



Lisa Foster
Associate
Richard Buxton Environmental and Public Law
19B Victoria Street
Cambridge CB1 1JP

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By email only to:
lfoster@richardbuxton.co.uk

Our ref: FOI/EIR 313

Dear Ms Foster

Your request for information

Thank you for your email sent on the 16 April 2014 requesting the following information in relation to the issue of the need for an Appropriate Assessment (AA) for the Latchmore Brook Restoration Project:

'copies of all your correspondence and e-mail communications with Natural England including any supporting documents, together with your internal evidence and justification for this decision.'

Your request has been handled under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR). As you may be aware the Higher Level Stewardship Scheme (HLS) is granted by Natural England (NE) and is conducted through a formal partnership between the Verderers of the New Forest, the Forestry Commission (FC) and the NPA. I can confirm that the New Forest National Park Authority (NPA) holds four emails between officers and advisers involved in the HLS scheme that partially relate to your request; however, they will not be disclosed to you because the NPA take the view that the following exceptions are engaged and that the public interest test falls towards withholding the information.

Regulation 12(5)(b) – the course of justice and inquiries exception

In considering your request, the NPA took the view that the information requested was subject to legal professional privilege (LPP) and as such falls under the 'course of justice' exception contained in Regulation 12(5)(b). This exception exists to preclude disclosure where that disclosure would adversely affect the course of justice (among other factors). Adverse effect means that the disclosure would have a negative impact on the relevant interest.

New Forest National Park Authority
Lymington Town Hall, Avenue Road, Lymington SO41 9ZG
Telephone 01590 646653 Fax 01590 646666 Email jo.murphy@newforestnpa.gov.uk
www.newforestnpa.gov.uk

The guidance on EIR issued this year by the Information Commissioner's Office (ICO) indicates that the meaning of the 'course of justice' is quite broad and includes the concept of LPP. The ICO's latest guidance note entitled 'The course of justice and inquiries exception (regulation 12(5)(b))' states that public authorities may consider applying this exception to requests for material covered by LPP.

As set out in the ICO's guidance note on legal professional privilege, LPP covers 'communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the "dominant" (main) purpose of litigation'. The information in question includes communications between officers at the NPA and its own legal adviser(s), as well as communications with and relating to advice given by NE's legal advisers. In respect of the former, this advice is clearly covered by LPP. In respect of the latter, case law and the guidance note also indicate that communications between third parties outside the immediate lawyer-client relationship will also be privileged where there is a real prospect or likelihood of litigation, and in this instance I believe this to be the case, so this information is also covered by LPP.

I take the view that issues at this site are still very much live and that there is a real prospect of litigation, which goes to the heart of why I feel that disclosure would be likely to adversely affect the course of justice. The ICO guidance on LPP states that the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP.

This exception is known as a 'qualified exception' under the Regulations, which means that it is necessary to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. This is known as the "public interest test". In applying the public interest test to the exception referred to above, the NPA considered the following factors and the NPA reached the view that in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosure.

Factors considered relevant to the public interest in maintaining the exception

- There is a strong element of public interest inbuilt into the privilege itself; 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 administration of justice.
- There is considerable local objection to the proposed works, evidenced by the formation of the 'Friends of Latchmore' group and by the objections received when initial works were carried out, and there is a real risk of litigation in this case. The matters at this site are still very much live and it is anticipated a planning application will be considered by the NPA in the future which may yet be subject to challenge. Any legal advice relating to the site remains highly relevant given that there are matters still to be determined. Clearly there would be a severe adverse effect in the public disclosure of any legal advice given to the parties, prior to any litigation proceedings.
- More generally, some of this material is covered by legal advice privilege as well as litigation privilege. The parties must be able to take general legal advice on the proper course of action in relation to this site. Parties must have a 'safe space' to discuss legal issues with their advisers in order to allow them to carry out their

duties without having to disclose all their deliberations. This would clearly be detrimental to the administration of public affairs given that the parties may be reluctant to engage in free and frank discussions of the legal issues for fear of public disclosure, both in the current issue and future matters.

Factors considered relevant to the public interest in disclosing the information:

- Promoting accountability and transparency by public authorities for decisions taken by them and the spending of public money.
- Allowing individuals and companies to understand decisions made by public authorities.

Conclusion: That the importance of the factors in maintaining the exception considered in the public interest test outweighs those in favour of disclosure.

Regulation 12(5)(f) – Interests of the Person who provided the information to the authority

Some of the information in question is also covered by the exception in Regulation 12(5)(f). The NPA is entitled to withhold information where its disclosure would adversely affect the interest(s) of the person(s) who supplied it, where (i) they were under no legal obligation to supply it, (ii) we would not have to disclose it other than under the Regulations, and (iii) the person(s) who supplied the information have not consented to its disclosure.

This exception is also a ‘qualified exception’ under the Regulations, and as explained above, is subject to the public interest test.

Factors considered relevant to the public interest in maintaining the exception

- The information in question was not disclosed to the NPA in the expectation that it would be released to members of the public or become publicly available. As stated above, the advice was sought because the recipients wished to take legal advice on the proper course of action in relation to this site and/or believed there was a very real risk of litigation and it would not be in the public interest for this to be disclosed by us now, given that the advice is considered to attract LPP. Under these circumstances there is a clear expectation that it would not be made public and disclosure of the information would be contrary to these expectations.
- If the information is disclosed contrary to the expectations of the person(s) supplying the information then they would be less willing to supply information to the NPA in future. This ‘chilling effect’ would be detrimental to the relationship between the HLS partners who do need to continue to collaborate on common issues relating to the protection of the environment and the local area.

Factors considered relevant to the public interest in disclosing the information:

- Promoting accountability and transparency by public authorities for decisions taken by them and the spending of public money.

- Allowing individuals and companies to understand decisions made by public authorities.

Conclusion: That the importance of the factors in maintaining the exception considered in the public interest test outweighs those in favour of disclosure.

I am sorry that on this occasion I have not been able to disclose the information you have requested; however, if you have any further queries relating to this response, please do not hesitate to contact me. Under Regulation 11 of the EIR you may ask for your request to be reviewed by the NPA; this request must be received by us within 40 working days of your receipt of this letter. The review will be undertaken through the Authority's complaints procedure, details of which can be found on our website or by following this link www.newforestnpa.gov.uk/about-us/your-views/comments-and-complaints

In addition, under Regulation 18, and Section 50 of the FOIA, you may apply to the Information Commissioner for a decision as to whether or not, in any specified respect, your request for information has been dealt with in accordance with the requirements of the Regulations. You can contact the Information Commissioner at First Contact Team, Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, SK9 5AF www.ico.org.uk

Yours sincerely

Jo Murphy (Mrs)
Information and Data Protection Officer