

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

**Decision notice**

**Date:** 30 November 2017

**Public Authority:** The Planning Inspectorate  
**Address:** 4\A Eagle Wing  
Temple Quay House  
2 The Square  
Bristol  
BS1 6PN

**Decision (including any steps ordered)**

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1. The complainant has requested the information held in a case file by The Planning Inspectorate. The public authority refused the request on the basis of regulation 12(5)(b) as it considered the information attracted legal professional privilege.
2. The Commissioner's decision is that the public authority has demonstrated that regulation 12(5)(b) is engaged and the public interest favours withholding the information. She requires no steps to be taken.

**Request and response**

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3. The Planning Inspectorate is a joint executive agency of the Department for Communities and Local Government (DCLG) and the Welsh Government. For the purposes of this decision notice and for consistency the Commissioner has referred to the Planning Inspectorate rather than DCLG throughout this notice.
4. On 6 February 2017, the complainant wrote to The Planning Inspectorate ("the Inspectorate") and requested information relating to a specific case file. The request was in the following terms:

*"Through FOI, I would like a copy of the inspectorate file in this case including the officer who was instructing [name redacted] and details of the contact that was made to Winchester City Council."*

5. The Inspectorate responded on 10 March 2017. It stated that it held information generated as a result of the complainant's High Court challenge but this information was being withheld on the basis of the regulation 12(5)(b) exception – that disclosure would adversely affect the course of justice. In addition, the Inspectorate considered any personal data within the information was exempt from disclosure under regulation 13 of the EIR.
6. Following an internal review, the Inspectorate wrote to the complainant with the outcome on 27 March 2017. The complainant had argued that the decision by the Inspectorate to pursue the case had impacted on the value of her home and the public interest in the case was high. The Inspectorate explained the information in question was the case file for the complainant's High Court challenge and consisted of communications between legal advisors. Therefore, the Inspectorate considered the information attracted legal professional privilege.

## **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way her request for information had been handled. The Commissioner accepted the complaint for investigation on 22 May 2017.
8. The Commissioner considers the scope of her investigation to be to determine if the Inspectorate has correctly applied the exception at regulation 12(5)(b) to withhold the requested information.

## **Background**

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9. A neighbour of the complainant built a structure which was later refused planning permission. This decision was appealed and representations were made from all concerned parties both for and against the decisions, including by the complainant, to the Planning Inspector and this resulted in planning permission being granted.
10. The complainant sought to make a legal challenge in the High Court but permission to appeal the Inspector's decision was refused by the Court by Order. The request relates to a copy of the information in the Inspectorate's file in relation to the legal challenge.

## Reasons for decision

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

11. All of the information in scope has been withheld by the public authority in reliance on this exception.

Regulation 12(5)(b) states:

*".....a public authority may refuse to disclose information to the extent that 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 inquiry of a criminal or disciplinary nature."*

12. The information in the Inspectorate's case file is in respect of the complainant's statutory challenge under section 288 of the Town and Country Planning Act and was created after the challenge was received. The Inspectorate has stated that the creation and contents of the file are as a direct result of the challenge and were for the predominant purpose of seeking and obtaining legal advice in defence of that claim.
13. The Inspectorate has confirmed its court file consists of internal correspondence and internal consideration of legal advice in relation to the claim, correspondence from the Government Legal Department (GLD), the Court Order and other documents filed in respect of the claim. The latter of these documents (the Court Order and applications for judicial review) have already been disclosed to the complainant and are not being considered as part of this investigation.
14. The Inspectorate considers that disclosing the information withheld on the basis of this exception would adversely affect the course of justice, specifically on the basis that the information is subject to legal professional privilege (LPP). It considers that the information is subject to advice privilege because it was created for the dominant purpose of providing and receiving legal advice.
15. The Commissioner considers that the "*course of justice*" element of the exception at regulation 12(5)(b) is very wide in coverage and includes material covered by LPP. She also considers there are two types of privilege within the concept of LPP; litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice.

16. The Commissioner has inspected the information the Inspectorate considers is legally privileged and she is satisfied that it is information in respect of which a claim to LPP could be maintained in legal proceedings. She is satisfied that the information is subject to litigation privilege. The complainant had submitted a statutory challenge under the Town and Country Planning Act and the information held is solely held as a result of the claim. The information is the communications about the claim with legal advisors to seek instructions in respect of that claim.
17. The Inspectorate has also stated that the information is confidential and has not been made available to the public or any third parties so the privilege has not been waived.
18. The Commissioner has consequently concluded that the Inspectorate was entitled to engage the exception at regulation 12(5)(b) in respect the information in its file.
19. The exception at regulation 12(5)(b) is subject to a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

*Public interest factors in favour of disclosure*

20. The Inspectorate accepts that there is a public interest in transparency in decision making, including its decision to defend the claim that is the subject of this request.
21. That being said, the Inspectorate considers this has largely been met – it filed Summary Grounds for defending the claim which provided the Court with its reasons for defending the challenge and also provided the Inspector's reasoning in the appeal decisions. These documents were provided to the complainant. However, the Inspectorate accepts disclosing the court file would provide further transparency about the decisions made in respect of the legal challenge.

*Public interest factors in favour of maintaining the exception*

22. There is a general public interest inherent in this exception in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice. Anything which undermines the general principles of LPP, without special or unusual factors being present, would be likely to affect the smooth running of the course of justice, which would not be in the public interest.

23. Furthermore, the Inspectorate notes that the complainant disagrees with the Inspector and the decision made about the planning permission and believes that the decision was reached improperly and is tainted by procedural irregularity and bias. The Inspectorate states that the Court has independently ruled in refusing the complainant permission to challenge the Inspector's decision, and this shows there is no evidence of bias or corruption.

*Balance of the public interest arguments*

24. The Commissioner accepts there is a strong element of public interest inbuilt to LPP and at least equally strong arguments for disclosure would need to be demonstrated to override that inbuilt public interest.
25. The Commissioner also accepts that there is a strong public interest in transparency, openness and accountability on the part of public authorities with regard to their decision-making processes.
26. With regard to the public interest in maintaining the exception, the Commissioner considers that there is a significant public interest in maintaining LPP due to the importance in safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice, which in turn is fundamental to the administration of justice. Consequently, she considers that there is a significant public interest in ensuring that the public authority is able to access full and frank advice, which in turn is fundamental to the administration of justice. Given that the withheld information is still fairly recent, disclosure is likely to severely restrict the Inspectorate's ability to do that in future in relation to similar matters.
27. The Commissioner also accepts the point made by the Inspectorate that the Court has already ruled that it does not give permission to the complainant to challenge the Inspector's decision and this is indicative that there has been no wrong doing on the part of the Inspector.
28. In addition to this, having viewed the withheld information the Commissioner notes that the communications in the file relate to legal advice regarding the legal challenge, not directly to the Inspector's decision to grant planning permission. This weakens the argument that disclosing the information would be in the public interest as it would not reveal anything which would allow the complainant to scrutinise whether there was any bias or procedural irregularities in the decision of the Inspector.
29. Regardless of this the Commissioner is also not minded to accept there is a wider public interest in the disclosure of information on this issue except to those few individuals directly impacted by the decision of the

Inspector. She does not therefore consider there are any special factors in this case that would warrant overriding the significant public interest in maintaining LPP and protecting the confidence that public authorities have in the operation of LPP.

30. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## Right of appeal

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31. 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)

32. 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.
33. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**