

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 20 October 2009**

**Public Authority:** St Albans City and District Council  
**Address:** District Council Offices  
St Peter's Street  
St Albans  
Herts  
AL1 3JE

### Summary

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The complainant made a request to St Albans City and District Council ('the council') for legal advice and the evidence before the Counsel concerning an application to the Land Registry for the registration of a right of way. The council initially claimed that the information was exempt under section 42 of the Freedom of Information Act ('the Act'). The Commissioner told the council that the information should have been considered under the Environmental Information Regulations 2004 ('the Regulations'). The council therefore reconsidered the information and applied Regulation 12(5)(b). The Commissioner's decision is that Regulation 12(5)(b) is engaged and that the public interest in maintaining the exception outweighs the public interest in disclosing the information therefore the council 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.

### Background

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2. The complainant's request follows a long running dispute with the council regarding a right of way over council land beside the complainant's house. The

complainant had been advised by solicitors that he had acquired a vehicular right of way as a result of long usage and in 2004 sought to establish the legal status of the right by an application to the Land Registry. The council lodged an objection and the application was referred to an Adjudicator who ordered a court hearing. In the month prior to the scheduled court hearing in August 2006, the council offered to grant a limited right of way as had been suggested by the complainant 2 years earlier. The complainant accepted the offer having been assured by the council's Estates Department that that the offer was a genuine attempt to bring about agreement and not related to advice given by Counsel instructed to conduct the case for the council. The complainant later suspected that the assurance was false and that he was deceived into withdrawing his application and agreeing to a restricted right of way because having reviewed the witness statements and legal submissions, Counsel believed that the council's case was likely to be lost.

## The Request

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3. On 4 August 2007, the complainant made the following request to the council;

"In connection with my dispute with the Council and my application for compensation, I ask to be informed of the nature and circumstances and full details of all and any legal advice given by your Department , and/or to your Department by Counsel, concerning my application to the Land Registry for the registration of a Right of Way, and the evidence then before Counsel, in the period immediately before and leading to the decision, after 2 years to make an offer of a restricted Right of Way over the Council's land beside my house."

4. The council responded on 4 September 2007 by confirming that it held information of the description specified in the request as set out in the chronology attached to the council's letter of 22 January 2007 and legal advice in memorandums, emails and attendance notes from 29 June 2005 to 22 January 2007. The council stated that the request is covered by the legal professional privilege exemption within the meaning of section 42 of the Act because it relates to legal advice and communications and provided its reasons as to why the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
5. Following the complainant's request for an internal review of the decision, the council responded on 1 November 2007 to the effect that the request had originally been properly considered and good reasons had been given as to why the requested information would not be disclosed. The council did not provide any further arguments.

## The Investigation

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### Scope of the case

6. On 22 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated that the council had misjudged the public interest and misused the legal professional privilege exemption in withholding the information when the normal honest need for legal professional privilege has gone by as the court hearing was no longer pending. He also stated that disclosure of advice long after the matter had been resolved and in the face of doubts of the truth of the assurance given could not prejudice or erode the doctrine of legal professional privilege and that that doctrine was not developed to cover up falsehood or to prolong a suspicion of falsehood.
7. During the course of the Commissioner's investigation the council reviewed the case and on 7 September 2009 disclosed approximately half of the documents previously withheld as in its view the legal privilege no longer applied. The Commissioner has therefore not considered the application of the exception at 12(5)(b) of the Regulations to the disclosed information.
8. The Commissioner has considered whether the Council was correct to apply the exception at 12(5)(b) of the Regulations to the remainder of the information and whether it responded to the request in accordance with the relevant procedural requirements.
9. Some of the information requested was considered to be the complainant's own personal data and as such was dealt with as a subject access request under the Data Protection Act 1998 and is therefore outside the scope of this decision notice.

### Chronology

10. On 5 September 2008 the Commissioner wrote to the Council requesting a copy of the withheld information and noting that the data protection matters have been assessed under a different case reference number.
11. The Commissioner commenced the full freedom of information investigation by writing to the council on 21 July 2009. The Commissioner conveyed his view that the information is environmental falling within the scope of the Regulations and requested that the council review the case and consider disclosing the information. The Commissioner also requested that if the council was not willing to disclose the information, it provide the Commissioner with a copy and requested detail of the council's application of the exception at 12(5)(b) of the Regulations and the public interest test.
12. On 15 August 2009 the Council provided a substantial response including copies of the withheld information. As mentioned in paragraph 7, it also retracted its reliance on the exception at 12(5)(b) to approximately half of the information.

## Analysis

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### Substantive Procedural Matters – Is it environmental information?

13. The Commissioner notes that the council initially refused the request for the information because it considered it exempt under section 42 of the Act. However the Commissioner considered that the information was environmental information which falls under the scope of the Regulations.
14. The Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR. Regulation 2(1)(c) provides that;  
  
“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 –  
  
(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’
15. The factors referred to in (a) include;  
  
‘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’.
16. The Commissioner does not believe that it is necessary for information to have a direct effect on the environment for it to be environmental, only that it be linked in the appropriate manner and considers that the phrase “any information...on” should be interpreted widely and in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIRs enact.<sup>1</sup>
17. The Commissioner is satisfied that the legal advice falls within the definition of environmental information for the purposes of the Regulations as provided in Regulation 2(1)(c). The information in this case is legal advice which relates to a right of way over council land. The right of way is a measure, as defined in Regulations 2(1)(c), likely to affect the elements and factors referred to in 2(1)(a) and the information in question relates to that measure.

### Exceptions - Regulation 12(5)(b)

18. The council claimed that the information is legal advice which is subject to legal professional privilege and that it is therefore exempt from disclosure under

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<sup>1</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.

Regulation 12(5)(b) of the Regulations. 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.

19. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Information Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* 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’. (paragraph 9)

20. There is no specific exception within the Regulations referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that Regulation 12(5)(b) encompasses such information.

21. In the case of *Kirkaldie v ICO & Thanet District Council [EA/2006/0001]* 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’. (paragraph 21)

22. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Vederers of the New Forest [EA/2008/0020]*, 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.’ (paragraph 29)

23. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase ‘course of justice’. He therefore considers that the arguments put forward by the council are relevant to whether Regulation 12(5)(b) is engaged or not.

Is the exception engaged?

24. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse affect on the course of justice.
25. There are two types of privilege, namely; legal advice privilege and litigation privilege.
26. The council have stated that it is seeking to rely on litigation privilege in relation to one witness statement only. The Commissioner's Awareness Guidance entitled 'The exemption for legal professional privilege' (AG4) states that;  
  
'For information to be covered by litigation privilege, it must have been created for the "dominant purpose" (the main purpose) of obtaining legal advice on the litigation or for lawyers to use in preparing the case. This is a question of fact in each case and may be obvious from inspecting the documents in question.'
27. Having seen the information in question, the Commissioner is satisfied that litigation privilege applies as the witness statement is information that was created for use in litigation which was pending at the time.
28. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
29. In response to the Commissioner's enquiries, the council have confirmed:
  - that the information was created in the course of a relationship between the Legal Department or Counsel and the Estates Department;
  - that the Legal Department or Counsel were providing advice in their professional capacity;
  - that all of the information was either created to enable the solicitors in the Legal Department or Counsel to give legal advice or contains the provision of such legal advice;
  - that the legal advice was obtained for the purposes of assisting the Estates department to decide what rights the complainant had over the public amenity land, what options were available to the Estates Department to address the complainant's request for a right of way and what the legal implications were of any action taken by the Estates Department; and
  - that the information has not been disclosed or privilege otherwise waived.
30. The Commissioner has reviewed the withheld information. Based on that review and the council's submission detailed in paragraph 29 the Commissioner and is satisfied that the withheld information is subject to legal professional privilege.
31. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse affect on the course of justice.



32. In *Archer v ICO & 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 course of justice, 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 effect and that any statement that it could or might have such an effect was insufficient.
33. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word “would”. It is the Commissioner’s view that the Tribunal’s comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & 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” 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.
34. The Commissioner notes that 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.
35. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the Act or the Regulations. Clients and their advisers’ confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
36. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by this request when making his decision in this case.
37. The council submitted that disclosure would adversely affect the course of justice as, if released, the legal advice would damage the council’s ability to deal with similar matters relating to public amenity land. It stated that disclosure would adversely affect the Council’s ability to defend public amenity land against claims from residents for rights of way as the general public would have access to information about potential strengths and weaknesses that there may be in the council’s position on any such case. The council further argued that it would adversely affect the course of justice if the council were not on an equal footing with any other party in a particular matter.
38. The Commissioner has seen the withheld information and considered the council’s arguments and is satisfied that disclosure of the withheld information would more likely than not adversely affect the course of justice. Disclosure of the advice would provide a clear indication of the arguments, strengths or

weaknesses which the council might have in any litigation taking place over rights of way of public amenity land, placing it at a disadvantage in any such litigation. In the Commissioner's view, disclosure would unbalance the level playing field under which adversarial proceedings are meant to be carried out. The Commissioner is therefore of the view that regulation 12(5)(b) is engaged.

### **The public interest**

39. Regulation 12(1)(b) requires that where the exception in Regulation 12(5)(b) 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.
40. The Commissioner notes that Regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

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

41. The council have acknowledged that there is always a need to be transparent whenever possible in decisions made by the council and that disclosure of the information would assist with transparency and accountability in the actions and decisions it takes.
42. The council also recognises that those involved in dealings with the Council may feel they have better understood the process if they know how the Council reached its decisions and its legal justification for a course of action and that there is a strong argument that decisions which will be made public are more likely to be sound decisions.
43. The Commissioner agrees with the council's submissions in favour of disclosing the information as its release would promote accountability and transparency and allow the public to better understand the basis of the council's decision and its legal justification for a particular course of action.
44. The complainant expressed the opinion that the normal honest need for legal professional privilege had passed in this case and that the benefit of legal professional privilege could no longer have the force it would have had at the time the court hearing was pending.
45. The Commissioner does not agree with the complainant on this point in this case and he is of the opinion that disclosure of the information would place the council at a disadvantage in any future litigation concerning rights of way over amenity land as stated in paragraph 38.
46. The complainant also submitted that the doctrine of legal professional privilege was not developed to cover up a falsehood nor to prolong a falsehood and it is not in the public interest that a reasonable suspicion should be left outstanding as insistence by the council upon legal professional privilege enforces suspicion in this case. He stated that;



'It cannot be in the public interest that the reasonable suspicion of deceit [sic] by the Council's officers be left outstanding. I submit that the truth of this matter should be brought into the open. If the true position is that the suspicion of duplicity is ill-founded, then it must be right that the officers' honesty be clearly shown so that faith in the probity of the Council's actions may be restored. If on the other hand it transpires that the suspicion of duplicity is justified, then it must be right that elected Councillors unaware of it, should be apprised of the truth, so that they may take steps to ensure that all future actions by officers in their name are carried out in good faith. The legalistic insistence upon legal protection privilege exemption in these circumstances, merely reinforces suspicion, such that it cannot be in either the public interest or in the interests of the Council.'

47. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO [EA/2007/0092]*, which considered the public interest in relation to the section 42 exemption of the Freedom of Information Act 2000 (this provides an exemption for information to which a claim to legal professional privilege could be maintained in legal proceedings). During its deliberations the Tribunal said;

'...what sort of public interest is 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 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...' (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

48. Having considered the circumstances of the case the Commissioner has not found any evidence of the above factors and therefore does not place any significant weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.
49. As stated in paragraph 40, the Commissioner also places weight on the specific presumption set out in the EIR that favours disclosure of environmental information.

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

50. The council have argued that there is public interest in maintaining the exception due to the need to protect the established principle of confidentiality in communications between lawyers and their clients as without the certainty relating to confidentiality the quality of legal advice may not be as full and frank as it ought to be if there were a risk that it would be disclosed in the future.
51. The Commissioner recognises that there is a strong and inbuilt public interest in protecting the concept of legal professional privilege and places a great deal of weight upon this. The concept has developed to ensure that clients are able to

receive advice from their legal advisors in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the doctrine of legal professional privilege could therefore damage the ability of parties to provide or receive legal advice on a full and frank basis, thereby damaging the parties' ability to effectively determine their legal options, or to defend, or seek legal restitution against other parties in accordance with their rights.

52. The council have also submitted that if legal advice were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the Act. It stated that;

'The Council would be severely disadvantaged if the general public were able to see the advice of Counsel, and the internal legal discussions on the matter, in dealing effectively with future cases. It would put the Council at a disadvantage in any future discussions or legal actions because the other party would already have an indication of how the Council will approach the matter. This remains the case even two years later as there has not been any legislative or Council policy changes since 2007 that would reduce the interest to the Council in retaining the privacy of this legal advice and legal discussions.'

53. The council further argued that it is not in the public interest for the information to be disclosed as legal advice and discussions will highlight both the strengths and weaknesses in a case and the council should be able to protect its position and be able to defend its rights as much as any private company or individual.
54. The Commissioner accepts the council's arguments that, if disclosed, the advice could be analysed for weaknesses which could then be exploited in any future cases regarding rights of way over public amenity land. The Commissioner has given this argument significant weight as it would effectively cause an imbalance in the level playing field which should be present within the adversarial process. As legal professional privilege is one of the guarantees of a fair trial, the Commissioner would not expect privilege to be waived in cases where disclosure might prejudice the rights either of the authority itself or any third party to obtain access to justice.

### **Balance of the public interest arguments**

55. The Commissioner accepts the generic arguments that there is public interest in disclosing information to aid transparency and accountability, that decisions which are made public are more likely to be sound decisions, and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action.
56. The Commissioner also accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately.

57. However, the Commissioner acknowledges and places great weight on the fact that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) 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' (paragraph 25).

58. The Commissioner believes that there must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be. The Tribunal in the *Bellamy* case made it clear that disclosure was unlikely to be justified in most cases:

'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...' (paragraph 25).

59. Furthermore, as legal advice has to be fair, frank and reasoned, it is inevitable that it will highlight the strengths and weaknesses of any course of action. Therefore, if advice obtained for the purposes of litigation were to be routinely disclosed, public authorities would potentially be in a weakened position in litigation compared with other persons not bound by the Act. The Tribunal in the *Bellamy* case acknowledged that English law considers

'privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned'.

Therefore, there is a strong public interest in ensuring that legal professional privilege applies equally to all parties before, during and after litigation to which the Commissioner has given substantial weight.

60. On balance, the Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at Regulation 12(5)(b) outweighs the public interest in disclosure of the information.

### **Procedural Requirements**

61. Given that the Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

## The Decision

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62. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:

- The council incorrectly considered the information under the provisions of the Freedom of Information Act 2000 rather than the Environmental Information Regulations 2004.
- In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations, the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information

63. However, the Commissioner has also decided that the following elements of the request were dealt with in accordance with the Act:

- The council was correct to apply Regulation 12(5)(b) to the information.

## Steps Required

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64. The Commissioner requires no steps to be taken.

## Right of Appeal

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65. 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 the 20<sup>th</sup> day of October 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 the 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(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;

### Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including

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- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).