

Environmental Information Regulations 2004

Decision Notice

Date: 01 December 2009

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XX

Summary

The complainant requested the Council to release the legal advice it obtained relating to a planning enforcement matter, which was currently at appeal. The Council responded to this request, refusing to disclose the requested information as it considered that it was exempt from disclosure under regulations 12(5)(b) and 12(5)(g) of the EIR. After investigating the case the Commissioner decided that regulation 12(5)(b) was engaged and that the public interest in maintaining the exception outweighed the public interest in disclosing the information. As the Council was correct to withhold the information under regulation 12(5)(b) the Commissioner did not consider the Council's application of regulation 12(5)(g).

The Commissioner's Role

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

2. The complainant contacted the Council on 11 June 2008 to request that the following information be released in accordance with the EIR:

"We note from the minutes of the Regulation Committee that the County Council has sought advice from Counsel about environmental issues. Please accept this letter as a formal request under The Environmental Information Regulations 2004 for disclosure of Counsel's advice".

3. The Council first acknowledged receipt of this information request on 13 June 2008 advising the complainant that it would endeavour to respond in full within 20 working days. The Council then wrote to the complainant on 19 June 2008 requesting clarification as to the information that was required as preliminary searches failed to identify any recorded information relevant to the complainant's request.
4. The complainant responded on 2 July 2008 directing the Council to three pieces of correspondence which refer to the requested information.
5. The Council advised the complainant on 4 July 2008 that it would now reconsider the request and respond in full within a further 20 working days.
6. The Council issued its Refusal Notice on 24 July 2008. It advised the complainant that it was unwilling to disclose the requested information as it considered that it was exempt from disclosure under regulations 12(4)(e), 12(5)(d), 12(5)(f), 12(5)(g) of the EIR.
7. The complainant appealed against this decision on 29 July 2008.
8. The Council acknowledged receipt of this appeal on 6 August 2008 advising the complainant that it would issue its further response within 28 days. As it could not meet this deadline, the Council wrote to the complainant again on 27 August 2008 to confirm that it would respond within the 40 working day timeframe as prescribed by the EIR.
9. The Council completed its internal review on 26 September 2008. It confirmed that there were seven pieces of legal advice it wished to withhold and despite the complainant's further representations, it remained of the view that the requested information was exempt from disclosure under regulation 12(5)(b) and 12(5)(g) of the EIR.

The Investigation

Scope of the case

10. On 11 November 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 whether the Council had correctly applied regulations 12(5)(b) and 12(5)(g) of the EIR to the requested information.
11. The Commissioner notes that at the time of the internal review (as referred to in paragraph 9 above) the Council held seven pieces of legal advice dated as follows:
 - i. Counsel's advice 5 July 2004
 - ii. Counsel's advice 26 January 2005

- iii. Counsel's advice 24 January 2006
- iv. Counsel's advice 26 February 2007
- v. Counsel's advice 22 April 2008
- vi. Counsel's advice 28 July 2008
- vii. Counsel's advice 1 August 2008

The latter two pieces of legal advice dated 28 July 2008 and 1 August 2008 post date the complainant's request and the date by which the Council was obliged to respond (20 working days from the date it received the request). As the Commissioner can only consider the information held at the time the information request was made, the advices dated 28 July 2008 and 1 August 2008 do not fall within the scope of this investigation. The Notice will therefore only consider the advices i to v, as listed above, and whether this information should be withheld under the exceptions cited.

12. The complainant also asked the Commissioner to consider the Council's practice of excluding the public from parts of its meetings and its refusal to publicise minutes of alleged exempt business. As these issues are not requirements of Part 1 of the Act they are not addressed in this Notice.

Chronology

13. The Commissioner wrote to the Council on 6 August 2009 to request a copy of the withheld information and to obtain further more detailed arguments as to why it felt regulations 12(5)(b) and 12(5)(g) of the EIR applied.
14. The Council responded on 3 September 2009 providing a more detailed explanation as to why it considered regulation 12(5)(b) of the EIR applied in this case. No further arguments were submitted in support of the Council's previous application of regulation 12(5)(g) of the EIR.
15. As the Council failed to supply a copy of the withheld information, the Commissioner wrote to the Council on 9 September 2009 to again request that this was provided.
16. The Council forwarded a copy of the withheld information to the Commissioner on 14 September 2009.

Analysis

Exceptions

Regulation 12(5)(b)

17. As the Council has supplied more detailed arguments concerning its application of regulation 12(5)(b) of the EIR, the Commissioner will first consider whether this exception is engaged. If it is not, he will then go on to consider the Council's application of 12(5)(g).

18. Under this regulation 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 Information Commissioner and Thanet District Council (EA2006/001)* the Information Tribunal stated that the purpose of this exception was reasonably clear that:

“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”.

It is the Tribunal’s view that legal professional privilege is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

Legal professional privilege

19. Firstly, the Commissioner has considered whether the requested information is subject to legal professional privilege. There are two categories of legal professional privilege: legal advice privilege and litigation privilege.
20. In its submissions to the Commissioner, the Council stated that it is of the view that both categories of legal professional privilege apply in this case. It stated that the requested information is a series of confidential communications between lawyer and his client for the dominant purpose of giving legal advice and assistance.
21. In terms of litigation privilege, the Council advised that any communication which is made confidentially between lawyer and client for the dominant purpose of conducting or giving advice in relation to litigation, either pending or contemplated falls within this category of legal professional privilege. It confirmed that it is of the view that the requested information meets these criteria. It explained that the Council commenced enforcement proceedings by serving a notice on 19 May 2008. These proceedings resulted in the Inspectorate making a decision in the Council’s favour on 24 March 2009. However, the defendant filed a notice of appeal on 15 July 2009 and this is likely to be heard towards the end of the year. The Council advised that it intends to oppose the appeal and that litigation privilege will continue to apply pending the completion of all proceedings in relation to this matter.
22. In his correspondence to the Commissioner, the complainant argued that litigation privilege does not apply in this case. Referring to the wording of the actual exception he stated that the appeal against the Enforcement Notice issued is not a “trial” rather that it is a public inquiry designed to enable all interested parties to express their view. The complainant also confirmed that it is not “litigation” as no lawsuit is involved. The complainant is of the view that the criminal law only becomes relevant if the appeal is lost and is followed by non compliance with the

Enforcement Notice once it has come into force. Non compliance could then be the basis for a prosecution.

23. The Commissioner has reviewed the five pieces of legal advice individually. It is clear that each of the Counsel's opinion is a communication which was made confidentially and for the dominant purpose of providing legal advice and assistance to the Council. The Commissioner is therefore satisfied that the requested information falls within the category of advice privilege and is therefore subject to legal professional privilege.
24. As he is satisfied that advice privilege applies, there is no need for the Commissioner to go on and consider whether the requested information falls into the category of litigation privilege.
25. As the Commissioner is satisfied that the requested information attracts legal professional privilege he will now go on to consider whether disclosure would have an adverse affect and to what extent. If this cannot be substantiated, the exception cannot apply.

Adverse affect

26. In the decision of *Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)* the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out in paragraph 18 above; the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse affect and that any statement that it could or might have such an effect was insufficient.
27. In reaching a decision on whether disclosure would have an adverse affect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Information Tribunal's comments in the case of *Hogan and Oxford City Council v 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 affect. The Tribunal stated that when considering the term "would prejudice" that 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.
28. The Council argued that disclosure of information subject to legal professional privilege will, in itself, have an indirect adverse affect on the course of justice through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis. It stated that disclosures in such circumstances are likely to inhibit clients from seeking advice and advisers giving it in a free and frank manner.
29. The Council confirmed that the advices are still very much live. It explained that the case in question is at appeal and disclosure of the advices at this stage would clearly be very damaging to the Council's prospects. The advices outline various

different enforcement options and strategies and also discuss the strengths and any possible weaknesses in the Council's case. The Council confirmed that such information would be of great interest not only to the other side in the forthcoming appeal but to any person seeking to evade prosecution under the planning control legislation. The Council confirmed that the advices will also be used to influence future planning enforcement cases.

30. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)* the Information Tribunal set out the various authorities relating to legal professional privilege and described it as:

“a fundamental condition on which the administration of justice as a whole rests”.

31. The Commissioner accepts 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 Council's ability to obtain such advice in the future and this would in turn adversely affect its ability to manage its assets effectively and make future decisions.
32. The Commissioner also notes that this is a live issue and that there is a current planning enforcement appeal that touches on the advices in question. The advices necessarily highlight the strengths and any possible weaknesses in the Council's position. Disclosure prior to the appeal hearing due to take place later this year would adversely affect the Council's ability to defend its position and therefore damage its prospects. The Council should be able to defend its position and any claim made against it without having to reveal its position in advance.
33. The Commissioner accepts that disclosure would also place public authorities in a weakened position when compared to other persons not bound by the EIR or the Act. Legal professional privilege must apply equally to all parties to ensure that there is a level footing in legal proceedings.
34. The Commissioner has carefully considered the arguments presented and he is satisfied that in this case it is more likely than not that disclosure of the legal advices in question would adversely affect the course of justice and therefore that the exception provided by regulation 12(5)(b) is engaged.

Public interest test

35. The exception claimed is subject to the public interest test. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request under the legislation.

Public interest arguments in favour of disclosing the requested information

36. The Council stated that it considered the public interest test, in this case, in accordance with regulation 12(2) of the EIR, as explained in paragraph 35 above. Specifically, the Council confirmed that the following arguments in favour of disclosure were considered:

- i) Disclosure would promote public awareness of the Council's enforcement role.
- ii) It would promote accountability and transparency of its decision making process.
- iii) Disclosure would promote accountability and transparency in the Council's spending of public money.
- iv) It would allow members of the public the opportunity to understand the decisions taken by the Council in relation to enforcement matters.
- v) Releasing the requested information could assist public debate and allow members of the public to challenge the decisions taken.

Public interest arguments in favour of maintaining the exemption

37. Against disclosure, the Council put forward the following arguments:

- i) Legal professional privilege has a fundamental status in English law and it is of the view that there is a strong public interest in maintaining privilege.
- ii) Legal advice will not only contain final conclusions but also outline the arguments for and against those conclusions. Disclosure would expose both the strengths and weaknesses in the Council's case and any negotiating or settlement strategies and prejudice its ability to pursue matters of this nature effectively.
- iii) Disclosure of legal advice would erode the principle of legal professional privilege itself undermining a lawyer's capacity to give full and frank legal advice.
- iv) If legal advice were readily disclosed this very fact would discourage a client from seeking advice in relation to such matters in the future.
- v) The above reasons against disclosure would have clear negative implications on the quality of the Council's decision making process
- vi) Disclosure would undermine the Council's capacity to perform its planning enforcement functions to the detriment of the public.

38. In conclusion, the Council confirmed that it felt there were no compelling arguments in favour of disclosure in this case that would outweigh the arguments against disclosure. It stated that the public interest was best served in withholding the requested information.

Balance of the public interest arguments

39. The Commissioner has given careful consideration to the arguments presented both for and against disclosure. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role

and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. In this particular case the Commissioner understands that the complainant requires access to the requested information to understand more fully why enforcement action has been taken and why it perceives the Council has more recently changed its previous view on enforcement issues relating to this particular case.

40. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.
41. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exception. The Council argued that it needs to be able to obtain free and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."

42. It is also the Commissioner's view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR or the Act. This view was supported by the Information Tribunal in the hearing of *Creekside Forum v Department of Culture, Media and Sport (EA/2008/0065)*. The Tribunal stated that:

"Disclosure under [the Act or Regulations] puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis."

There is a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.

43. In this case the Commissioner accepts that the advices in question are live; they discuss the strengths, weaknesses, different enforcement options and strategies of a current planning enforcement issue which is subject to appeal this year. He notes that the advices are considered live in a broader context too. As the advices discuss different enforcement options and strategies, the advices will be relevant and used in future planning enforcement cases. Disclosure of these advices prior to the hearing would hinder the Council's ability to defend its position effectively. Disclosure would also provide valuable information to members of the public seeking to escape enforcement action or indeed prosecution for a breach of planning control legislation. It is the Commissioner's view that this would not be in the public interest, as such outcomes would

undermine the Council's ability to carry out its planning enforcement functions to the detriment of the public.

44. In the hearing of *Calland v Financial Services Authority (EA/2007/0136)* the Information Tribunal stated:

“What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential”.

45. In this particular case, it is the Commissioner's view that no compelling arguments have been presented by either party to justify the disclosure of privileged information. He has therefore concluded that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
46. As the Commissioner is satisfied that regulation 12(5)(b) applies to the requested information and that the public interest rests in non disclosure, there is no need for him to go on to consider the Council's application of regulation 12(5)(g).

The Decision

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR, in that regulation 12(5)(b) applies and the balance of the public interest lies in non-disclosure.

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. 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.
Website: 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 the 1st day of December 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Regulation 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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2)** A public authority shall apply a presumption in favour of disclosure.
- (3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

 - (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.
- (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 –

 - (a) international relations, defence, national security or public safety;
 - (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;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person–

 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
 - (g) the protection of the environment to which the information relates.