

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

Decision Notice

Date: 29 March 2010

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

Summary

The complainant requested information in respect of an application for planning permission for a housing development. The Commissioner is satisfied that the requested information is environmental information which falls to be considered under the EIR.

The Commissioner's decision is that the Department correctly applied the exception under regulation 12(4)(e) of the EIR to withhold the requested information.

The Commissioner's Role

- 1 The Environmental Information Regulations (the 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.
 - 2 This Notice sets out the Commissioner's decision in respect of the complainant's request of 14 May 2007.
-

The Request

3. The complainant's request was made to the public authority, the Planning Service, an executive agency within the Department of the Environment (Northern Ireland), on 14 February 2007. The request concerned legal advice provided to the Department regarding planning approval for development adjacent to a listed building and a site of archaeological interest.

4. The complainant wrote:

"Can I, under Freedom of Information Act, have a copy of the Solicitor's response to Mr Ferguson [Chief Executive of the Planning Service]?"

5. The Department wrote to the complainant on 7 March 2007 stating:

"As regards your request for a copy of the legal advice we received, the most relevant legislation is the Environmental Information Regulations 2004 but material of this type falls within the exception under Regulation 12.4(e) which deals with internal communications. In considering the public interest on this issue, we have to balance the rights of access to information against the need to ensure the provision of free and frank legal advice. This type of material would be subject to legal professional privilege and in all the circumstances of the case, we have concluded that the balance of the public interest lies in maintaining the exemption."

6. The complainant wrote to the Department seeking an internal review of its decision. On 5 July 2007 the Department upheld its original decision to withhold the information citing the exception under regulation 12(4)(e) of the EIR. The Department stated:

"I am satisfied that the information you requested comprises internal communications consisting of legal advice provided to the Department and, therefore, the information falls within the terms of this exception."

... There is an inherent public interest in terms of transparency and accountability of a public authority, and also of furthering public understanding of issues with which it has to deal. On the other hand, there is a strong public interest in the protection of

the principle of legal professional privilege which allows individuals and public authorities to be able to consult their lawyers in confidence, to be able to share information fully and frankly with together, and to seek and obtain advice with the knowledge that such advice is privileged."

7. On 11 September 2007 the complainant contacted the Commissioner to complain that his request had not been dealt with appropriately.

The Investigation

Scope of the case

8. This case concerns the decision of the Department to grant planning permission for a number of dwellings within the grounds of a listed building. It is the view of the complainant that planning approval in this instance was contrary to planning policy. The subject of this complaint is legal advice provided to the Department by the Departmental Solicitor's Office (the DSO) in response to correspondence from the Chief Executive of the Planning Service of 13 November 2006 (the withheld information).

Chronology

9. The Commissioner wrote to the Department on 26 November 2007 confirming that he was undertaking an investigation of the Department's handling of the complainant's request of 14 February 2007. The Commissioner requested that the Department provide a copy of all of the requested information.
10. The Department provided the Commissioner with a copy of the withheld information, a copy of the brief provided to the DSO and the complete planning application file upon which the Department had sought the legal advice.

Analysis

Is the requested information environmental?

11. 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 of the EIR.

12. 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);”

13. 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 of the environment and factors likely to affect those elements referred to in regulations 2(1)(a) and (b) of the EIR.

14. In this case the planning application process is the activity under regulation (2(1)(c)) which is likely to affect the landscape (as set out in regulation 2(1)(a) upon which development may take place as a result of planning decisions by the Department.
15. Further, the withheld information is information on a listed building and an ancient monument which are cultural sites (as set out in regulation (2(f)) affected by changes to the landscape resulting from the decisions of the Department.

Exception claimed

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

Regulation 12(4)(e) - internal communications

18. The Department has refused to disclose the withheld information on the basis of its application of the exception under regulation 12(4)(e) of the EIR.

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

" 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."

20. The exception is class based, therefore if information falls within the scope of regulation 12(4)(e) then this information will be exempt. The Commissioner has considered the withheld information and notes that it is comprised of legal advice within a letter from the Department's legal adviser, the DSO, to the Department.
21. The Commissioner has considered whether the withheld information constitutes an 'internal communication.'

22. Communications within any single public authority will be internal for the purposes of regulation 12(4)(e). Further, regulation 12(8) of the EIR provides that:

"For the purposes of paragraph (4)(e), internal communications include communications between government departments."

23. The Commissioner recognises that neither the EIR, nor the Directive from which they are derived, provide a definition of what constitutes an internal communication.¹

24. Furthermore the Commissioner notes the comments in the Information Tribunal's decision in *Department for Transport v Information Commissioner*², which involved the consideration of regulation 12(4)(e). The Tribunal stated that whether the exempt information constituted an internal communication was a question of fact and law and moreover it suggested that:

'We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation'. (Para 96).

25. The Commissioner is of the view that this case by case approach to the application of regulation 12(4)(e) and the interpretation of the Directive is appropriate as the Directive should apply equally to all member states, some of which may have simple government structures, and others complex. Those member states with complex structures of government should not be penalised by having to make their interdepartmental communications available, where a state with a single government body would be able to protect its communications by way of this regulation.
26. The communication under consideration in this case is comprised of legal advice provided to the Department by the DSO.
27. The DSO is a division of the Department of Finance and Personnel (Northern Ireland) (DFPNI). DFPNI provides shared services across the Northern Ireland government departments in areas including finance, personnel services, procurement and legal advice. The DSO provides legal advice to the Northern Ireland Executive, Ministers and

¹ Council Directive 90/31EEC & 2003/4/EC:

[http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/european_directive_\(eur-lex\).pdf](http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/european_directive_(eur-lex).pdf)

² EA/2008/0052

Departments, represents Departments in litigation and in property and commercial transactions and develops proposals for civil law reform.

28. Having had regard to the function of the DSO and its place within the Northern Ireland departments, the Commissioner is satisfied that communications between the Department and the DSO are internal communications. Therefore the Commissioner finds that the exception under regulation 12(4)(e) is engaged.

The public interest test

29. Regulation 12(4)(e) is subject to the public interest test set out at regulation 12(1) which states that a public authority can only rely on an exception contained within 12(4) or 12(5) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The nature of the withheld information

30. The Commissioner has considered the nature of the withheld information and finds that it is comprised of legal advice to the Department from the DSO. The Commissioner has considered whether this information is subject to legal professional privilege.
31. There are two categories of legal professional privilege, advice privilege and litigation privilege. The Commissioner is satisfied that the withheld information is subject to legal advice privilege.
32. Advice privilege attaches to those communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. For privilege to attach the information must be communicated in a professional capacity; and the communication made for the principal or dominant purpose of seeking or giving advice.
33. The Commissioner has reviewed the withheld information and is satisfied that it constitutes a communication between the Department and its legal advisers, the DSO, the sole purpose of which is the provision of legal advice. The Commissioner is therefore satisfied that the withheld information is subject to legal professional privilege.

Public interest factors favouring disclosure of the information

34. The Department has recognised the inherent public interest in transparency and in the accountability of public authorities and of

- furthering public understanding of the issues with which those public authorities must deal.
35. The Commissioner considers that public confidence is necessarily dependent on such transparency and on the demonstration by a public authority that it has acted within all applicable laws and acted with clear probity.
 36. Further, the Commissioner recognises the presumption in favour of disclosure under regulation 12(3) and notes the importance of access to environmental information as a prerequisite to participation in environmental decision making and access to environmental justice.
 37. The Commissioner believes that there is a strong public interest in improving the public's understanding of decisions made by public authorities, particularly those decisions that may have an impact upon the environment.
 38. The Commissioner also believes that disclosure of internal communications may serve to increase public confidence in the robustness and efficacy of the Department's exercise of its statutory duties in relation to enforcement.
 39. The Commissioner recognises that it is in the public interest to disclose information where such disclosure will encourage public participation in and improve understanding of participation in public debate of important issues of the day and that, where public authorities must give reasoned explanations for their decisions, the quality of such decisions may be improved. The Commissioner recognises the issues in this matter have been the subject of public debate and concern.
 40. The Commissioner notes that this complaint relates to the granting of planning approval for a development, which resulted in an archaeological site being destroyed. Subsequently the complainant had asked the Department whether or not planning permission could be discontinued. The Department had agreed to consider the complainant's representations, and it would need to take legal advice. Therefore disclosure of the legal advice in this particular case might clarify the basis on which the Department decided not to discontinue the planning permission.

Public interest factors favouring maintaining the exception

41. The Commissioner is satisfied that the internal communications in this case are comprised of privileged legal advice provided to the Department by its lawyers. The Commissioner finds that it is relevant

to give weight to legal professional privilege factors under the 12(4)(e) exception. The basis of the exception is to protect a safe space for internal deliberation and to 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 communication process in question.

42. The Department has argued that there is a strong public interest in the protection of the principle of legal professional privilege which allows public authorities and individuals to consult their legal lawyers in confidence, to be able to share information fully and frankly and to seek and obtain advice with the knowledge that such advice is privileged.
43. The Commissioner is mindful of the strong public interest in protecting the established principle of legal professional privilege. This principle allows clients to confidently seek legal advice and allows for full and frank exchange between advisor and client. The Commissioner accepts that if such advice was to be routinely disclosed, public authorities may be reluctant to seek advice for fear of damaging their position in relation to future proceedings.
44. In considering the public interest in this case the Commissioner has had regard to the view of the Information Tribunal as expressed in matter of Bellamy v The Information Commissioner (Appeal Number EA/2005/0023). At paragraph 35 of that judgment the Tribunal commented as follows:

"As can be seen from the citation of the legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".

45. However, while the Commissioner recognises that there is a strong element of public interest inbuilt into legal professional privilege, the Commissioner is not of the view that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty that

those in favour of maintaining the exemption'. (Tribunal at para. 41).

46. Accordingly, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
47. Further, the Commissioner recognises the strong public interest in maintaining a private thinking space for Departmental staff in which advices from colleagues may be sought and freely given and ideas may be tested, explored and recorded without inhibition. The Commissioner recognises that public authorities often require a safe space in which to debate issues and that disclosure of such internal communications may inhibit the candid expression of views. The Commissioner recognises that disclosures of internal communications, especially those which are subject to legal privilege, may result in a loss of frankness in internal debate and to a diminution in the quality of internal advice.

The balance of the public interest

48. The Commissioner recognises the inherent public interest in the transparency of the decision making of public authorities and that it is in the public interest to disclose information where such disclosure will encourage public participation in and improve understanding of participation in public debate of important issues of the day.
49. However the Commissioner is mindful of the need for public authorities to be able to obtain free and frank legal advice to support them in the effective and appropriate exercise of their functions and of the inherent public interest in protecting privileged communications between client and legal adviser.
50. The Commissioner is not satisfied that in the present case the countervailing considerations outlined above are of sufficient weight to override this *"inbuilt public interest."* The Commissioner appreciates the need for the Department to be able to obtain legal advice on planning issues, in order to fulfil its functions effectively.
51. Accordingly, the Commissioner is satisfied that, in all the circumstances of the case, the balance of the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The Decision

52. The Commissioner's decision is that the Department was correct in its application of the exception under 12(4)(e) of the EIR.

Steps required

53. The Commissioner requires no steps to be taken.

Right of Appeal

54. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 29th day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex: Relevant statutory obligations

Environmental Information Regulations 2004

Regulation 2(1) 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 –

- (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);

Regulation 12 provides that –

(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.

...

(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 of internal communications.