

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 September 2009

Public Authority: Department for Environment Food and Rural Affairs
Address: 3 – 8 Whitehall Place
London
SW1A 2HH

Summary

The complainant requested information from Department for Environment, Food and Rural Affairs (Defra) relating to the legal advice used by Defra to formulate its view on whether EU Procurement Directives allow social criteria to be taken into account in public procurement.

The Commissioner finds that Defra was correct to withhold the information under regulation 12(4)(e) of the Environmental Information Regulations 2004 (the EIR) as the withheld information is comprised of internal communications and, in all the circumstances of the case, the public interest in maintaining the exception to disclosure provided by regulation 12(4)(e) of the EIR outweighs the public interest in disclosing the information.

In failing to provide the complainant with notice of its decision in response to the representations of the complainant under regulation 11(1) of the EIR, within the appropriate time period, that is no later than forty days after the date of receipt of those representations, Defra has failed to comply with regulation 11(4) of the EIR.

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. This Notice sets out the Commissioner's decision in respect of the complainant's request of 15 April 2005.

The Request

2. The complainant's request was made to the public authority, for Environment Food and Rural Affairs (Defra) on 15 April 2005.

3. The complainant requested:

"Could you please supply me with the legal advice (provided, for example by DEFRA lawyers, OGC officials etc) used by DEFRA to formulate its view on whether EU Public Procurement Directives allow social criteria to be taken into account in public procurement, specifically the UK Government's timber procurement policy."

4. Defra wrote to the complainant on 13 May 2005 advising:

"Defra does not hold any legal advice on this subject from sources external to Government. The Government was guided by the relevant interpretative communications published by the Commission of the European Community. Annex A to this letter is a series of extracts from those communications which are pertinent to the point at issue, Annex B to this letter is Chapter 9 of the 'Joint Note on the Environmental issues in Purchasing' which deals with social criteria."

5. Defra also advised that it was of the view that the internal legal advice held by Defra fell within the exception under Regulation 12(4)(e) of the EIR.

6. Defra stated:

"The Environmental Regulation 04 contains an exception in respect of internal communications (regulation 12(4)(e) unless there is an overriding public interest that merits disclosure. Internal legal advice held by Defra falls within this exception. In this case the public is best served by not disclosing the internal legal advice held by Defra. Decisions by Government must be taken in a fully informed legal context, which includes assessing the weakness of its position. It follows that the disclosure of internal communications between Government officials could prejudice the government's ability to defend its legal interests - both directly by exposing its legal position to challenge and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.

In keeping with the spirit and effect of the Environmental Information Regulations 2004, all information is assumed to be releasable to the public unless exempt."

7. On 21 June 2005, the complainant requested an internal review of the decision of Defra.

8. On 7 October 2005 Defra wrote to the complainant with the outcome of its internal review of its decision. Defra apologised for the '*very long delay*' in responding.
9. Defra advised the complainant that, upon internal review, it found that the information was excepted from the requirement to disclose as the information was covered by the exception under regulation 12(4)(e) of the EIR, relating to internal communications, and also under the exception under regulation 12(5)(d) of the EIR, relating to disclosure adversely affecting the proceedings of a public authority, where such confidentiality is provided by law.

The Investigation

Scope of the case

10. The complainant wrote to the Commissioner on 20 December 2005 requesting an investigation into the handling of his information request. The Commissioner accepted the complainant's request as a valid complaint under section 50 of the Act and has considered the conduct of this matter by Defra in relation to that recorded information relevant to the request.

Chronology

11. In its request for an investigation of 20 December 2005, the Complainant assisted the Commissioner in his investigation by providing detailed and considered submissions in support of its position that the information should properly have been disclosed by Defra.
12. The Commissioner wrote to Defra on 25 June 2007 requesting a copy of the withheld information.
13. On 20 July 2007 Defra provided the Commissioner with a copy of the withheld information.
14. On 18 February 2008 the Commissioner requested that Defra provide the Commissioner with its full submissions in support of its decision to withhold the information.
15. Defra responded to the Commissioner on 17 October 2008 providing details of its consideration of the application of the exceptions under regulations 12(5)(d) and 12(4)(e) of the EIR and of its consideration of the public interest in maintaining the exceptions and the public interest in disclosing the information.
16. Defra confirmed that it had considered the public interest in disclosing the information. Defra advised that it considered that its internal review response agreed with the complainant's summary of the public interest factors in favour of release but that, having weighed the public interest with a presumption in favour of disclosure, it still considered that the harm arising from disclosure of the information outweighed the potential benefits of disclosure in this case. Defra

advised the Commissioner that it wished to make every effort to work with the complainant to explain the basis for, and contextualise, its decision making in relation to social criteria in public procurement which was communicated to the complainant by the Commissioner.

17. The Commissioner has considered the withheld information and the submissions of the Defra and of the complainant.

Analysis

Environmental Information

18. The Commissioner is satisfied that all of the requested information is environmental information and falls to be considered under the EIR for the following reasons.
19. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged by regulations under section 74 of the Act to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in regulation 2.
20. Regulation 2 of the EIR states:

“environmental information” has the same meaning as in Article 2(1) 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 these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of 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;*
 - (d) reports on the implementation of environmental legislation;*

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

21. The Commissioner has considered the requested information and is satisfied that the requested information is environmental information as defined by regulation 2 of the EIR.
22. The Commissioner is satisfied that the requested information is environmental information under regulation 2(1)(c) of the EIR (in that it is information on measures and activities affecting or likely to affect the elements and factors referred to in regulations 2(1)(a) and (b) of the EIR). The information is on the measure of timber procurement policy.

Procedural matters

23. Regulation 11 (1) of the EIR provides that an applicant may make representations to a public authority, in relation to the applicant's request for information, that the authority has failed to comply with the requirements of the EIR in relation to that request. The complainant in this case made such representations and request for review on 21 June 2005.
24. Regulation 11(4) of the EIR require that the authority notify the applicant of its decision in relation to the applicants representations no later than forty working days after receipt of those representations. In this case Defra notified the complainant of its decision on 7 October 2005, apologising for the '*very long delay*' in responding.
25. In failing to provide the complainant with notice of its decision, in response to the representations of the complainant under regulation 11(1) of the EIR, within the appropriate time period Defra has failed to comply with regulation 11(4) of the EIR.

Exceptions

26. Regulation 12(1) of the EIR states that a public authority may refuse to disclose requested environmental information if an exception to disclosure applies under regulations 12(4) or 12(5) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. Regulation 12(2) of the EIR requires that a public authority apply a presumption in favour of disclosure.

Regulation 12(4)(e) (Internal communications)

28. The Commissioner has considered whether the Department correctly applied the exception under regulation 12(4)(e).

29. Regulation 12(4)(e) states:

“12 (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that ...

(e) the request involves the disclosure on internal communications.”

30. The Commissioner is satisfied that the withheld information is comprised of internal communications and that the exception under regulation 12(4)(e) of the EIR is engaged.

The public interest test

31. Mindful of the presumption in favour of disclosure, the Commissioner has considered the public interest in favour of maintaining the exception and whether, in all of the circumstances of this case, it outweighs the public interest in disclosing the information.

Public interest factors favouring withholding the information

32. The Commissioner is satisfied that these internal communications are comprised of legal advice from internal Departmental lawyers and that the requested information attracts legal professional advice privilege. Commissioner finds that it is relevant to give weight to LPP factors under the 12(4)(e) exception. The basis of the exception is to protect a safe space for internal deliberation and protect the provision of frank and candid advice. The information in question is legal advice and it is relevant to take into account the characteristics of that information when considering the weight to be given to protecting the internal communications process in question.

33. Legal professional privilege is an important principle of English law established since at least the sixteenth century which provides for special protection from disclosure of communications between lawyers and their clients. In the Information Tribunal case of Mr Christopher Bellamy and The Information Commissioner and the DTI (EA/2005/0023) the Tribunal described the notion of legal professional privilege as,

“ a set of rules or principles which are designed to protect 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.

34. Legal professional privilege is classified into two categories; legal advice privilege and litigation privilege.

35. Legal advice privilege relates to confidential communications and other documents such as draft statements and reports passing between lawyer and client for the purpose of receiving legal advice in a non-litigation context.
36. There are two aspects to legal professional privilege: (i) the public interest in enabling persons to obtain appropriate legal advice and assistance; and (ii) the recognition by the courts that effective legal advice requires absolute candour between a client and his lawyer. The requisite candour is much less likely to exist if their exchanges are liable to be disclosed.”¹
37. Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect or is pending. The sole purpose of the communications must be to give or get advice in relation to the litigation or collect evidence for use in the litigation.
38. Confidentiality is an essential prerequisite to a claim for legal professional privilege. Communications will be confidential if they have taken place in circumstances where a relationship of confidence is express or implied.
39. The Commissioner recognises that there is a strong public interest in enabling persons to obtain appropriate legal advice and assistance. It is important that members of the public can have frank communications with their lawyers with a high degree of certainty that the exchanges are not liable to be disclosed without consent and used against them. According to Sir Gordon Slynn in *AM&S Europe Ltd v European Commission* (1983) this public interest,

*“springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons real and legal, that they should be able to know what they can do under the law what is forbidden, where they must tread circumspectly, where they run risks.”*²

40. In the 2006 case of *Bellamy v the Information Commissioner and the DTI* the Information Tribunal found that at least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest and stated,

*“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.”*³

¹ See Bankim Thanki QC, *The Law of Privilege*, (2006), p8

² *AM&S Europe Ltd v European Commission* (1983) QB 878, 913

³ *Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry*, EA/2005/0023

41. In the 2007 case of Pugh v the Information Commissioner and the MOD said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect “a significant group of people”.⁴

42. In the 2008 case of Mersey Tunnel User Association v The Information Commissioner and Merseytravel the Tribunal concluded:

*“to quote Bellamy: ‘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 public interest’. In our judgment, the countervailing considerations adduced here are not equally strong, they are stronger. The opinion should be disclosed”.*⁵

43. This view was further confirmed by the Information Tribunal in the 2008 case of Calland v the Information Commissioner and the Financial Services Authority stating:

*“what is quite plain, from a series of decisions beginning with Bellamy..., 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.”*⁶

44. Defra argued that government departments need to make decisions in a fully informed legal context. It argued that lawyers need to be able to present to the public authority including arguments in support of their final conclusions and in addition, any relevant counter arguments.

45. Defra considered that it is important that government Departments are able to withhold legal advice received, in order to protect its legitimate interests and to ensure that it is not unfairly prejudiced in its ability to defend its policy position, or result in legal advice not being sought in the future, which would in turn weaken the policy making process.

Public interest factors favouring the release of the information

46. Defra confirmed that it had considered the public interest in disclosing the information. Defra advised that it considered that its internal review response agreed with the complainant’s summary of the public interest factors in favour of release but that, having weighed the public interest with a presumption in favour of disclosure, it still considered that the harm arising from disclosure of the information outweighed the potential benefits of disclosure in this case. Defra did not make its own explicit or specific representations to the Commissioner on the public interest in disclosure.

47. The Commissioner considers that there is a public interest in transparency in decision making by a public authority. Public confidence is necessarily dependent

⁴ Pugh v the Information Commissioner and the MOD, EA/2007/0055

⁵ Mersey Tunnel User Association v The Information Commissioner and Merseytravel, EA/2007/0052

⁶ Calland v the Information Commissioner and the Financial Services Authority, EA/2007/0136

on such transparency and on the demonstration by a public authority that it has satisfied all applicable laws and acted with clear probity.

48. The Commissioner recognises that there is a clear public interest in ensuring the accountability of public authorities for the procurement decisions they take that will have an impact on the environment, and disclosure of the legal advice relied upon by Defra in making these decisions may aid understanding of the decisions taken. The information in question would enable the public gain a greater understanding on the legal basis of procurement approaches and enhance the wider public debate about procurement policies that have an impact on the environment.
49. On balance, however, whilst the Commissioner considers these are strong public interest arguments favouring the release of the information, these are outweighed by the significant public interest in protecting legal advice and therefore regulation 12(4)(e). The Commissioner has accorded significant weight beyond the general weight applied to protecting legal advice as it is recent and current advice.
50. The Commissioner therefore concludes that the public interest favours the maintaining the exemption under regulation 12(4)(e).

Regulation 12(5)(d) (confidentiality of proceedings)

51. As the Commissioner finds that the exception under regulation 12(4)(e) is engaged and that the public interest in maintaining this exception alone outweighs the public interest in disclosing the information, the Commissioner is satisfied that Defra is not required to disclose the information under the EIR.
52. Accordingly, the Commissioner has not addressed in this decision whether the exception under regulation 12(5)(d) is engaged with respect to the information.

The Decision

53. The Commissioner's decision is that Defra was entitled to refuse to provide the withheld information on the basis that the withheld information was exempt under regulation 12(4)(e) of the EIR.
54. Further, in failing to provide the complainant with notice of its decision, in response to the representations of the complainant under regulation 11(1) of the EIR, within the appropriate time period Defra has failed to comply with regulation 11(4) of the EIR.

Steps required

55. In light of his findings on the application of the exception under Regulation 12(4)(e) the Commissioner does not require any steps to be taken.

Right of Appeal

56. 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 7th day of September 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex: Relevant statutory obligations

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (g) 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 these elements;
- (h) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (i) 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;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

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 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 - Exceptions to the duty to disclose environmental information

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.

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

Regulation 12(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.

Regulation 12(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.

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 –

- (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.

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.