

## Environmental Information Regulations 2004

### Decision Notice

**Date:** 10 December 2009

**Public Authority:** Department of the Environment (Northern Ireland)  
**Address:** Clarence Court  
10-18 Adelaide Street  
Belfast  
BT2 8GB

### Summary

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The complainant requested information relating to a boundary fence that was to be erected around Crawfordsburn Country Park. Information relating to three elements of the request was provided to the complainant following the initial information request. However the second and third elements were considered to be exempt under regulation 12(5)(b) of the EIR. Initial information was provided in relation to the fourth element of the complainant's request. The public authority advised that it did not hold any other information relating to this element of the request. The Commissioner is satisfied that the exception is engaged in relation to parts 2 and 3 of the information request, and has decided that in all of the circumstances of this case, the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner does not require any further steps to be taken.

### 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.

### Background

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2. The Commissioner notes that the request in this case was made to the Environment and Heritage Service (the EHS), an executive agency of the Department of the Environment for Northern Ireland (the Department). However, on 1 July 2008 the responsibilities of the EHS were transferred to the Northern Ireland Environmental Agency (the Agency), which is also an executive agency of the Department. Therefore, the public authority in this case is actually the Department. For the sake of clarity, this decision notice

- refers to the Department rather than the EHS or the Agency, as the public authority.
3. The background to the complaint relates to a boundary fence surrounding Crawfordsburn Country Park, which is owned by the Department, and adjacent residential properties. An issue arose as to the Department's responsibility to fence its property so as to protect it against the potential loss, over time, of land through adverse possession or the establishment of other rights.
  4. A number of unauthorised access points through the Country Park also raised concerns for the Department. The Department was mindful that potential litigation could arise from accidents relating to these unapproved access points, most of which would not meet health and safety standards.
  5. The Department proposed to erect a boundary fence around the Country Park which would border residential properties.

## The Request

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6. The complainant submitted the following request to the Department on 25 February 2008.

"I wish to make a Freedom of Information Request for a copy of

1. The report (in whatever format it was made, memo, email) made by EHS staff who attended the public meeting with [redacted] in Crawfordsburn Countryside Centre in the summer of 2007 to their superiors regarding the meeting. (Presumably the Director/Assistant Director who were expected but failed to appear at the meeting would wish informed as to the content of the meeting. This is the report I wish to have sight of).
  2. The report from the Departmental Solicitors that you refer to in your letter of February 2008 to [redacted] where the Solicitors advise you not to enter into the arrangement with the residents.
  3. The request for advice sent by your office to the Departmental Solicitors that resulted in the Departmental Solicitors report. I wish to see how the situation was portrayed to the Departmental Solicitors by your office.
  4. The costs incurred to date on this project.
  5. The projected cost to erect a fence around Chimera Wood.
  6. The projected costs of the entire fence project."
7. On 21 March 2008, the Department provided the complainant with a response to his request. The Department provided documentation in respect of parts 1, 4, 5 and 6 of the information request. The Department confirmed that information relating to parts 2 and 3 of the request could not be released to the complainant as it fell within the exception under regulation 12(5)(b), namely the

- course of justice. The Department considered the information to consist of legal advice and thereby attract legal professional privilege. The Department also considered the public interest test and decided that the information should not be released.
8. The complainant disagreed with the arguments presented by the Department. On 25 March 2008 the complainant asked for an internal review to be conducted in relation to his request. The complainant expressed concern regarding the information provided by the Department as to part 4 of his information request. The complainant asked the Department to provide an explanation as to why staffing costs had not been included within the information provided. The complainant suggested that either the figures were not known by the Department or there was a decision made not to disclose them, which would be a breach of the Act. The complainant also requested that the Department review its decision to refuse the disclosure of the information that was considered to be exempt due to legal professional privilege and the public interest test.
  9. On 29 May 2008, the Department confirmed to the complainant that an internal review of the request had been carried out. The public authority confirmed that the request fell within the remit of the EIR rather than the Act. The Department advised the complainant that it did not hold any information detailing the amount of staff time that had been spent on this particular project. The only information that it held was in relation to the costs of materials which had already been provided to the complainant.
  10. The Department also considered the arguments surrounding legal privilege and the public interest test. The Department advised the complainant that it was upholding its decision to withhold the information requested on this basis.

## The Investigation

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### Scope of the case

11. On 9 June 2008, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate the Department's response regarding the costs of the project that had been incurred to date. The complainant also asked that the Commissioner investigate the Department's refusal to release the information that was considered exempt due to legal professional privilege.
12. The Commissioner contacted the complainant and advised him that the Department did not have any further information regarding the issue of staffing costs. The complainant is satisfied with this explanation and accordingly the Commissioner will not be investigating this issue in this Decision Notice.

## Chronology

13. On 14 April 2009, the Commissioner contacted the Department regarding this matter. The Commissioner asked the Department for sight of the information that was withheld as part of the information request.
14. On 18 May 2009, the Department provided the Commissioner with the withheld information.
15. The Commissioner contacted the Department on 2 July 2009 and asked the Department for any further comments that it had regarding the legal privilege arguments. The Commissioner also asked for specific arguments from the Department as to how it reached the view that the course of justice would be adversely affected if the information requested by the complainant were to be released into the public domain.
16. The Department replied to the Commissioner on 3 August 2009 in respect of the Commissioner's query regarding the legal privilege arguments. The Department cited a previous ruling of the Information Tribunal where the Tribunal made reference to the issue of confidentiality between a lawyer and its client<sup>1</sup>. The Department also provided the Commissioner with additional arguments in relation to the public interest test in favour of maintaining the exception.

## Analysis

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### Is the requested information environmental information?

17. The definition of "environmental information" is set out in regulation 2(1) of the EIR. This is set out in the Legal Annex which can be found at the end of this Notice.
18. The Commissioner considers that the phrase "any information .... on" should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.<sup>2</sup>
19. In this case, the relevant part of the above definition is regulation 2(1)(c). This defines environmental information as information on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements. In this instance, the information in question is legal advice surrounding the erection of a boundary fence between property owned by the Department and residential property. It also relates to

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<sup>1</sup> Creekside Forum v Information Commissioner and Department for Culture, Media and Sport [EA/2008/0065], para. 34.

<sup>2</sup> Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

the Department's responsibility to fence its property in relation to potential loss of land through adverse possession or any liabilities that may arise through unauthorised access. The Commissioner considers that the legal restrictions are a measure, as defined in regulation 2(1)(c), likely to affect the use and therefore the state of the land, and that the information in question is information on (concerning or about) that measure. Therefore the Commissioner is of the view that the information in question is information on a measure which is likely to affect the elements and factors referred to in (a) and (b). The Commissioner is satisfied that the withheld information falls under the definition of environmental information for the purposes of the EIR.

## Exception

### Regulation 12(5)(b)

20. The Department has cited regulation 12(5)(b) as the exception applicable to the requested information on the basis that disclosure would adversely affect the course of justice. The full text of regulation 12(5)(b) can be found in the Legal Annex attached to the end of this Decision Notice.
21. As stated above, the Commissioner is satisfied that the legal advice falls within the definition of environmental information as provided in regulation 2(1)(c).
22. Under regulation 12(5)(b), a public authority can 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. In the case of *Kirkaldie v ICO & Thanet District Council*, the Tribunal stated that:

“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.”<sup>3</sup>

23. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Vederers of the New Forest*, which stated that: -

“... the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’.... Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system.”<sup>4</sup>

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<sup>3</sup> EA/2006/0001, para 21.

<sup>4</sup> EA/2008/0020, para 29.

24. Therefore the Commissioner considers that the principle of legal professional privilege is a central component in the administration of justice, and that legal advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'.

### Is the exception engaged?

25. Regulation 12(5)(b) provides a number of different criteria in order for it to be engaged. The Department has not submitted arguments about any inquiry of a criminal or disciplinary nature being involved in this case, and therefore the Commissioner has excluded these criteria from his considerations. The Commissioner notes that the test is whether disclosure "would" have an adverse effect rather than "could" and so the Department needs to show a clear argument as to how justice would be affected by its disclosure.
26. In order to reach a view as to whether or not the exception is engaged, the Commissioner has first considered whether the withheld information is subject to legal professional privilege. He must also decide whether disclosure of that information would have an adverse effect on the course of justice or the ability of a person to receive a fair trial.
27. Legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence. In particular, legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in *Bellamy v ICO & DTI* as:
- "... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."<sup>5</sup>
28. There are two types of privilege – legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
29. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. In this case, the Commissioner is of the view that the information in question falls within the definition of legal advice privilege. The Commissioner has inspected the withheld information, and is satisfied that it constitutes communications between the Department and its legal advisers for

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<sup>5</sup> EA/2005/0023 para 9.



the sole or dominant purpose of obtaining legal advice. It is noted by the Commissioner that there is no suggestion that privilege has been waived in this instance.

30. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse affect on the course of justice, with particular reference to legal professional privilege.
31. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice. This is because the principle of legal privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. The confidence that discussions between clients and their advisers will remain private would become weaker and their discussions may therefore become inhibited. He considers the likelihood of this happening to be more probable than not and therefore finds that the exception at Regulation 12(5)(b) is engaged.
32. Regulation 12(1)(b) requires that where an exception is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

### **Public interest arguments in favour of disclosing the requested information**

33. The nature of the legal advice surrounded the erection of a fence between a Country Park and a number of adjoining residential properties.
34. The complainant argued that, whilst legal privilege can be justified in some instances, it was unreasonable for the Department to make a decision that would directly affect a small community, without allowing those involved to have sight of the information on which that decision was based.
35. The Commissioner is mindful of the fact that the Information Tribunal has previously found that there is a clear public interest in planning decisions being taken by public authorities in an open and transparent way. The Commissioner therefore considers, for similar reasons, that there is a public interest in disclosure of the information in this case. Disclosure of the legal advice would provide a degree of transparency and reassurance to interested parties that the Department's actions were in the best interests of the community.
36. In addition, the Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exception. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel* (EA/2007/0052) the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people.

37. The Commissioner considers that there is a strong public interest in public authorities being transparent in their decision making and in the public understanding the reasons behind decisions made. In this case disclosure of the legal advice may assist the public in understanding the legal basis for this particular decision.
38. The Commissioner also believes that by disclosing the reasoning behind public authorities' decisions, there is a greater sense of accountability in relation to actions or decisions that are taken. This would allow for a more informed debate as to how and why decisions are made. The Commissioner believes that this is all the more important in cases where a public authority's decisions have a direct effect on the environment and on people's lives.

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

39. Whilst recognising the complainant's arguments, the Commissioner also accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
40. The Information Tribunal has endorsed this view. In its decision in *Bellamy v ICO & DTI*, the Tribunal stated 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. It may well be that in certain cases .... for example where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight ... 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 ....”<sup>6</sup>
41. In this case the Department made a number of submissions regarding the public interest in maintaining the exception. The Department stated that the public interest would not be served by disclosing legally privileged documents as it may inhibit the future provision to the Department of necessary and unbiased legal advice.
42. The Department also stated that it is fundamentally in the public interest for it to be able to communicate with its legal advisers confidentially and to receive frank and unfettered opinion regarding the lawfulness of its decision making. If this information were to be released, the Department was of the view that future provision of free and frank legal advice from the Department's solicitors may be jeopardised. This would adversely affect the quality of legal advice the Department would receive and ultimately the public interest is best served by a Department that receives and obtains quality legal advice.

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<sup>6</sup> EA/2005/0023



## Balance of the public interest arguments

43. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and in doing so has taken into account the presumption of disclosure as set down by regulation 12(2). In line with the Information Tribunal in the Mersey Tunnel Users Association case mentioned previously the Commissioner has given particular consideration, when balancing the public interest, to whether the advice is recent and/or live and to the number of people affected by the public authority's decision.
44. The Commissioner does not believe that in this case the Department's decision affects a substantial number of people. In the Mersey Tunnels Users Association case, where disclosure was ordered by the Tribunal, the number of people affected was approximately 80,000 people per weekday. The Commissioner does recognise the objections of the complainant and is aware that this decision will impact upon those members of the community who made use of the previous access to the Park. However he considers that this is a relatively small number of people. In line with the Information Tribunal decision in *Gillingham v the Information Commissioner and the Crown Prosecution Service (EA/2007/0028)*, which concerned a decision about a public footpath, he does not accept the number of people affected in this case to be a significant factor in favour of disclosure.
45. The Commissioner has noted that at the time of the request, the legal advice related to a live issue, albeit one that had been ongoing for some years. Even though no legal proceedings were anticipated at the time of the request, the public authority was still relying upon the advice in question. The Commissioner believes that it is in the public interest to allow a public authority to defend itself against any potential litigation action, without the legal advice being relied upon being put into the public domain at an earlier point. This is because disclosure of legal advice would be likely to unfairly prejudice the authority's position, and the Commissioner believes that to disclose legal advice where litigation is in contemplation or prospect would upset the delicate balance of fairness between legal adversaries. The Commissioner considers that the fact that the advice remained live as at the date of the request adds considerable weight to the public interest in maintaining the exception.
46. The Commissioner has also considered the age of the advice itself. In the case of *Kessler v Information Commissioner and the Ministry of Defence*, the Tribunal considered that advice which was weeks old was "relatively recent"<sup>7</sup>. In *Kitchner v Information Commissioner and Derby County Council* advice which was 6 years old was described "still relatively recent"<sup>8</sup> whereas in *Mersey Tunnel Users Association v Merseytravel and Information Commissioner*, advice which was over ten years old was considered "not recent"<sup>9</sup>. Upon consideration of the withheld information in this case, the Commissioner has seen evidence to satisfy himself that, as of the date of the request, the legal

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<sup>7</sup> EA/2007/0043

<sup>8</sup> EA/2006/0044

<sup>9</sup> EA/2007/0052

advice was recent. Again the Commissioner considers that this adds weight to the public interest in favour of maintaining the exception.

47. The Commissioner is also mindful of the Tribunal decision in the case of the *Foreign and Commonwealth Office v Information Commissioner* in which it was stated that:

“...what sort of public interest in likely to undermine [this] privilege?...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the public authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained...”

The Tribunal went on to state that such arguments of misrepresentation should be supported by “*cogent evidence*”<sup>10</sup>.

48. The Commissioner has found no evidence of the legal advice being misrepresented by the DOE. Therefore, whilst the Commissioner has given some weight to the general public interest in the transparency of a public authorities decisions, and further weight to the particular public interest in the transparency of decisions which affect the environment, he does not afford the public interest in disclosure the substantial weight that he would have given it had there been cogent evidence of misrepresentation.
49. Taking into account the recent and live nature of the advice, the Commissioner has given considerable weight to the public interest in the public authority being able to avail of legal advice, which could be jeopardised both in quality and quantity if this information was subject to disclosure.
50. The disclosure of the Department’s legal advice or the legal basis for its decision would have consequences for the Department if litigation ensued. Through disclosure of the legal advice, those who objected to the Department’s decision would be able to glean any potential weaknesses in the Department’s arguments. This would lead to an imbalance in the level playing field which is a fundamental requirement within the adversarial process.
51. After considering the above factors the Commissioner is satisfied that in this particular case, there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered in this case by at least equally strong arguments in favour of the disclosure. Therefore the Commissioner finds that in this case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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<sup>10</sup> EA/2007/0092, para;s 29 and 33.

## **The Decision**

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52. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Regulations in that it correctly applied the exception at regulation 12(5)(b).

## **Steps required**

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53. The Commissioner requires no steps to be taken.

## Right of Appeal

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54. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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 this 10<sup>th</sup> day of December 2009**

**Signed .....**

**Lisa Adshead  
Senior FOI Policy Manager**

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

## Legal Annex

### Environmental Information Regulations 2004

#### Regulation 2

2(1) In these Regulations

“environmental information” has the same meaning as in Article 2(!) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

#### Regulation 12

12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

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

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 enquiry of a criminal or disciplinary nature;