

Environmental Information Regulations 2004

Decision Notice

Date: 26 January 2010

Public Authority: Department of the Environment (Northern Ireland)
Address: Room 6-01A
Clarence Court
10-18 Adelaide Street
Belfast
BT2 8BG

Summary

The complainants requested a legal opinion regarding a planning application. The DOE withheld this information under regulation 12(5)(f) of the EIR. During the course of the Commissioner's investigation, the DOE also sought to rely on the exception at regulation 12(5)(b). The Commissioner is satisfied that the information requested is environmental information and also finds that regulation 12(5)(b) is engaged. The Commissioner has also considered the public interest in relation to this exception and is of the view that the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner also finds that the DOE breached regulation 14(2) in that it failed to provide the complainants with an adequate refusal notice within the time period specified in the EIR.

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.

Background

2. This case relates to a planning application for a development of a fish meal processing facility to be situated at Londonderry Port. The application was as follows:

“Planning Application for Industrial Facility for production of fish meal and fish oil consisting of

- (a) a principal building accommodating production/workshop areas and administrations/staff facilities*
- (b) raw material silos, fish oil tanks, fish meal silos, diesel fuel tanks, high level pipe and meal conveyors and ancillary minor buildings*
- (c) jetty with fish unloading facilities on the foreshore*
- (d) elevated services bridge linking jetty and silos to production site”.¹*

The Request

3. On 6 March 2008, the complainants submitted their request to the Department of the Environment Northern Ireland (the DOE). The complainant referred to the planning application as detailed at paragraph 2 above, and requested

“a copy of the Opinion of [named barrister] QC submitted by Londonderry Port in support of the application”.

4. The complainants advised the DOE that the Opinion had been contained in the open file held by the DOE, and that they had viewed the Opinion on 5 March 2008.
5. On 11 March 2008 the DOE acknowledged receipt of the complainants' request and advised that the request was being dealt with under the EIR.
6. On 11 April 2008, the complainants contacted the public authority as no response had been provided within the required timescale of the EIR. The complainant asked for a response to be provided by return, failing which a complaint would be made to the Commissioner's office.
7. On 15 April 2008, the DOE responded to the complainants' letter of 11 April 2008. The DOE advised that it would carry out an internal review of its handling of the request of 6 March (although it had not in fact responded to this request).
8. On 24 April 2008, the DOE advised the complainants that their request was being refused under regulation 12(5)(f) of the EIR. This exception applies where disclosure of the information would adversely affect the interests of the person providing it. The DOE accepted that that the Opinion had been placed in the DOE's open file, which was subsequently viewed by the complainants. However the DOE did not consider this a valid reason to disclose the Opinion.
9. On 6 May 2008 the complainants wrote to the DOE and provided arguments as to why they considered the decision to withhold the information wrong. The complainants highlighted the fact that the Opinion had already been placed in the

¹ Planning Service reference: A/2006/0672/F
http://www.planningni.gov.uk/devel_control/council_schedules/derry/Derry_A191208.pdf

public domain and its contents noted. The complainants asked that the DOE release the requested information.

10. The complainants wrote to the DOE on 31 July 2008 as no response had been received.
11. On 8 August 2008, the DOE contacted the complainants and apologised for the delay in providing a response to earlier correspondence. The DOE informed the complainants that an internal review had been carried out, but that the decision to refuse the request was upheld. The DOE did however state that:

“Legal opinions are not placed on open files as a matter of course, and this clerical error, whilst unfortunate, does not outweigh the public interest in legal advice and opinions only being disclosed with the agreement of the commissioning party”.

The Investigation

Scope of the case

12. On 28 August 2008 the complainants contacted the Commissioner to complain about the way their request for information had been handled. The complainants questioned the DOE's application of the exception and argued that it had not shown what adverse effect would be caused by releasing the information. The complainant suggested that the DOE was basing its objections on speculative risks of harm, rather than real ones. The complainants also asked the Commissioner to investigate the arguments presented by the DOE in relation to the public interest test.

Chronology

13. Unfortunately the investigation was delayed by the large number of complaints received by the Commissioner's office. On 9 June 2009, the Commissioner wrote to the DOE and requested sight of the withheld information. The Commissioner subsequently requested further details in relation to the DOE's handling of the complainants' request.
14. On 1 July 2009, the Commissioner received the withheld information from the DOE.
15. On 8 July 2009, the Commissioner wrote to the DOE in relation to a number of queries which arose from the initial review of the withheld information. The Commissioner asked whether the DOE had considered the exception at regulation 12(5)(b) as it had done in similar cases. This exception applies where disclosure would adversely affect the course of justice, and is often applied to information which comprises legal advice. It was not clear to the Commissioner why the DOE had not done so in this particular case.

16. On 8 September 2009, the DOE provided the Commissioner with a detailed response in respect of the matters raised by the Commissioner in earlier correspondence. The DOE also confirmed that it was continuing to rely on regulation 12(5)(f) in respect of the requested information.
17. The DOE advised the Commissioner that the Opinion was commissioned by the Londonderry Port and Harbour Commissioner (the LPHC). The DOE claimed that the Opinion was protected by legal professional privilege, which could only be waived by the LPHC as the “owner” of the Opinion. The DOE accepted that the Opinion had been held on the Planning Service’s “open file” but advised that this was an administrative error.
18. The DOE confirmed to the Commissioner that it had contacted the LPHC to ascertain whether or not it was agreeable to disclose the information. The DOE advised the Commissioner that the LPHC expressly refused to waive legal privilege in respect of the Opinion. Additionally the DOE advised the Commissioner of its strong view that disclosure of the requested information would adversely affect the interest of the person who supplied the information, i.e. the LPHC.
19. On 9 September 2009, the Commissioner wrote to the DOE. Having considered the Opinion, the Commissioner was of the view that the information contained within it related to information on emissions and therefore could not be withheld under regulation 12(5)(f) in accordance with regulation 12(9) of the EIR. The Commissioner asked the DOE for its views in respect of this assessment.
20. Despite sending a number of reminders, the Commissioner did not receive any response from the DOE until 22 October 2009. The DOE advised the Commissioner of its view that the subject matter of the Opinion should not be considered as an emission. The DOE provided the Commissioner with a detailed explanation as to why this was the case. By concluding that the subject matter was not an “emission”, the DOE maintained that regulation 12(9) was not engaged.
21. The DOE also advised the Commissioner that when the request was originally considered, it was viewed that regulation 12(5)(b) was also engaged, but a view was taken that 12(5)(f) would be solely relied on as it provided a sufficiently strong ground to refuse disclosure. However, the DOE informed the Commissioner that whilst it was and remained correct to rely on regulation 12(5)(f), it also now wished to rely on regulation 12(5)(b). The Commissioner noted that this was the first time that the DOE had indicated an intention to rely on a further exception despite it having been brought to the DOE’s attention by the Commissioner some months before.

Findings of Fact

22. The withheld information in this case is a legal Opinion obtained by the LPHC from Senior Counsel dated 24 December 2007. The Opinion was obtained in

relation to the planning application referred to at paragraph 2 above, and was provided to the DOE by the LPHC.

Analysis

Is it environmental information?

23. The definition of “environmental information” is set out in regulation 2(1) of the EIR. This states 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)...

24. The Commissioner considers that the phrase “any information... on” should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.²

² 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.

25. The information requested in this case is the legal Opinion of Senior Counsel in relation to a planning application for an industrial facility for production of fish meal and fish oil. The dispute around the proposed application centres on a number of legal issues, particularly though not exclusively to the waste products that will be produced by the plant and their disposal into the sea. It is accepted by all parties in this case, including the Commissioner, that this information falls within the definition of environmental information as set out in (b), as it is information on factors (waste, discharges) affecting or likely to affect the state of the elements of the environment (the sea) referred to in (a) above. The Commissioner also considers that it is environmental information by virtue of regulation 2(1)(b) because it is information on emissions, although the DOE dispute this point. Finally the Commissioner considers that it is also environmental information by virtue of regulation 2(1)(c) as it is information on a measure (the building of a fish processing plant) which would affect the state of the elements of the environment (the sea) via the factors of waste, emissions and discharges.
26. The Commissioner considers that, despite the arguments presented by the DOE, the information requested relates to information on emissions originating from the end products of the fish processing. Where the information is information on emissions, a public authority, by virtue of regulation 12(9), cannot refuse to disclose information under exceptions 12(5)(d) to (g). However, in light of the fact that the DOE has informed the Commissioner that it also seeks to rely on regulation 12(5)(b), the Commissioner must first consider whether or not the late application of an exception is permissible.

Late application of exceptions

27. The DOE indicated to the Commissioner on 22 October 2009 that they also sought to rely on the exception at regulation 12(5)(b) as well as regulation 12(5)(f). The intention to rely on this additional regulation was only indicated in correspondence to the Commissioner some 18 months after the DOE issued its refusal notice to the complainants, and four months after the Commissioner began his investigation. This was despite the fact that the Commissioner raised the possibility that this exception may be applicable in correspondence sent to the DOE on 8 July 2009. The DOE did not cite regulation 12(5)(b) until the Commissioner highlighted his view that the withheld information related to emissions and that the exception at regulation 12(5)(f) could not therefore be engaged. However the Commissioner notes that the arguments that the DOE made under regulation 12(5)(f), as detailed at paragraphs 17 and 18 above, also had some relevance to the application of regulation 12(5)(b) and that the DOE did not seek to introduce entirely new arguments when it relied upon the new exception.
28. Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised in the course of his investigation. This issue was discussed by the Information Tribunal in the case of

Department of Business and Regulatory Reform v Information Commissioner and Friends of the Earth which held that:

“The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases³ and there is now considerable jurisprudence on the matter. In summary the Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss.10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA.”⁴

29. In the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Peninsula Business Services Ltd*, the Information Tribunal held that:

“The Tribunal should consider the interests of those who supplied the information to the public authority (and who are not represented in these proceedings), as well as the interests of the public authority itself. Those former interests are best protected by ensuring that if disclosure is to occur, that should be as a result of a decision by the Information Commissioner or of the Information Tribunal. Disclosure should not occur solely because of a failure of BERR to claim the s.32 exemption at an earlier stage”⁵.

30. The Tribunal in this case also outlined a number of factors whereby the application of late exemptions could be seen as justifiable. These include:
- the nature of the information in question which the exemption is designed to protect, taking into consideration risks associated with disclosure;
 - where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure;

³ *Bowbrick v Information Commissioner & Nottingham City Council* [EA/2005/006]; *England & London Borough of Bexley v Information Commissioner* [EA/2006/0060&66]; *Benford v Information Commissioner* [EA/2007/0009]; *Archer v Information Commissioner & Salisbury County Council* [EA/2006/0037] and *Ofcom v Information Commissioner & T-Mobile* [EA/2006/0078].

⁴ [EA/2007/0072] para 42.

⁵ [EA/2008/0087] para 24.

- where the authority has correctly identified the harm likely to arise from disclosure however applies these facts and reasoning to the wrong exemption or legislation;
- what point in either the Commissioner's investigation or the proceedings before the Information Tribunal was the exemption claimed;
- where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution, and
- where the refusal notice was issued at an early stage of the implementation of the Act when there was limited experience of the application of the exemptions.

When taking these factors into account, the Commissioner will also consider the topic of the information at question, its profile, sensitivity and the impact that would result from the release of said information.

31. The Commissioner has considered carefully whether or not the additional exception cited by the DOE should be taken into account at such a late juncture of his investigation. In doing so, the Commissioner has also noted the length of time that the DOE has taken to inform the Commissioner of its intention to rely on regulation 12(5)(b), despite this being brought to its attention some months previous. However, bearing in mind the nature of the information requested, and taking particular account of the interests of the third party which supplied the information to the public authority, the Commissioner is minded that on this occasion he is prepared to take the DOE's reliance on this additional exception into account.

Regulation 12(5)(b)

32. The DOE has cited regulation 12(5)(b) as one of the exceptions applicable to the requested information on the basis of disclosure would adversely affect the course of justice. The full text of regulation 12(5)(b) can be found in the Legal Annex attached to the end of this Decision Notice.
33. As stated above, the Commissioner is satisfied that the information requested falls within the definition of environmental information as provided in regulation 2(1).

Is the exception engaged?

34. Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. In the case of *Kirkaldie v Information Commissioner & Thanet District Council*, 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.”⁶

35. The DOE has claimed that the Opinion is subject to legal professional privilege, and therefore its disclosure into the public domain would adversely affect the course of justice.
36. The Commissioner considers that legal professional privilege is a central component in the administration of justice, and that advice on legal rights, obligations and liabilities is a key feature of the issues that constitutes the phrase ‘course of justice’.
37. In order to reach a view as to whether or not the exception is engaged, the Commissioner must first consider whether the requested information is subject to legal professional privilege. He must also decide whether a disclosure of that information would have an adverse effect on the course of justice or the ability of a person to receive a fair trial.
38. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in *Bellamy v Information Commissioner & Department of Trade and Industry* 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.”⁷

39. There are two types of privilege – legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
40. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and professional legal advisor acting in their professional capacity and for the sole or dominant purpose of obtaining legal advice. Communications made between advisor and client in a relevant legal context will attract privilege.

⁶ EA/2006/0001, para 21.

⁷ EA/2005/0023 para 9.

41. The Commissioner has reviewed the withheld information, and is satisfied that it constitutes communications between a client and its legal advisers for the sole or dominant purpose of obtaining legal advice. Therefore he is satisfied that the withheld information is subject to legal advice privilege.
42. The Commissioner has also considered whether or not the privilege has been waived in this case. The complainants indicated that they had viewed the information in question as it had been placed on an open file for viewing, albeit in error. The Commissioner considers that as the DOE was not the client in this case, it did not have the authority to waive legal privilege. This could only be waived by LPHC. He therefore concludes that privilege has not been waived in this case.
43. The Commissioner has also considered whether the temporary placing of the information on an open file means that the communications are no longer confidential. The Commissioner's view is that the fact that a public authority has breached confidence once does not entitle it to breach that confidence again. The DOE has advised the Commissioner that the only occasion on which the information was viewed was when the complainants viewed it on 5 March 2008 and that subsequent to this viewing, it was realised that the information should not be held on an open file, and it was removed the same day. The complainants letter of complaint to the Commissioner confirms that when they asked for a copy of the opinion during the inspection this was refused. In the circumstances of this case, the Commissioner considers that the fact that the information was inadvertently placed on an open file, and viewed but not copied by the complainants, does not mean that the information had been disseminated sufficiently to mean that it can no longer be considered to be confidential.

Adverse effect

44. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse affect on the course of justice, with particular reference to legal professional privilege.
45. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice. This is because the principle of legal privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. The confidence that discussions between clients and their advisers will remain private would become weaker and their discussions may therefore become inhibited. He considers the likelihood of this happening to be more probable than not and therefore finds that the exception at Regulation 12(5)(b) is engaged.
46. 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. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

47. The complainants provided the Commissioner with a number of reasons as to why they considered it in the public interest to have the requested information disclosed. The complainants advised the Commissioner that in order to have full participation to discussions, full disclosure of representations is required and the public interest falls in favour of disclosure of all submissions, regardless of whether they support the particular planning application or not.
48. The Information Tribunal has previously found that there is a clear public interest in planning decisions being taken by public authorities in an open and transparent way. The Commissioner therefore considers that a disclosure of the information in this case would be generally in the public interest in a similar way. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance to interested parties that the DOE's actions were in the best interests of the community and may assist the public in understanding the legal basis for this particular decision.
49. The Commissioner also believes that by disclosing information relating to a public authority's decisions, there is a greater sense of accountability in relation to actions or decisions that are taken. This would allow for a more informed debate as to how and why decisions are made. The Commissioner believes that this is all the more prudent in cases where the public authority's decisions have a direct effect on the environment.
50. The Commissioner considers that Parliament did not intend the exception of legal privilege to be used as an absolute exception. In the case of *Mersey Tunnel Users Association v Information Commissioner & Mersey Travel* (EA/2007/0052) the Tribunal confirmed this point and held that it was in the public interest to disclose the legal advice obtained by Mersey Travel. The Tribunal placed particular weight on the fact that the legal advice related to an issue of public administration which affected a substantial number of people.

Public interest arguments in favour of maintaining the exception

51. Whilst recognising the complainants' arguments, the Commissioner also accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers. It 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. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
52. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v Information Commissioner & DTI*, 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. It may well be that in certain cases for example where the legal advice was stale, issues

*might arise as to whether or not the public interest favouring disclosure should be given particular weight ... 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*⁸

53. In this case, the DOE quoted the findings in *Three Rivers District Council and others v Governor and Company of the Bank of England* which stated:

*“...it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers’ legal skills in the management of their (the clients’) affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else....I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law.”*⁹

54. The Commissioner has taken the comments above into account during the course of his investigation. He notes that the comments in the *Three Rivers District Council* case were made prior to the introduction of the EIR but nevertheless recognises the importance of being able to obtain legal advice and for it to remain confidential.
55. In this case the DOE advised the Commissioner that the Opinion was provided in confidence by the LPHC. It was provided in the full knowledge that it would be considered by the DOE’s own legal advisers but with the expectation that it would not be disclosed further.
56. The Commissioner has also considered whether or not the advice was recent. In the Tribunal case of *Kessler v Information Commissioner and the Ministry of Defence*, advice which was weeks old was described as “relatively recent”¹⁰. In *Kitchner v Information Commissioner and Derby County Council* advice which was 6 years old was described “still relatively recent”¹¹ whereas in *Mersey Tunnel Users Association v Merseytravel and Information Commissioner*, advice which was over 10 was considered “not recent”¹². Upon consideration of the withheld information in this case, the Commissioner believes that, as at the date of the request, the advice was only a few months old and was therefore recent.
57. In this case the Commissioner has noted that at the time of the request, the information related to a live issue. During the course of the Commissioner’s investigation, it was noted that the planning application had subsequently been withdrawn, but this has no bearing upon the Commissioner’s decision which is based upon the situation as it was at the date of the request. Even though no

⁸ EA/2005/0023

⁹ [2004] UKHL 48

¹⁰ EA/2007/0043

¹¹ EA/2006/0044

¹² EA/2007/0052

legal proceedings had been initiated as at the date of the request, the Commissioner believes that it is in the public interest to allow parties to defend themselves against any potential litigation action, without the legal advice upon which they might wish to rely having been put into the public domain at an earlier point. Disclosure of the legal advice would be likely to unfairly prejudice LPHC's position in any legal proceedings and this, the Commissioner believes, would not be in the public interest. The Commissioner considers that although the general content of the advice might potentially have been committed to memory when the information was viewed this is not the same as allowing the exact and detailed wording and content of the advice to be put into the public domain to the prejudice of LPHC.

Balance of the public interest arguments

58. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and in doing so has taken the presumption of disclosure as set down by regulation 12(2) as the foundation of his decision.
59. The Commissioner in reaching his decision has also considered the great deal of weight that is placed on the right of LPHC to protect advice it receives which is subject to the doctrine of legal professional privilege, especially where that advice is both recent and live. The Commissioner understands the importance of the availing of legal advice which could be jeopardised both in quality and quantity if it was subject to disclosure.
60. The disclosure of the LPHC's legal advice would have consequences for it if litigation ensued. Through disclosure opponents in any legal proceedings would be able to glean any potential weaknesses in LPHC's case. This would lead to an imbalance in the level playing field which is a fundamental requirement within the adversarial process.
61. After considering the above factors the Commissioner is satisfied that in this particular case, there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered in this case by at least equally strong arguments in favour of the disclosure. The Commissioner believes that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
62. Therefore the Commissioner is satisfied that the Opinion has been properly withheld under regulation 12(5)(b).

Procedural requirements

Regulation 14: refusal of a request

63. Regulation 14(1) states that:

“if a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and shall comply with the following provisions of this regulation.”

64. Regulation 14(2) states that: -

“The refusal shall be made as soon as possible and no later than 20 working days after the date of the receipt.”

65. The complainants submitted the information request on 6 March 2008. The request was acknowledged by the local planning office (part of the DOE) on 11 March 2008. The complainants did not receive any response within the timescale permitted by the EIR and so correspondence was forwarded to the headquarters of the DOE on 11 April 2008.

66. The DOE acknowledged receipt of the complainants' correspondence on 15 April 2008 but appeared to treat this as a request for an internal review, even though a refusal notice had yet to be issued. This again seemed to be the approach taken by the DOE on 24 April 2008 in relation to correspondence received by the complainants dated 24 April 2008.

67. The DOE provided the complainant with a refusal notice on 24 April 2008. Within the correspondence there was an indication that the DOE appeared to be treating the date of the request being received as 11 April 2008 rather than 6 March 2008. The Commissioner finds that the DOE breached regulation 14(2) by providing a refusal notice outside the allocated time within the EIR as it should have been provided within 20 working days, and not 32 working days, as it was in this case.

68. As outlined above, the DOE indicated to the Commissioner that it also wished to rely upon regulation 12(5)(b) in respect of the information requested. This was only relied upon by the DOE some 18 months after the initial refusal was issued and the Commissioner finds the DOE to be in breach of regulation 14(2) in relation to the application of this exception.

Regulation 11: representations and reconsideration

69. Regulation 11 of the EIR provides that a complainant may request that an authority reconsider its decision in relation to a request. Regulation 11(4) provides that an authority must conduct such a review, and inform the complainant of the outcome no later than 40 working days after that date of receipt of the representations.

70. The Commissioner notes that the complainants requested an internal review on 6 May 2009. However, a review was not carried out until 8 August 2008. No correspondence was forwarded by the DOE to notify the complainants as to any reason why the internal review had not taken place within the statutory 40 working days. This is made all the more apparent by the fact that the complainant sent correspondence to the DOE on 30 July 2008 asking for an update on the outcome of the internal review.

71. The Commissioner also considers that the DOE failed to provide him with a satisfactory explanation as to why it failed to comply with this requirement.

The Decision

72. The Commissioner's decision is that the DOE was entitled to withhold the Opinion under regulation 12(5)(b) of the EIR.
73. However the Commissioner also finds that the DOE breached regulation 11(4), 14(2) and 14(3)(a) in its handling of the request.

Steps Required

74. The Commissioner requires no steps to be taken.

Right of Appeal

75. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
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 January 2010

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

Regulation 2

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 –

- (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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 5

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.

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 11

11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it

appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

- 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes the public authority has failed to comply with the requirement.
- 11(3) The public authority shall on receipt of the representations and free of charge –
- (a) consider them and any supporting evidence produced by the applicant; and
 - (b) decide if it has complied with the requirement.
- 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.
- 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –
- (a) the failure to comply;
 - (b) the action the authority has decided to take to comply with the requirement; and
 - (c) the period within which that action is to be taken.

Regulation 12

- 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.
- 12(2) A public authority shall apply a presumption in favour of disclosure.
- 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 proceeds 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 interest 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 these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
 - (g) the protection of the environment to which the information relates.
- 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 14

- 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- 14(3) The refusal shall specify the reasons not to disclose the information requested, including –
- (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).