

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 26 November 2009

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8UJ

Summary

The complainant requested a copy of the internal legal advice which the Council obtained in respect of a right of way across land known as Rotherwick which is currently a golf course. The Council refused the request claiming that the exceptions in Regulations 12(4)(e) and 12(5)(b) of the Environmental Information Regulations 2004 ('the Regulations') applied.. The Commissioner's decision is that the information requested is legal advice, Regulation 12(5)(b) is engaged and the public interest in maintaining the exception outweighs the public interest in disclosing the information. As the application of Regulation 12(5)(b) is upheld no finding has been made on the exception at regulation 12(4)(e).

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.

Background

2. During routine Council research into the definitive map of the area the Council discovered information about a specific right of way which had previously been considered to be a footpath. The right of way was

originally a bridleway. This right of way had been diverted in the 1950s as a footpath not a bridleway. As a result of this discovery questions have been raised by the Council regarding the classification of current rights of way which may or may not exist.

The Request

3. On 5 September 2008 the complainant requested:
“... a copy of the legal advice given to the rights of way section (or a statement if given orally) as a result of which the Joint Opinion of George Laurence QC and Ross Crail, both leading experts in rights of way law, has been rejected or even doubted.”
4. On 3 October 2008 the Council issued a refusal notice in accordance with the Environmental Information Regulations 2005 (‘the EIR’).
5. On 27 October 2008 the complainant requested an internal review.
6. On 26 November 2008 the Council wrote to the complainant upholding its original decision to withhold the requested information.

The Investigation

Scope of the case

7. On 25 January 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider his own extensive experience in related tribunal work which informed his belief that the exclusion encompassing the FOI exemption of Legal Professional Privilege does not apply in the circumstances of this case.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

9. Having reviewed the nature of the request and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact the Council for further information or arguments in support of its decision to withhold the requested information.

Analysis

10. The complainant suggested that his request should not be considered under the EIR.
11. The EIR implement the access to information provisions of the Aarhus Convention. Guidance on the Convention is given in the Aarhus Implementation Guide which was prepared by the Regional Environmental Centre and other organisations for the United Nations. The AIG explores how the Convention may be interpreted.
12. The EIR in providing public access to environmental information encompass a wide scope of information which can be determined as 'environmental'. This is consistent with the purpose stated in the first recital of the Council Directive 2003/4EC from which the Regulations are derived. Environmental information as defined in regulation 2(1) includes :
"...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.
 - (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;"
13. The Commissioner considers that for information to qualify as environmental information by virtue of regulation 2(1)(c) :
 - the information must be on a measure or an activity,
 - the measure or activity (not the information itself) must affect or be likely to affect the elements and factors in regulation 2(1)(a) and (b), or be designed to protect the elements in (a).
14. In this case the requested information sought is the legal advice given internally on issues arising from rights of way in a specific area of land. The Commissioner considers this to qualify as information on measures, namely legislation and plans, which are likely to affect the permitted use, and therefore the state, of the land involved in the specific area of discussion.
15. The Commissioner therefore agrees with the Council that the request is appropriately considered under the EIR.

Exceptions

16. Although the Council argued that the information is exempt from disclosure on the basis of the exclusions contained in regulations

12(4)(e) and 12(5)(b), the Commissioner has initially considered the application of regulation 12(5)(b).

Regulation 12(5)(b)

17. Regulation 12(5)(b) provides that '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...'
18. Regulation 12(5)(b) is the regulation which provides the exception equivalent to the exemption found in section 42 (legal professional privilege, 'LPP') of the Act. This exception is wider than section 42 but can be used for information covered by LPP in a similar way to the section 42 exemption in the Act. In the case of *Kirkaldie v the Information Commissioner and Thanet DC (EA/2006/001)* the Tribunal expressed the view that the purpose of the exception was reasonably clear, concluding that the exception is "similar" to the exemption.
19. In its refusal notice the Council argued that the information is excepted on the basis of regulation 12(5)(b) because the information is legal advice which is covered by LPP and release of the advice could adversely affect the course of justice in any forthcoming inquiries or hearings relating to this subject matter.
20. The Council states that although there is currently no ongoing litigation there is clearly an ongoing dispute. The information requested is the legal advice sought and given in a client lawyer relationship.
21. The complainant provided the Commissioner with a lengthy reasoning of his opinion that regulation 12(5)(b) cannot be considered to be similar to LPP and cannot be applied in this case.
22. The complainant considers the context of regulation 12(5)(b) clearly refers to matters of a criminal or disciplinary nature involving individuals, and "is patently inappropriate to the rejection complained of."
23. There are two categories of LPP; litigation privilege and legal advice privilege. As the Council has confirmed that there is no litigation underway or contemplated in this case, the Commissioner considers the information requested to be covered in the second category. This privilege covers communications relating to the provision of legal advice and safeguards the right of any person to obtain frank and realistic legal advice. The Council was provided with legal advice from the County's legal advisor on the rights of way in a specific area. There

is no requirement for the legal advice to relate to litigation in order to engage privilege.

24. The Commissioner considers that advice privilege will apply where the communication is:

- confidential
- between a client and professional legal advisor
- made for the sole or dominant purpose of obtaining or providing legal advice and,
- privilege has not been waived

25. It has been established through FOI case law that regulation 12 (5)(b) includes LPP and has been upheld in the Tribunal decisions of Kirkaldie (EA/2006/001), Burgess (EA/2006/0091) and Rudd (EA/2008/0020). The Commissioner therefore rejects the complainant's argument that regulation 12(5)(b) cannot be considered to be similar to LPP and thus cannot be applied in this case.

26. It is the experience of the Commissioner that the Tribunal has agreed with his application of 12(5)(b) in cases which do not involve matters of a criminal or disciplinary nature. The Tribunal decision (EA/2007/0048) upheld the Commissioner's view that regulation 12(5)(b) was engaged when the public authority withheld information on a planning application. The Commissioner considers that although regulation 12(5)(b) covers adverse effect upon the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature the regulation is not restricted to only apply in such circumstances.. The wording of the exception also cover adverse effect upon "the course of justice" which, in line with the Kirkaldie decision, the Commissioner considers is wide enough to cover the concept of legal professional privilege. The Commissioner therefore rejects the complainant's argument that regulation 12 (5)(b) is "patently inappropriate to the rejection complained of".

27. The complainant lists the following points as considerations involved with the Council's discovery of information on rights of way in Rotherwick:

- i) Statutory processes (including a proposed Definitive Map Modification Order)
- ii) consideration of merit
- iii) possibility of a negotiated settlement
- iv) assessment of compensation, and
- v) damage to property interests.

He goes on to state "...there is no conceivably valid reason to withhold the reasons for rejecting or even doubting Leading Counsel's Joint Opinion".

28. The Commissioner considers that the complainant's position as expressed in the preceding paragraph fails to take into account the in-built public interest in preserving legal professional privilege as expressed by Justice Williams in the High Court case of *DBERR v Dermot O'Brien* (EWHC 164 (QB))

“The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight” (para 53).

which he will consider further later in this notice under the heading 'Public Interest'.

29. The complainant also raised matters regarding committees, future decisions and orders that may arise in the future, after the date of the request, which he considered pertinent to the case. However, the Commissioner's duty is to consider whether the information should have been disclosed as at the date of the request and therefore cannot take into account any factors occurring post the date of the request.
30. The complainant refers to the disclosure of legal advice in another matter involving definitive map modification orders. Again the Commissioner has not taken this into account as he considers each case on its own merits and takes the view that the disclosure of information in the circumstances of another matter cannot influence disclosure in this case.
31. The complainant states that he has “two overriding principles”. The first is his own experience in tribunal work and his qualifications which support his belief that regulation 12(5)(b) does not apply. The second principle is that the undisclosed legal advice will become public knowledge in the course of the legal processes involved in establishing new public rights.
32. The Commissioner notes these principles. However, the complainant's professional opinion cannot influence the Commissioner's regulation of the Act. Any future disclosure of the legal advice may or may not become public knowledge and cannot be addressed in this Decision Notice as this would be a matter post-dating the request.
33. The Council has explained to the Commissioner that the advice provided by the County's legal advisor to the Council's officers was confidential legal advice which the Council considered, if released, could adversely affect the course of justice in any forthcoming inquiry or hearing. The Council informed the Commissioner that the advice has not been released and therefore privilege has not been waived.
34. The Commissioner noted that in previous considerations the justification of non-disclosure because of adverse effect under

regulation 12(5) has been accepted in 12(5)(b) as a result of the acceptance of the inherent adverse effect in breaching LPP.

35. The Commissioner concluded that disclosure would adversely affect the Council's ability to receive legal advice in confidence and established that the exception in regulation 12(5)(b) is therefore engaged.
36. The exception is a qualified one and the balance of public interest must be assessed.
37. The Commissioner wishes to note that in considering the public interest test he can only take into account factors in existence at the time of the request.

Public Interest

38. Regulation 2(2) the EIR states that : "A public authority shall apply a presumption in favour of disclosure." This means that in order to conclude that information should be withheld from disclosure under an exception, the public interest in maintaining that exception must outweigh the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

39. In addition to the presumption in favour of disclosure mentioned above, the Commissioner also accepts that the fact that public funds are being spent by the Council in relation to this matter is a public interest factor in favour of disclosure of the information. This is because he considers that there is a public interest in knowing whether public funds are being allocated and spent in an appropriate manner.
40. The Commissioner has also taken into account that a number of people are likely to be affected by any decision about the rights of way in this case. He considers that it is generally in the public interest for people to be well informed about decisions which affect their lives.
41. The complainant has argued that disclosure of the legal advice would further public debate on the rights of way concerned. Such disclosure would enable the public to have access to all the information the Council would rely on in any presentation to appropriate committees or public bodies and to prepare counter-arguments accordingly. The Commissioner accepts this as a valid public interest argument in favour of disclosure.
42. The Commissioner considers that there is always an underlying public interest in public authorities being accountable for and transparent in their actions. Consequently he accepts that disclosure could be said to

be in the public interest if it added to the public's understanding of the Council's actions.

43. The complainant has expressed concern with regard to the Council's "secrecy" in withholding the legal advice and considers that disclosure would prevent any suspicion of misrepresentation. The complainant has also suggested that the Council's; "Refusal to discuss the matter is suggestive of ulterior motives," Whilst the Commissioner has not given any weight to the second unsubstantiated argument, he accepts that there is a public interest in disclosing the information in order to address any suspicion of misrepresentation.

Public interest arguments in favour of maintaining the exception

44. The Commissioner accepts that there is an in built public interest in preserving legal professional privilege as expressed by Justice Williams in the High Court case of *DBERR v Dermot O'Brien* (EWHC 164 (QB))

"The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53).

45. The Commissioner accepts, in line with the Information Tribunal decision in *Bellamy v the Information Commissioner* (EA/2005/0023), that there is a public interest in protecting legally privileged information so 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..."

Balance of the public interest arguments

46. The Commissioner has been guided over time by Tribunal decisions considering the weight to be given to public interest arguments relating to LPP. He considers that whilst there is an inherent public interest in protecting legally privileged information the weight that both this and the public interest in disclosure should be afforded will vary from case to case depending upon :

- The age of the advice.
- Whether the advice remains current.
- Whether the advice relates to the rights of individuals.
- The amount of money involved.
- The number of people affected.
- The existing transparency of a public authority's actions

47. The advice in this case was provided on 19 February 2007 and, as at the date of the request, was therefore still relatively recent advice which was likely to still be used in decision making processes. The

Commissioner recognises that these processes would be likely to be affected by disclosure as, at this point, the Council had not embarked on a settled course of action in relation to the rights of way.

48. The Commissioner also accepts that the advice was still live as at the date of the request, and that therefore the Council might be expected to continue to rely upon it in any future course of action adopted regarding the rights of way concerned. He accepts that although there was no ongoing litigation there was an ongoing dispute and that therefore the prospect of future judicial involvement could not be completely ruled out.
49. The Commissioner considers that the age of the advice and the fact that it remains current mean that considerable weight should be given to the public interest in allowing the public authority to obtain free and frank legal advice without fear of intrusion.
50. The Commissioner supports the Tribunal's decision in Fuller and the Ministry of Justice (EA/2008/0005) where it was said that the principles behind LPP; "...are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law...". He therefore does not reduce the weight given to the public interest in maintaining the exception simply because the advice has been provided to a public authority rather than a private individual.
51. With regard to the amount of money involved, the Commissioner notes that the Information Tribunal in the case of Mersey Tunnel Users Association v the Information Commissioner and Merseytravel found that the public interest in disclosure outweighed the public interest in maintaining the exemption for legal professional privilege partly because of the substantial amount of money involved which ran to tens of millions of pounds. In this case there is no suggestion that such substantial sums are at stake. The Commissioner considers that the sums involved in this case are relatively small and thus concludes that little weight should be given to this argument in favour of disclosure.
52. Similarly with regard to the number of people affected, in the Mersey Tunnel case the number of people concerned was substantial (approximately 80,000 people per weekday). Contrasted with this, in the case of Gillingham v the Information Commissioner and the Crown Prosecution Service (EA/2007/0028) the Tribunal indicated that the number of people affected by a decision concerning a public footpath was not a significant factor to be taken into consideration. In line with the Tribunal's decision in Gillingham, the Commissioner considers that the number of people involved is not sufficiently large for this to be a significant factor in favour of disclosure. He therefore affords little weight to this argument.

53. In balancing the public interest arguments the Commissioner believes that weight should be given to the accountability and transparency of the Council's actions. A number of differently constituted Tribunals have indicated that weight must be attached to a general principle of accountability and transparency. However, the Tribunal in the Foreign and Commonwealth Office case (EA/2007/0092) considered transparency and concluded that the sort of public interest which would be likely to undermine LLP would need to 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...”
54. The Commissioner has been presented with no evidence to suggest that any of the examples quoted in paragraph 53 apply in this case. He does accept, however, that disclosure of this information would address any concerns about possible misrepresentation by allowing the public to judge for itself whether or not this has occurred. He has therefore attached some weight to the factor of accountability and transparency but not the substantial weight that would have been afforded if he had been presented with clear reason to believe that misrepresentation or unlawful action might have taken place.
55. It is the Commissioner's understanding that there has already been public debate on the rights of way issues in this case and he accepts that disclosure of the legal advice would be likely to further this public debate. Therefore some weight has been given to this argument.
56. Having considered all of the above, and taking particular account of the fact that the advice is both recent and live, and that the underlying issue involves relatively small amounts of money and people the Commissioner finds that the public interest in maintaining the exception, in all the circumstances of the case, outweighs the public interest in disclosure.
57. On the basis that the Commissioner has concluded that the legal advice is exempted from disclosure on the basis of regulation 12(5)(b), he has not gone on to consider whether the advice would be exempt by virtue of the exception contained in regulation 12(4)(e).

The Decision

58. 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 provided at regulation 12(5)(b).

Steps Required

59. The Commissioner requires no steps to be taken.

Right of Appeal

60. 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 26th day of November 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

Regulation 2(1) provides that –

'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 –

(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;

R.12 Exceptions to the duty to disclose environmental information

Regulation 12(1) provides that –

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

*an exception to disclosure applies under paragraphs (4) or (5);
and*

in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'

Regulation 12(4)(e) provides that –

'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 of internal communications.'

Regulation 12(5)(b) provides that –

'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...'

Legal Professional Privilege

Section 42(1) provides that –

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

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

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