 12(3) of the EIR, the exception relating to personal data. It also withheld some information on the basis that it was covered by legal professional privilege.

Scope of the case

13. The complainant asked the Commissioner to consider whether the council had correctly withheld the information that it claimed was covered by legal professional privilege. He also alleged that more information may be held. For clarity, the complainant did not dispute the council's decision to withhold information using other exceptions.
14. As indicated by the chronology above, information was provided to the complainant thereby informally resolving part of the complaint. This notice only concerns the outstanding issues.
15. When the council provided the withheld information to the Commissioner, it was apparent to the Commissioner that the information contained various references to the complainant, identifying him by name. This information is the complainant's personal data. Personal data is defined by the Data Protection Act 1998 ("the DPA") as information relating to a living and identifiable individual. When a request for information is received for information that involves personal data, the council must consider it in accordance with the rights of subject access provided by section 7 of the DPA. This clearly did not occur in this case. However, the Commissioner is satisfied that the information in question would be covered by legal professional privilege for the reasons outlined below and the complainant would therefore not be able to access that information under the DPA either.
16. The Commissioner notes that the bundle provided also contained correspondence from the complainant. The Commissioner has scoped this out of his considerations since the complainant will clearly already have access to that correspondence.

Reasons for decision

Is the information environmental?

17. Information will be “environmental” if it falls within the scope of regulation 2 of the EIR. Regulation 2(1)(c) states that any information will be environmental if it relates to activities affecting or likely to affect the land. The Commissioner notes that the focus of this particular request concerns development and the use of a particular area of land. The Commissioner therefore considers that the EIR is the correct legislation under which to consider this request.

Regulation 5(1) - Was more information held?

18. Regulation 5(1) of the EIR provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant’s evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held “on the balance of probabilities”.¹
19. The complainant alleged that the public authority may hold more information concerning correspondence it had received from councillors. The complainant said that his understanding was that there had been more contact. He referred to the fact that he had been in touch with councillors and would have expected those councillors to have engaged with the council.
20. When the council responded to the Commissioner, it confirmed that it had searched for relevant documents between councillors and officers back to the date specified by the complainant. It said that there was no other information that had not already been identified and it was not

¹ This approach is supported by the Information Tribunal’s findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

aware of any relevant information having been deleted, destroyed or mislaid. It was apparent to the Commissioner that some correspondence involving councillors has been withheld by the council using the exception relating to legal professional privilege (the Commissioner's analysis of this information is shown below). This appears to account for the complainant's allegation that more information of this nature must exist.

21. The complainant also alleged that more information may be held concerning a particular matter. He provided the Commissioner with a copy of a letter dated 23 September 2012 from the council's monitoring officer. That letter referred to the complainant's complaints about enforcement activity on the site. It said that a decision had been taken to review the matter and a specialist team would be created for that purpose. The letter makes various references indicating that there would be a formal reporting process in the future regarding their findings.
22. The council explained to the Commissioner that it had consulted the Head of Planning about the query and the members of the specialist team referred to in the letter. It had received confirmation that no further information existed. The Head of Planning explained that there was a meeting that took place between the officers concerned but it was not the council's practice to record discussions of that nature. The council also explained that although it conceded that the letter did indicate that there was going to be written information created, such as a formal report, the fact is that this never took place due to management changes. This changed the council's approach to the situation and the specialist team that the letter had referred to was never reconvened. The council confirmed that it had never held this information and it had conducted thorough searches of its planning, enforcement and legal files to check that this was the case.
23. The Commissioner decided that on the balance of probabilities, no further recorded information was held by the council.

Regulation 12(5)(b) – Legal Professional Privilege

24. 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.

25. The Commissioner inspected the withheld information and was satisfied that it represented a serious of communications made for the dominant purpose of giving or seeking legal advice in the context of contemplated litigation. The council identified the qualified solicitors involved in those communications. There was no evidence to indicate that the information had lost its confidential character. The Commissioner was therefore satisfied that the information was covered by legal professional privilege.
26. 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.
27. In accordance with another Tribunal decision *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".
28. 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".
29. The Commissioner accepts that disclosure of the information 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. He also considers that disclosure of the information would adversely affect the Council's ability to defend itself in any future legal action. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
30. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant information.

Public interest arguments in favour of disclosing the requested information

31. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to

increase public understanding, trust and participation in the decisions taken by public authorities.

32. In this case, the council recognised that there is a public interest in being accountable about the actions it has taken or is considering in respect of planning enforcement cases. It recognises that the outcome of such cases affects the environment and this adds to the public interest.

Public interest arguments in favour of maintaining the exemption

33. 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 professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind the concept.

34. It is very important that public authorities should be able to consult with their lawyers in confidence. Any fear of doing so resulting from a 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 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".

35. 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 exchanges in advance.

36. 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..."

37. 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.

Balance of the public interest arguments

38. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. This is even more so where those decisions affect elements of the environment. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the authority's right to consult its legal team in confidence.
39. The Commissioner observes that the public interest in maintaining this exemption 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. It was not apparent to the Commissioner that these factors were relevant to this particular case.
40. The Commissioner also had regard to the timing of the request. It is clear to the Commissioner that the council is still considering these issues and the information requested relates to a matter that is still "live". It is in the public interest for the council to maintain a confidential space in which to discuss the issues involved with their legal team, and decide what actions to take, without the prejudice that would be likely to arise from premature disclosure.

Other matters

41. As discussed in the scoping section of this notice, the council failed to identify that some of the information it was seeking to withhold was the personal data of the complainant. This may indicate training issues. The council should ensure that it is aware of its legal obligations under the DPA when considering future requests for information. More information about dealing with subject access requests is available on the Commissioner's website at www.ico.gov.uk.

Right of Appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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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