

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

Decision Notice

Date: 3 June 2010

Public Authority: The Department for Transport
Address: Great Minster House
76 Marsham Street
London
SW1P 4DR

Summary

The complainant made a request for information relating to the question of VAT on a proposed new bridge building scheme, known as the Mersey Gateway Bridge Scheme. The Department for Transport (the 'DfT') refused to disclose the information, relying upon section 35(1)(a) (formulation of government policy), section 41(1) (confidential information) and section 42(1) (legal professional privilege) exemptions under the Freedom of Information Act 2000 (the 'Act'). The Commissioner considered the request should have been dealt with under the Environmental Information Regulations 2004 (the "EIR"). The Department for Transport reconsidered the information and withheld it under regulations 12(4)(e) and 12(5)(d). It is the Commissioner's view that the Department for Transport correctly withheld the information under Regulation 12(4)(e).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement

provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

3. The Mersey Gateway Project involves building a new toll bridge over the Mersey between the towns of Runcorn and Widnes. The plan is that this will be a tolled crossing which will cross the river 1.5 kilometres to the east of the existing Silver Jubilee Bridge. The new bridge is projected to open in 2014 and both this bridge and the existing Silver Jubilee Bridge will be tolled. There has been no decision yet on the cost of using the new bridge though it is thought that it will be similar to the cost of travelling through one of the Mersey Tunnels. The plan is also to make discounts available for local people. There will be a substantial government subsidy but toll levels remain speculative, possibly until 2011. There has been speculation among pressure groups and others as to whether VAT will be charged on these tolls and the effect this may have on the viability of the project. A Public Inquiry took place in 2009. In February 2010 it was announced that the Inspector's report from last summer's Public Inquiry has now been passed to Government officials before a final decision is made on whether the project can go ahead.

The Request

4. The complainant made his request for information regarding the proposed building of a new bridge (the Mersey Gateway Scheme) to the DfT on 24 April 2009:

*"So will VAT be charged or have the Government decided that it will not be?
And whatever the answer there is to that can we have a copy of whatever information including agendas, letters, minutes and emails that the DfT has (whoever they are from or to) which deals with the question of VAT on this scheme including any forecasts of the amount that the Treasury will receive from VAT on tolls."*
5. On 16 June 2009 the DfT responded, stating that the matter of charging VAT "is currently uncertain". Certain documents which related to VAT and the proposed new bridge were listed as held and extracts were provided as part of an attachment. The names of officials were redacted as they were not covered by the complainant's request.

6. However, some information was withheld under section 35(1)(a) (formulation of government policy), section 41(1) (confidential information) and section 42(1) (legal professional privilege) exemptions under the Freedom of Information Act 2000. The public interest arguments in favour of disclosing the requested information were cited as transparency, accountability, and a public interest in assessing the quality of advice given and the "subsequent decision-making". Set against the public interest arguments in favour of disclosure, the DfT argued that the information should be withheld as to release it had the potential to prejudice the ability of the government to make sound policy decisions.
7. On 19 June 2009 the complainant wrote to the DfT to request an internal review. He pointed out that it had failed to meet the statutory timeframe and had withheld documents.

The DfT responded on 6 July 2009, partly overturning its original decision:

"Having reviewed the original decision, we have concluded that the decision to withhold certain information, (namely an extract from a note on 'Mersey Gateway change of powers' dated 14.4.08) under Sections 35(1)(a) of the Freedom of Information Act 2000 (formulation of government policy) and Section 41(1) of the same Act (confidential information) was wrong. The relevant piece of information relates to the implementation of and not the development of government policy."

This information, it concluded, could now be released.

8. The DfT concluded that the remainder of the information fell within the categories of communication between a public authority and its own in-house legal advisers. It stated that the original decision to withhold the remainder of the information under section 42 of the FOIA remained correct and cited public interest arguments which it concluded were in favour of withholding the requested information.

The Investigation

Scope of the case

9. On 25 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether section 42(1) was applicable to the withheld information; whether the public

interest test in deciding to withhold these documents had been correctly applied; and whether the Commissioner believed that all disclosable documents had been provided to him.

Chronology

10. On 14 January 2010 the Commissioner wrote to the DfT stating that he considered that the information was in fact caught by the EIR and inviting it to consider whether it wished to consider resubmitting its response by reference to the EIR. The Commissioner also asked if the information that the DfT had suggested would be provided to the complainant after the internal review had, in fact, been provided.
11. The DfT replied on 2 February 2010 explaining that it had reconsidered the application of section 42 and stating that section 21 should have been cited. However, it was willing to release the information which should have been withheld under section 21. This information was only provided to the complainant on 22 January 2010. Some of the withheld information still fell under section 42(1) (legal professional privilege) and that would continue to be withheld.
12. In the same letter the DfT cited Regulations 12(4)(e) and 12(5)(d) in support of its refusal to provide some of the requested information.
13. At the same time the DfT considered the public interest arguments for and against disclosure as outlined in the analysis section. Having weighed the public interest with a presumption in favour of disclosure, it considered that the harm arising from disclosure of the information still outweighed the potential benefits of disclosure in this case.
14. Similar public interest arguments were given for the engagement of Regulation 12(5)(d).

Analysis

Application of the EIR

15. The Commissioner is satisfied that all of the requested information is environmental information and falls to be considered under the EIR for the following reasons.
16. 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.

Relevant legislation

17. Regulation 2(1) provides a definition of the term "environmental information" - "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)."
18. The Commissioner has examined all of the withheld information and is of the opinion that it falls within the definition of environmental information set out in regulation 2(1)(c), namely that information relating to the building of a new bridge and to tolling, albeit a tax measure, is information which is likely to affect the elements of the environment referred to in regulation 2(1)(a), in particular the land and the landscape. Building a new bridge inevitably changes the

landscape. The proposed bridge is likely to affect the use of land, as some traffic will be diverted away from the existing bridge in order to utilise the new bridge.

19. The Commissioner has taken into account Council Directive 2003/4/EC (derived from the Aarhus Convention) which is implemented into UK law by way of the EIR. The Directive sets out that one of the purposes of the legislation is to allow the participation of the public in environmental decision making at the earliest stages. This has been interpreted as meaning that information which would help the public contribute to the preparation of a plan which is likely to have an effect on the environment should be dealt with as a environmental information under the EIR. The Commissioner's view is that the fact a plan may not come to fruition does not prevent the information from being environmental. Further, the Commissioner has interpreted the phrase "information on" widely, to include information which is "about" a particular measure or activity. For these reasons, the Commissioner considers that all of the withheld information falls within the definition of environmental information as set out in Regulation 2(1) of the EIR and should properly have been considered as a request for information under that legislation.

Exceptions

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

Regulation 12(4)(e)

22. The DfT has refused to disclose the information on the basis of its application of the exception under Regulation 12(4)(e). The Commissioner has considered whether the DfT correctly applied the exception under regulation 12(4)(e).
23. 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. "*

24. The Commissioner has considered the withheld information and is satisfied that it consists of correspondence between the DfT and its in-house lawyers. Specifically it comprises of legal advice on the subject of the application of VAT to the proposed Mersey Gateway Bridge building scheme from internal departmental lawyers and the requested information therefore attracts legal professional privilege. The Commissioner is therefore satisfied that the exception under Regulation 12(4)(e) is engaged.

The public interest test

Public interest arguments in favour of maintaining the exception

25. As stated above the Commissioner is satisfied that these internal communications are comprised of legal advice from internal departmental lawyers and that the requested information attracts legal professional privilege. The Commissioner therefore considers that it is relevant to give weight to LPP factors under the 12(4)(e) exception. The basis of the exception is to protect a safe space for internal deliberation and protect the provision of frank and candid advice.
26. Legal professional privilege is an important principle of English law which provides for special protection from the disclosure of communications between lawyers and their clients. In the Information Tribunal case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the Tribunal described the notion of legal professional privilege as
- "a set of rules which are designed to protect 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."*
27. Legal professional privilege is classified into two categories; legal advice privilege and litigation privilege. The Commissioner is satisfied that the withheld information falls within the category of advice privilege.
28. The Commissioner has considered the following factors in relation to the public interest in withholding the information:
- the inbuilt weight of the concept of legal professional privilege.
 - the likelihood and severity of harm arising by disclosure.
 - whether the advice is recent; live or protects advice relating to the rights of individuals.
 - other circumstances relating to this particular case.

29. The Commissioner recognises that there is a strong and inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the principle of legal professional privilege could therefore harm the ability of parties to provide or receive legal advice on a full and frank basis. This in turn could damage the parties' ability to effectively determine their legal opinions, or to defend or seek legal restitution against other parties in accordance with their rights. In the case of *Bellamy v the ICO and the DTI (EA/2005/0023)* it 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 interest....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..."

30. The Tribunal's decision in the Bellamy case was referred to in *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*. The Tribunal in the Pugh case did not accept the conclusion reached by the Commissioner and the MOD in that the public interest in favour of disclosure would have to be "exceptional" where legal professional privilege is engaged. Instead the Tribunal stated that it did not require "exceptional" factors in favour of disclosure, "...just as or more weighty than those in favour of maintaining the exemption". The Commissioner has considered these comments in the context of this case.
31. Despite the somewhat generic response from the DfT, the principle of legal privilege is one that should be overturned only for compelling reasons.
32. In considering the DfT's arguments in favour of withholding the requested information the Commissioner is not convinced by the argument that future legal advice might be compromised and an edited version of that advice recorded for fear of disclosure. It seems unlikely that lawyers whose job is to provide advice would cease to do so or that a full and accurate record would be compromised for fear of disclosure.
33. However, the Commissioner is persuaded by the argument that officials need to be able to be free and frank in providing advice for internal consideration. The "chilling effect" arguments concern the disclosure of information that will affect the frankness or candour with which issues are debated by relevant parties such as Ministers and civil servants. If

poorer decision-making were to ensue this would not be in the public interest.

34. There is a need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a "safe space" exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under FOIA. Several Tribunals have accepted as valid, public interest arguments about the loss of a safe space, specific to the policy debate to which the information relates. This is on the basis that:
- there is a public interest in preserving a "safe space" for policy formulation, and
 - that to release information relating to a particular policy, whilst that same policy is still in its formulation and development stages might erode that "safe space".
35. There is however no suggestion that in this case any harm would result from disclosing the legal advice given to the DfT, other than the potential future harm if legal opinion cannot be presented without fear of imminent disclosure.
36. It could not be argued that the passage of time is a factor which favours disclosure as the advice with regard to VAT on the Mersey Gateway Scheme is less than 3 years old. The Commissioner accepts this principle and considers that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes and have current or future significance.
37. As stated in the previous paragraph, the Commissioner is minded that the advice given to the DfT in this case is recent by any interpretation of that word. At the point at which the request for information was made no decision had been taken and the issue was subject to a Public Inquiry which began in May 2009, was closed on all orders on 25 June 2009 and reopened on 28 July 2009 for one day only. The Inquiry was announced prior to the request being made. When older legal professional privilege is involved disclosure is likely to reduce any potential harm to the privilege holder, and, as it is no longer relevant to the decision-making process, underpins the argument in favour of disclosure. However, the advice relating to the requested information was recent when requested and is recent now. This advice is apparently ongoing and 'live' with regard to the issues surrounding the matter of VAT on tolls and is therefore open to possible legal challenge.

38. The Information Tribunal in a recent ruling¹ made the following observation whilst commenting on *Foreign and Commonwealth Office* (EA/2007/0092):

"Curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal arguments relevant to the issue concerned, are, in that Tribunal's words, "weak" factors that do not outweigh the strong public interest in withholding information to which LPP applies. In the circumstances of this case we agree with this observation." (paragraph 44)

The Tribunal went on to say that with regard to the legal advice given concerning the NHS Database proposals:

"...we find there is a strong public interest in maintaining the exemption for the reasons set up in §§35 to 37 above. The Disputed Information has the inbuilt weight in favour of maintaining the exemption. It is recent advice which in our view is still 'live' which makes it even weightier..." (paragraph 54)

Public interest arguments in favour of disclosing the requested information

39. In *Mersey Tunnel Users Association v ICO & Merseytravel* (EA/2007/0052) the Tribunal's decision in that case concluded that the public interest favoured disclosing legal advice received by Merseytravel, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice concerned issues which affected a substantial number of people. It stated that:

"We find, listing just the more important factors, that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining it..."

40. The DfT recognised that disclosure of the information would increase transparency, allow the public to assess the quality of advice given and consider any subsequent decision making. It also accepted that having knowledge of the way government works could increase the public contribution to the policy making process and as a result become more

¹ Text available at:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i375/Thornton v IC & DOH \(0071\) Decision 10-02-10 \(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i375/Thornton_v_IC_&_DOH_(0071)_Decision_10-02-10_(w).pdf)

effective and broadly based. Furthermore it acknowledged that the decisions made as regards the Mersey Gateway Bridge Scheme would affect a lot of people.

41. In *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people".
42. As the proposed Mersey Gateway Bridge would affect most people local to the area and those travelling in that area it is clear that the subject matter of the requested information would affect "a significant group of people".
43. The public interest arguments cited by the DfT to refuse disclosure are of a generic nature. It would appear that the arguments are general considerations of whether increased levels of transparency and accountability would be brought about by allowing the public access to the legal advice that underpinned a governmental decision.
44. The arguments in relation to transparency were considered by the Information Tribunal at paragraph 29 in the case of the *Mersey Tunnel Users Association v the ICO and Merseytravel (EA/2007/0052)*. It stated;

"...what sort of public interest is likely to undermine [this] privilege?...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."
45. A Public Inquiry has been held into the Mersey Gateway subsequent to the complainant's request for information which would support the view that transparency was being observed by the Department for Transport.
46. The complainant believes that Halton Council was in discussion with the DfT with regard to the imposition of VAT on the new bridge and the existing bridge, despite his contention that the Inquiry had been assured that VAT would not be imposed on the new bridge. The complainant has stated that the question of whether VAT will be applied is not an incidental matter, it is fundamental to whether the plan for a new bridge goes forward in its current form.

47. The Commissioner has therefore taken into account the comments made by the Tribunal in the Merseytravel case as quoted in paragraph 39. In particular in reaching his decision he has considered the following factors, the:
- Amount of money involved
 - Number of people affected
 - Transparency of the public authority's action

Balance of the public interest arguments

48. There is considerable money involved in this project rising from 390 million pounds to 431 million pounds, though the ultimate cost could change. Part of the Scheme will be funded by Private Finance Initiative. As discussed in paragraphs 40 and 41 there are a significant amount of people likely to be affected by the new bridge and the toll imposed, both local people and travellers from further afield. However, there has been a Public Inquiry conducted in 2009 into this matter. The results of the Public Inquiry have not yet been published. More significantly, as outlined in paragraphs 36 and 37, the legal advice regarding the imposition or otherwise of VAT on tolls under the Mersey Gateway Scheme is recent and ongoing.
49. The issue of the proposed Mersey Gateway Bridge and whether any tolls will include VAT remains unknown. In order that an accurate understanding of the legal concerns can be fully assessed the principle of legal privilege needs to be protected as it is in the interests of the DfT and the public that legal advice should not be constrained by the possibility of disclosure.
50. The Commissioner does recognise the strength of the public interest arguments provided in favour of the disclosure of this information. However on balance he considers that these are outweighed by the significant public interest in protecting legal advice and therefore regulation 12(4)(e) as it is recent and current live advice.
51. The Commissioner therefore concludes that the public interest favours maintaining the exception under 12(4)(e). As a result he has not gone on to consider exception 12(5)(d).

Procedural Requirements

Regulation 14 – Refusal to disclose information

52. 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. By failing to respond to the request within 20 working days the DfT has breached regulation 14(2).

The Decision

53. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

Regulation 12(4)(e)

However, the Commissioner also finds that the DfT breached the following requirements of the EIR:

- Regulation 5(2) in that the DfT failed to provide non-exempt information to the complainants within the statutory time limit
- Regulation 14(2) by failing to send a refusal notice within 20 working days

Steps Required

54. The Commissioner requires no steps to be taken.

Right of Appeal

55. 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 sent.

Dated the 3rd day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

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.

(2) A public authority shall apply a presumption in favour of disclosure.

4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.