

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

25 July 2007

**Public Authority:** Milton Keynes Council  
**Address:** Civic Offices  
1 Saxon Gate East  
Central Milton Keynes  
MK9 3HH

#### Summary

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The complainant requested the public authority's legal advice in relation to two planning applications. The public authority refused to provide this information by citing the exception under Regulation 12(5)(b) of the Environmental Information Regulations 2004. The Commissioner found that this regulation was engaged and the public interest in maintaining the exception outweighed the public interest in disclosing the information. The Commissioner therefore found that the public authority was correct to withhold the information.

#### The Commissioner's Role

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1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

#### The Request

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2. On 31 March 2006, the complainant made the following request for information from the public authority:

"Could you please supply me with your counsel's advice obtained between 9 December 2005 and 28 March 2006 in relation to the Brooklands and Glebe Lands planning applications within the Milton Keynes Eastern Expansion Area (planning application MKP refs: 06/00220/MKPCO, 06/00221/MKPCO & 06/00222/MKPCO)."

3. On 28 April 2006, the public authority wrote to the complainant refusing to provide the information by citing regulation 12(5)(b) of the EIR.
4. On 11 May 2006, the complainant wrote to the public authority asking for a review of the response to their request. On 12 June 2006, the public authority wrote to the complainant upholding its refusal to provide the information.

## **The Investigation**

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### **Scope of the case**

5. On 22 June 2006 the complainant contacted the Commissioner to complain about the way their request for information had been handled. The complainant specifically asked the Commissioner to consider whether the public authority was entitled to withhold the requested information.

### **Chronology**

6. On 10 April 2007 the Commissioner wrote to the public authority asking it to explain why it considered Regulation 12(5)(b) to apply to the information.
7. On 8 May 2007, the public authority wrote to the Commissioner stating that it considered the information to be protected by advice privilege. It confirmed that neither the advice nor a summary of the advice had been made public. It also confirmed that neither the fact that the advice had been requested nor that it had been received had been made public.
8. The public authority also explained its consideration of the public interest in relation to the exception. It confirmed that the arguments considered for disclosing the information related to the general presumption in favour of disclosure. The arguments it considered for maintaining the exception related to the maintenance of confidentiality in internal communications. It should, however, be noted that at no stage did the public authority state that it wished to specifically apply regulation 12(4)(e) (the exception available to refuse to disclose information to the extent that the request involves the disclosure of internal communications).

## **Analysis**

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### **Exception**

9. A public authority may refuse to disclose environmental information if:
  - An exception to disclosure applies, and
  - In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information

10. There is a presumption in favour of disclosure in the EIR, established by Regulation 12(2)<sup>1</sup>.
11. The Commissioner has therefore considered both the application of the exception and the public interest in reaching his decision on this complaint.
12. The Commissioner has firstly considered whether the exception under regulation 12(5)(b) of the EIR can be claimed by the public authority. Regulation 12(5) states that  
  
“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-  
  
(b) 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.”
13. The Information Tribunal case of ‘Mr M S Kirkaldie and the Information Commissioner EA/2006/001 (4 July 2006)’ outlines the similarity between regulation 12(5)(b) of the EIR and section 42<sup>1</sup> (legal professional privilege) of the Freedom of Information Act at paragraph 21 of that case as follows:  
  
“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.”
14. The concept of legal professional privilege is therefore covered by regulation 12(5)(b) of the EIR. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client.
15. There are two separate categories within this privilege known as advice privilege and litigation privilege.
16. Advice privilege covers communications between a person and his lawyer provided they are confidential and take place for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
17. The Commissioner has obtained a copy of the information withheld by the public authority. The information consists of written communication from a lawyer to the public authority for the dominant purpose of providing legal advice on dealing with two planning applications. The public authority has also given assurance that neither the advice nor a summary of it has been made public and therefore remains confidential. For these reasons the Commissioner is satisfied that the requested information is protected by advice privilege.

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<sup>1</sup> See legal annex for relevant extract of legislation

18. Turning now to the consideration of the adverse effect of disclosure, in the case of *Christopher 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”.
19. The Commissioner considers that if information subject to legal professional privilege were to be disclosed to the public, this would undermine the common law principle on which it rests. He also accepts that it would adversely affect the public authority's ability to obtain such advice in the future.
20. In reaching his decision on whether disclosure would have an adverse effect, the Commissioner has considered the interpretation of the word “would”. It is the Commissioner's view that the Information Tribunal's comments in the case of *Hogan vs. Oxford City Council and Information Commissioner (EA/2005/0026 and EA/2005/0030)* in relation to the wording of “would prejudice” are transferable to the interpretation of the word “would” when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term “would prejudice” it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
21. The Commissioner is satisfied that in this case it is more likely than not that disclosure of the legal advice would adversely affect the course of justice and therefore that the exception provided by regulation 12(5)(b) is engaged.

## **Public interest**

### **Arguments in favour of maintaining the exception**

22. Regulation 12(5)(b) of the EIR is subject to a public interest test. The Commissioner acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view also supported by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the DTI* (3 April 2006). At paragraph 8 of the Bellamy case, the Tribunal states that “with regard to legal professional privilege, there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.”
23. At paragraph 35 of the Bellamy case, the Tribunal stated that “there is a strong element of public interest inbuilt into the [legal professional] privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.” At paragraph 35, the Tribunal also states that “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 cut case.”

24. The above two paragraphs demonstrate that there is a clearly strong public interest in protecting the concept of legal professional privilege and therefore withholding the information in this current complaint.

### **Arguments in favour of disclosure**

25. Whilst there is no obligation for the complainant to do so, the Commissioner invited them to put forward any public interest arguments in favour of disclosure. However, the complainant did not contribute any such arguments.
26. The Commissioner considers that there is a general public interest in releasing the information for the following reasons. Firstly, it may help the public to form a view as to whether the public authority is acting responsibly in similar planning application considerations, based on the legal advice received.
27. Secondly, release of the information would enable the public to check the quality of the legal advice on which the Council spends public money to receive.
28. Both of the above reasons underlie the overarching general reason that releasing the information ensures that the public authority is accountable for its actions.

### **Balancing the competing considerations**

29. Regulation 12(1) of the EIR states that “a public authority may refuse to disclose environmental information requested if -
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”
30. The Commissioner recognises that there is a strong public interest in disclosing the information. However, he considers that the arguments set out above in favour of maintaining the exception are stronger. He has concluded that the public interest lies in maintaining the exception and therefore withholding the information.

### **The Decision**

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31. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with Regulation 5(1)<sup>1</sup> of the EIR. The public authority correctly cited Regulation 12(5)(b) of the EIR to withhold the information.

### **Steps Required**

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32. The Commissioner requires no steps to be taken.

## Right of Appeal

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33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 25th day of July 2007**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal annex

### Freedom of Information Act 2000

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

### Environmental Information Regulations 2004

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (b) 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;