

Environmental Information Regulations 2004

Decision Notice

Date: 10 February 2010

Department: Department of the Environment (Northern Ireland)
Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8BG

Summary

The complainants requested information relating to legal advice obtained regarding a planning application. The DOE disclosed some information but withheld the actual legal advice under regulation 12(5)(b) of the EIR. The Commissioner is satisfied that the information requested is environmental information and also finds that regulation 12(5)(b) is engaged. The Commissioner finds that the public interest in maintaining the exception outweighs the public interest in the disclosure of the information. The Commissioner also finds that the DOE was in breach of regulation (5)(2) by failing to release the non-exempt information within 20 working days.

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 complaint relates to a planning application for a development of a fishmeal 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 27 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

“Following a recent open file appointment with regard to the above matter, we are aware that the Planning Service has sought legal Opinion from Senior Crown Counsel in relation to the above application. Indeed, we have had sight of and examined Planning Service’s brief to Counsel with regard to the above application as it was previously made available on the open file at the date of our inspection on 5th March 2008.

We hereby request under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 a copy of Planning Service’s brief to Counsel and resultant legal Opinion to which we refer to above.”

4. On 28 March 2008 the DOE acknowledged receipt of the complainant’s request and advised that the request was being dealt with under the EIR.
5. On 23 April 2008, the DOE responded to the complainants. The DOE provided a copy of a letter from its legal department to Senior Crown Counsel which was entitled “First Draft” and was dated February 2008. This was the letter of instruction to the barrister. However, the DOE withheld the resulting Opinion, which for the purposes of clarification shall be referred to as “Opinion A” throughout this Decision Notice. The DOE withheld the requested information under regulation 12(5)(b) of the EIR. This exception applies where disclosure of the information would adversely affect the course of justice.
6. On 24 April 2008, the complainants advised the Planning Service that they had not received any of the enclosures referred to within the letter of instruction to the barrister. These enclosures were the Environmental Statement, the Oslo & Paris Convention on the Protection of the Marine Environment of the North East Atlantic (OSPAR), and a separate legal Opinion that had been provided by Senior Crown Counsel. For the purposes of clarification, this Opinion shall be referred to as “Opinion B” throughout this Decision Notice.
7. On 28 April 2008, the complainants asked the DOE to conduct an internal review in relation to its decision to withhold some of the information requested. The

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

complainants were of the view that by disclosing the instructions to Counsel, legal professional privilege had been waived. The complainants also informed the DOE that they were still awaiting sight of the enclosures that accompanied the letter of instruction to Counsel, as set out at paragraph 6 above.

8. The complainants wrote to the DOE on 13 August 2008 as no response had been received.
9. On 21 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 in relation to the information request and that the decision had been taken to uphold the decision in relation to the withheld information.

The Investigation

Scope of the case

10. On 11 September 2008 the complainants contacted the Commissioner to complain about the way their request for information had been handled. The complainants specifically asked the Commissioner to investigate whether or not legal professional privilege had been waived through the disclosure of the letter of instruction to Senior Counsel. The Commissioner was also asked to address the fact that the DOE failed to comply with the requirements of the EIR in that they failed to disclose the enclosures that were attached to the letter of instruction or provide an explanation as to why they could not be disclosed.
11. Of the enclosures, the Commissioner notes that Opinion B is the subject of a separate complaint submitted by the complainants (reference FER0212345). The Commissioner has already considered this complaint and has issued a Decision Notice in respect of same. Therefore the Commissioner does not find it appropriate to consider this Opinion within the course of this investigation and accordingly the Commissioner has excluded it from the analysis and findings below and has not commented on it further in this Decision Notice.

Chronology

12. 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 to request a copy of the withheld information.
13. On 7 July 2009, the Commissioner received the withheld information from the DOE.
14. 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 and in particular the issues regarding the impact that disclosure would have on the course of justice. The Commissioner also asked for confirmation as to whether or

not there were any subsequent drafts of the instructions to Counsel, given that the one disclosed was entitled "First Draft".

15. Despite sending a number of reminders, the Commissioner did not receive a response from the DOE until 19 August 2009. The DOE confirmed that the "First Draft" was disclosed to the complainants but they did not hold a copy of any revised draft. The DOE provided further reasoning as to why it considered that the public interest favoured maintaining the exception at regulation 12(5)(b) rather than in disclosure. In respect of the Commissioner's comments surrounding the handling of the case, the DOE acknowledged that there had been a delay in providing the complainants with a response to the internal review request.
16. On 24 August 2009, the Commissioner wrote to the DOE. The Commissioner noted the enclosures contained within the letter of instruction (as set out at paragraph 6 above) had not been disclosed to the complainant. The Commissioner asked the DOE to explain why this was the case.
17. Despite sending a number of further reminders, the Commissioner did not receive any response from the DOE until 13 October 2009. The DOE informed the Commissioner that the complainants did not request the enclosures that were referred to in the letter of instruction to Senior Counsel.
18. On 15 October 2009, the Commissioner advised the DOE of his view that the complainants did ask for the documents referred to in the letter of instruction. The complainants asked for the brief of papers, and it was the Commissioner's opinion that a brief contained all papers which supported a set of instructions. The Commissioner also noted that no explanation was given to the complainants as to why these supporting documents were being withheld despite the fact that the complainants submitted two letters to the DOE requesting them.
19. On 28 October 2009, the DOE advised the Commissioner that:

"...the complainant's request was for a copy of the Department's instructions to Senior Counsel. As is clear from previous correspondence, the Department does not hold that document but rather a "First Draft" which has already been disclosed to the complainant. As that was a document in the process of being developed, only the "First Draft" text is held by the Department; it was not accompanied by any of the 3 documents referred to therein.

That the request might be construed as including a request for the document or part documents eventually to be appended was not considered by the Department in its handling of the request originally, and in undertaking the internal review, I did not contemplate such a construction."

20. However, the DOE indicated that the Environmental Statement was in the public domain and a full copy would be made available to the complainants. In relation to the OSPAR Guidelines, the DOE advised the Commissioner that this was not held by the DOE but could be accessed elsewhere.

Findings of fact

21. The withheld information in this case is Opinion A provided by Senior Crown Counsel in response to a letter of instruction from DOE's legal department. This Opinion was obtained in relation to the planning application referred to at paragraph 2 above.

Analysis

Is it environmental information?

22. 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)..."

23. 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
24. The information requested in this case relates to a legal Opinion (Opinion A) provided 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 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.

Regulation 12(5)(b)

25. The DOE has cited regulation 12(5)(b) as the exception applicable to the requested information on the grounds that disclosure of this information 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.
26. As stated above, the Commissioner is satisfied that the information requested falls within the definition of environmental information as provided in regulation 2(1)(c).
27. Under regulation 12(5)(b), a public authority can refuse to disclose information if 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 enquiry 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 Department is or is likely to be involved in litigation.”*³
28. The Commissioner has also noted the views of the Tribunal in *Rudd v Information Commissioner & The Vederers of the New Forest*, which stated that:

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.

³ EA/2006/0001, para 21.

“... the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’.... Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system.”⁴

29. Therefore the Commissioner considers that legal professional privilege is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase ‘course of justice’.

Is the exception engaged?

30. The DOE has claimed that the Opinion A is subject to legal professional privilege and if it were to be disclosed, it would adversely affect the course of justice. The Commissioner notes that the test is whether disclosure “would” have an adverse effect rather than “could” and so the DOE needs to show a clear argument as to how the course of justice would be affected by disclosure of the withheld information.
31. 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.
32. Legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence. In particular, 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.”⁵

⁴ EA/2008/0020, para 29.

⁵ EA/2005/0023 para 9.

33. 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.
34. 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.
35. 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 the Commissioner is satisfied that the withheld information is subject to legal advice privilege.
36. The Commissioner has also investigated as to whether or not privilege has been waived in this case. The complainants were of the view that the letter of instruction sets out the scope, nature and content of the advice sought and in doing so effectively discloses the majority of the anticipated content of Opinion A. The letter of instruction set out in detail the background to the circumstances surrounding the planning application. The letter stated:

“The primary purpose of these instructions is therefore to request counsel to confirm that he agrees with this revised approach.”

It went on to add:

“Counsel is asked to advise on the specific question raised above, and generally. Judicial Review proceedings are anticipated whether the Department grants planning permission or refuses it.”

37. The Commissioner considers that partial waiver may occur where the substantive contents of the legal advice have been disclosed. A mere reference to or a brief summary of the legal advice will not be sufficient to waive privilege but it will always be a question of fact and degree in relation to the specific circumstances of each case. However, the Commissioner finds that partial waiver may only occur in the content of litigation. The Commissioner notes that in this case, no legal proceedings have been initiated.
38. In the case of *Kirkaldie v Information Commissioner and Thanet District Council*, the Tribunal held that:

“The test for waiver is whether the contents of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver.”

The Tribunal went on to state:

“Waiver is an objective not subjective principle. Whether a party intended to waive privilege in a particular document is not the question. What matters is an objective analysis of what the part has done.”⁶

39. The Commissioner has also considered the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel*. In this case, the Tribunal considered a document which confirmed that legal advice had been sought as well as the conclusion of the advice provided which justified the course of action taken by the Department. Reference was also made on Merseytravel's website to a “legal duty”, the source of which was the legal advice. The Tribunal found that privilege had not been waived in this case as there had not been a substantial disclosure of the privileged information. The Tribunal held that:

“The 2003 document entitled “To Whom It May Concern” only provided a brief summary of the conclusion of the disputed advice but revealed nothing of the reasoning or other options concerned.”⁷

40. Even in cases where there appears to be a substantial disclosure of the privileged information, this does not necessarily mean that privilege has been waived. The Tribunal, in the case of *Foreign Commonwealth Office v Information Commissioner*, considered the disclosure of a legal Opinion which had been repeated verbatim in correspondence and held that waiver only applies to cases where privileged material has been relied on in the course of litigation. The Tribunal quoted the findings of Lord Justice Mustill L.J in the case of *Nea Carteria Maritime Co. v Atlantic and Great Lakes Steamship Corp.* which stated that:

“Where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves what the party has chosen to release from that privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood”.⁸

41. The Tribunal in this case also added that:

“Authority apart, there is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation”⁹.

42. As litigation was not ongoing when the information request was lodged, the Commissioner is of the view that the issue of waiver does not arise in this case.

⁶ EA/2006/001, paras 26 and 42

⁷ EA/2007/0052, para 26.

⁸ [1981] Com. L.R. 139

⁹ EA/2007/0092, para. 22

Adverse effect

43. The Commissioner has considered whether the disclosure of the withheld information would have an adverse effect on the course of justice, with particular reference to legal professional privilege.
44. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will necessarily 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.
45. 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

46. The complainants provided the Commissioner with a number of reasons as to why they considered it was in the public interest to disclose the withheld information. The complainants suggested that, as the Opinion had been substantively disclosed through the disclosure of the letter of instruction to Counsel, the interest in maintaining legal professional privilege had been weakened.
47. The Commissioner has noted the previous findings of the Information Tribunal in respect of the public interest in transparency and openness in relation to planning decisions taken by public authorities. The Commissioner therefore considers, for similar reasons, that there is a general public interest in disclosure of the information in this case. Disclosure of Opinion A would provide a degree of transparency and reassurance to interested parties that the actions of the DOE as a public authority were in the best interests of a community and may assist the public in understanding the legal basis for this particular decision.
48. The Commissioner 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 important in cases where decisions taken by a public authority have a direct effect on the environment.
49. The Commissioner also 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

50. The Commissioner, whilst recognising the complainant's arguments, also acknowledges 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. This 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. Therefore legal professional privilege is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
51. The Information Tribunal has endorsed this approach. 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"*¹⁰
52. The DOE put forward a number of arguments as to why it felt it was in the public interest to maintain the exception in this case. The DOE stated that it believed there was a strong public interest in favour of withholding the privileged material and that the legal professional privilege applies equally to all parties involved. The DOE held that it was in the public interest that decisions taken are taken in a fully informed legal context. The DOE argued that whilst there is a public interest in disclosing information which adds to the public's understanding and transparency of government, this is not outweighed by the greater public interest in allowing public authorities to obtain full and frank legal advice without fear that it would be disclosed at a later date.
53. The Commissioner accepts that disclosure of information which is subject to legal professional privilege will generally have an adverse effect on the course of justice simply through a weakening of the principle of legal privilege if information subject to privilege is disclosed on a regular basis under the Act or the EIR. The confidence that discussions between clients and their advisers will remain private will become weaker and their discussions may therefore become inhibited.

¹⁰ EA/2005/0023

54. The Commissioner has considered the argument raised by the complainant that the legal privilege had been weakened as a result of the disclosure of the letter of instruction. The Commissioner has had the benefit of reviewing the withheld information and is of the view that the legal Opinion contains more information than merely an acceptance or rejection of the proposals outlined in the letter of instruction from the DOE's legal department. The Commissioner believes that by disclosing this information would provide an unfair advantage to other parties should legal proceedings be issued as they would be privy to any weaknesses in the DOE case.
55. The Commissioner considers that the age of the advice is relevant in this case. In the Tribunal case of *Kessler v Information Commissioner and the Ministry of Defence*, advice which was weeks old was described as "relatively recent"¹¹. In *Kitchner v Information Commissioner and Derby County Council* advice which was 6 years old was described "still relatively recent"¹² whereas in *Mersey Tunnel Users Association v Merseytravel and Information Commissioner*, advice which was over 10 was considered "not recent"¹³. 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.
56. The Commissioner notes 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 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 the DOE's position in any legal proceedings and this, the Commissioner believes, would not be in the public interest.

Balance of the public interest arguments

57. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and in doing so as taken account of the presumption of disclosure as set down by regulation 12(2).
58. The disclosure of the DOE's legal advice or the legal basis behind its decision would have consequences for the DOE if litigation ensued. Through disclosure, those who objected to the DOE's decision would be able to glean any potential weaknesses in the DOE's arguments. This would lead to an imbalance in the level playing field which is a fundamental requirement within the adversarial process.

¹¹ EA/2007/0043

¹² EA/2006/0044

¹³ EA/2007/0052

59. The Commissioner is also mindful of the Tribunal decision in the case of the *Foreign and Commonwealth Office v Information Commissioner* in which it was stated that:

“...what sort of public interest is likely to undermine [this] privilege? ...plainly it must amount to more than curiosity as to what advice the Department has received. The most obvious cases would be those where there is a reason to believe that the Department 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...”

The Tribunal went on to state that such arguments of misrepresentation should be supported by “*cogent evidence*”¹⁴.

60. The Commissioner has been presented with no evidence of the legal advice being misrepresented by the DOE. Therefore the Commissioner has not afforded any weight to this argument for disclosure.
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 disclosure. The Commissioner concludes that the public interest in maintaining the exception in this case outweighs the public interest in disclosing the information.

Procedural requirements

Regulation 5(2): duty to make environmental information available on request

62. Regulation 5(1) states that:

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request”.

Regulation 5(2) states that:

“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”.

63. The complainants submitted their information request on 27 March 2008. The DOE issued a refusal notice on 23 April 2008. The DOE released part of the information requested to the complainants, namely the letter of instruction to Senior Counsel entitled “First Draft”, dated February 2008.

¹⁴ EA/2007/0092, para's 29 and 33.

64. The complainants wrote two letters to the DOE on 24 and 28 April 2008 which made references to the fact that the enclosures attached to the letter of instruction had not been disclosed. The DOE made no reference to these within its correspondence to the complainants of 21 August 2008 following the completion of the internal review.
65. The Commissioner notes that two of the three documents referred to in the letter of instruction to Counsel have now been provided to the complainants following the Commissioner's intervention. In failing to provide these documents at the time of the request, the Commissioner finds the DOE to be in breach of regulation 5(2).

Regulation 11: representations and reconsideration

66. Regulation 11 of the EIR provides that a complainant may request that a public authority reconsider its decision in relation to a request. Regulation 11(4) provides that an authority must conduct this review, and inform the complainant of the outcome no later than 40 working days after the date of receipt of such a request.
67. The Commissioner notes that the complainants requested an internal review on 28 April 2008. However, a review was not carried out until 21 August 2008. The DOE did not explain to the complainants why the internal review had not taken place within the statutory 40 working day period. This is made all the more apparent by the fact that the complainants sent correspondence to the DOE on 13 August 2008 asking for an update in respect of the internal review.
68. The Commissioner notes that the DOE accepts that the delay in responding to the internal review process was a breach of its obligations under the EIR. The Commissioner expects that the DOE will take steps to ensure that breaches of this nature do not recur in relation to future requests.

The Decision

69. The Commissioner's decision is that the DOE was entitled to withhold the Opinion A under regulation 12(5)(b) of the EIR.
70. However, the Commissioner also finds that the DOE breached the following requirements of the EIR:
 - Regulation 5(2) in that the DOE failed to provide non-exempt information to the complainants within the statutory time limit
 - Regulation 11(4) in that the DOE failed to conduct an internal review within the statutory timescale
 - Regulations 14(3) in that it failed to issue a correct refusal notice to the complainant

Steps Required

71. The Commissioner requires no steps to be taken.

Right of Appeal

72. 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 10th day of February 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 Department 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 12

12(1) Subject to paragraphs (2), (3) and (9), a Department 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 Department shall apply a presumption in favour of disclosure.

12(5) For the purposes of paragraph (1)(a), a Department 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 Department 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 Department 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 Department;
 - (ii) did not supply it in circumstances such that that or any other Department 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.