

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

Decision Notice

Date: 23 February 2011

Public Authority: Ministry of Justice
Address: Selborne House
Victoria Street
London
SW1E 6QW

Summary

The complainant submitted a request to the Ministry of Justice ('the MoJ') for a copy of the legal opinion commissioned by the MoJ on the issue of charging for inspection of the Local Land Charges Register under the EIR. The MoJ withheld this information under the exemption at section 42 of the Act on the grounds that it was subject to legal professional privilege. During the course of the investigation, the MoJ reconsidered the request under the EIR and withheld the information under the exception at regulation 12(5)(b). The Commissioner has investigated and found that the exception at regulation 12(5)(b) was applied correctly. However, the MoJ has breached regulation 14(2) by failing to provide the complainant with a refusal notice within 20 working days. It has also breached regulation 14(3)(a) by failing to cite the specific exception it relied upon, and 14(3)(b) in failing to detail the public interest matters considered in relation to the application of regulation 12(5)(b). The Commissioner does not require the MoJ to take any further action.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner ('the Commissioner'). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 ('the Act') are imported into the EIR.

Background

2. Section 3 of the Local Land Charges Act 1975 (LLCA) compels all local authorities to generate, maintain and update a Local Land Charges Register. Under the LLCA applicants can obtain an 'Official Search' of the register by submitting form LLC1 to the relevant local authority.
3. The Local Land Charges (Amendment) Rules 2009 stated that a standard fee of £22 could be levied to allow an applicant to conduct a personal search of the Local Land Charges Register.
4. The Commissioner has issued several Decision Notices which concluded that charging a fee to allow an applicant to inspect the Local Land Charges Register was not compliant with the EIR. This is because regulation 8(2)(b) of the EIR provides that no charge can be made for allowing an applicant to inspect environmental information.
5. In August 2010, the Local Land Charges (Amendment) Rules 2010 ('the Amendment') came into force. This revoked the previous fee of £22 set out in the Local Land Charges Rules (1977) (as amended), so that no charge could be made for allowing a personal inspection of the Local Land Charges Register. The Local Land Charges (Amendment) (Wales) Rules 2010 made the same provision for local authorities in Wales. The explanatory memoranda that accompanied the Amendments stated that the fee had been removed to ensure that the legislation was compliant with the EIR.

The Request

6. On 11 March 2010, the complainant submitted the following request to the MoJ:

"The free inspection of the Local Land Charges Register, which is claimed by personal search companies, is subject to receipt of a legal opinion commissioned by the Ministry of Justice. Please confirm:

- 1) The legal opinion requested by the Ministry of Justice, or on its behalf, and the date.
- 2) Whether the legal opinion has been received by the Ministry of Justice and the date of receipt
- 3) Provide a copy of the legal opinion"

7. On 22 March 2010, the MoJ emailed the complainant and stated that it had not dealt with his request under the Act, but forwarded it to the Ministerial General Correspondence Unit (MCU).
8. On 23 March 2010, the complainant emailed the MoJ to ask why his request had not been considered under the Act.
9. On 25 March 2010, the MoJ emailed the complainant and explained that decisions about whether to deal with a request for information under the Act were made by senior caseworkers in its Data Access and Compliance Unit. It stated that a major factor was whether a request was for recorded information.
10. On 25 March 2010, the complainant emailed the MoJ to point out that a legal opinion, if held, would comprise 'recorded' information. He therefore asked that an internal review of the way his request had been handled was conducted.
11. On 15 April 2010, the MoJ acknowledged the complainant's request for an internal review.
12. On 30 April 2010, the MoJ wrote to the complainant with a more detailed explanation of why his request had not been dealt with under the Act, but as a "general enquiry". This again reasserted that the Act only covered information held by public authorities, and did not apply to opinions or explanations that are not held. The MoJ quoted the complainant's request and stated that it did not ask for recorded information. However, it assured the complainant that the MCU would provide a response to his enquiries.
13. The MCU provided a response to the complainant's enquiry on 18 June 2010. This explained that the Local Land Charges Rules 1977 were shortly to be amended to ensure compliance with the EIR. No other information was disclosed.
14. Following the intervention of the Commissioner, the MoJ provided a response to the complainant under the Act on 9 July 2010. This applied the exemption at regulation 42(1) to the requested information. The public interest test conducted by the authority found in favour of maintaining the exemption.
15. Following the further intervention of the Commissioner, on 27 September 2010 the MoJ reconsidered the request under the provisions of the EIR and applied the exception at regulation 12(5)(b). The public interest test found in favour of withholding the information.

The Investigation

Scope of the case

16. On 30 April 2010 the complainant contacted the Commissioner to complain about the MoJ's refusal to deal with his request under the Act.
17. The Commissioner contacted the complainant on 21 June 2010 to enquire if the 'course of business' response from the MoJ of 18 June 2010 had satisfied his request. The complainant confirmed that he still wished to receive a copy of the legal opinion. The scope of the investigation has therefore been restricted to question 3 of the complainant's original request for information.

Chronology

18. On 21 June 2010, the Commissioner wrote to the MoJ to enquire if the requested information was held. The Commissioner asked the MoJ to provide answers to a series of questions about whether a legal opinion had been sought or received. He also advised the MoJ that he considered that the requested information should be considered under the EIR. He asked that the MoJ provide a response to the complainant under this legislation, and to copy it to him.
19. On 1 July 2010, the MoJ wrote to the Commissioner to reassert that the request was not for 'recorded' information and so was not required to be considered under the Act or the EIR
20. On 15 July 2010, the MoJ telephoned the Commissioner to explain that it felt that the request should be handled under the Act rather than the EIR. The Commissioner asked that the MoJ explain why it felt this was the case in its response to his email of 21 June 2010.
21. On 23 July 2010, the Commissioner wrote to the MoJ to enquire when it anticipated responding to his email of 21 June 2010. The Commissioner also asked that if the MoJ considered that the request should be considered under the Act, it explain this in its response.
22. On 29 July 2010 and 3 August 2010, the Commissioner telephoned the MoJ to ask that it provided its response. On 6 August 2010, the Commissioner wrote to the MoJ to ask that it sent its response to both him and the complainant as soon as possible.

23. On 9 August 2010, the MoJ responded to the complainant, stating that the requested information was exempt under section 42(1) of the Act. The MoJ did not explain why it felt the information should be considered under the Act rather than the EIR.
24. On 19 August 2010, the Commissioner wrote to the MoJ to again reassert that he considered the appropriate access regime for the requested information was the EIR. He asked that the request was reconsidered on this basis. The Commissioner drew the MoJ's attention to the exception at regulation 12(5)(b), which covers environmental information subject to legal professional privilege.
25. On 20 August 2010, the MoJ emailed the Commissioner to state that it did not understand how the request could fall under the provisions of the EIR.
26. On 26 August 2010, the Commissioner wrote to the MoJ with a more detailed explanation of why he believed the requested information was likely to be environmental. The Commissioner asked that the MoJ either reconsider the request under the EIR, or provide him with a copy of the withheld information along with its analysis of why it felt the Act was the correct access regime.
27. On 21 September 2010, the MoJ sent the Commissioner a copy of the withheld information. The Commissioner then telephoned the MoJ to explain that, having reviewed the information, he was still of the opinion that it should be considered under the provisions of the EIR.
28. On 27 September 2010, the MoJ emailed the Commissioner to explain that whilst it was unsure that the requested information was environmental in nature, it had considered the request under the EIR and applied the exception at regulation 12(5)(b) to the requested information.
29. On 27 September 2010 the Commissioner emailed the complainant to explain that the MoJ had now reconsidered the request under the EIR. The complainant provided some arguments in favour of disclosure and asked that these were considered in a Decision Notice.

Analysis

Substantive Procedural Matters

Regulation 2

30. As already stated in the chronology, the Commissioner's view is that the request should have been considered under the EIR.
31. The Commissioner considers that the requested information falls within regulation 2(1)(d) –

“reports on the implementation of environmental legislation”,

as it reports on the implementation of the EIR. The advice considers whether the Local Land Charges Rules 1977 (as amended) is compatible with the EIR and whether its provisions should be altered. The EIR are considered to comprise “environmental legislation”

32. The Commissioner is also of the opinion that the requested information falls within regulation 2(1)(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”.

Paragraph 1 of the [Directive 2003/04EC](#) states that “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” . Therefore the EIR is in itself considered a “measure” and information relating to it, such as the legal opinion in question, falls within regulation 2(1)(c).

Regulation 12(5)(b)

33. Regulation 12(5)(b) provides an exception for information where 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”

34. The First Tier (Information Rights) Tribunal in the case of [Kirkaldie v the Information Commissioner and Thanet District Council](#) (EA/2006/001) found that the exception “covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”. (para 21) This view was supported by the Tribunal in the case of [Creekside Forum v Information Commissioner and DCMS](#) (EA/2008/0065). The Tribunal found that “...whilst regulation 12(5)(b) does not explicitly name legal professional privilege, its function and substance fall under the umbrella of ‘the course of justice’”. (para 29)
35. The Commissioner therefore considers that legal professional privilege is a concept covered by regulation 12(5)(b).

Is the exception engaged?

36. The Commissioner must assess whether the 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.
37. There is no suggestion that disclosure would impact upon 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, and so the Commissioner has not considered these factors. The Commissioner notes that the test is whether disclosure “would” have an adverse effect, and so there needs to be a clear argument why the course of justice would be affected by disclosure of the information.

Is the information subject to legal professional privilege?

38. Legal professional privilege protects the confidentiality of communications between a lawyer and client. 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.
39. 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.

40. The Commissioner considers that the requested information attracts legal advice privilege. This is because it is a legal opinion obtained to provide advice on whether charging for personal inspection of the Local Land Charges Register is compliant with the EIR. The Commissioner is satisfied that the advice was sought from and provided by a qualified legal adviser, in this case a barrister, in his professional legal capacity. The Commissioner therefore accepts that the advice attracts legal professional privilege. There is no suggestion that the confidentiality of the information has been lost in this instance and the Commissioner is satisfied that the privilege is maintained.

Would disclosure have an adverse effect on the course of justice?

41. Legal professional privilege is an established principle which allows parties to take advice and discuss legal interpretation freely and frankly in the knowledge that such information will be retained in confidence.
42. The Commissioner notes the view of the Tribunal in the case of [Rudd v Information Commissioner and The Verderers of the New Forest \[EA/2008/0020\]](#), which found that:

“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” (para. 29)

43. The Commissioner is therefore satisfied that the disclosure of legally privileged information would have an adverse effect on the course of justice.

Public interest test

44. Like all exceptions under the EIR, regulation 12(5)(b) is subject to the public interest test. The Commissioner has gone on to consider the public interest test arguments submitted by the Council in its application of section 42 and has considered them in relation to regulation 12(5)(b). Regulation 12(2) of the EIR sets a presumption in

favour of disclosure and the Commissioner has borne this requirement in mind in carrying out his assessment of the public interest test.

Factors in favour of maintaining the exception

45. The MoJ argued that it was important that its officials could receive “full, frank and considered” legal advice before deciding whether to take decisions – in this case, the introduction of the Amendment, which amends the Local Land Charges Rules 1977. The MoJ points out that legal advice is likely to discuss both the positive and negative implications of a proposed decision, and it is not in the public interest to inhibit the frank discussion of proposed actions. This is because decisions that are not taken on a fully informed basis may result in poorer decision making.
46. The MoJ also contends that the disclosure of legal advice has the potential to prejudice the government’s ability to defend its legal interests, both by exposing its position to challenge, and because advice given when disclosure is a possibility may not address all of the relevant issues fully. The MoJ argues that this could result in “serious consequential loss”, or in wasted resources spent on defending unnecessary legal challenges.

Factors in favour of disclosing the requested information

47. The MoJ acknowledges that disclosure could enable the public to understand what issues were considered as part of the decision-making process and therefore create greater transparency. Disclosure could also allow the public to find out whether the MoJ chose to follow the legal advice it received, which might contribute towards greater accountability and transparency.
48. The complainant has submitted that the Amendment has, by revoking the previous statutory fee of £22 for a personal search of the Local Land Charges Register, created financial implications for all local authorities. This impacts the allocation of public money and therefore affects upon all taxpayers.

Balance of the public interest arguments

49. The Commissioner accepts that the Amendment has financial implications for all local authorities and that there is therefore a public interest in ensuring that the MoJ is transparent and accountable for the decision making process that led to the introduction of the Amendment.

50. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.
51. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exception. The MoJ argued that it needs to be able to obtain free and frank legal advice in order to ensure that it is fully informed of all the relevant legal issues before decisions are made. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain such advice in the future and have the confidence that advice given is done so freely without the consideration of disclosure. In the case of [*Kitchener v Information Commissioner and Derby City Council* \[EA/2006/0044\]](#) the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."

52. In its summary of [*Bellamy v the Information Commissioner and the DTI* \[EA/2005/0023\]](#), the Information Tribunal stated that:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest."

The Tribunal referred to legal professional privilege as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases.

53. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in the non disclosure of the legally privileged information. He also notes that whilst the legal advice has not been disclosed, the MoJ has explained to the complainant that the Amendment was brought into force because the previous provisions of the Local Land Charges Rules 1977 (as amended) were incompatible with the provisions of the EIR and the underlying EU directive. This is also explained more fully in the explanatory memorandum that accompanies the Amendment, and in several of the Commissioner's published decision notices in cases that concern the provision of property search information under the EIR.

54. Whilst the Commissioner recognises the weight of the arguments in favour of releasing the requested information he has, on balance, decided that they are outweighed by the arguments in favour of maintaining the exception, especially given the inherent public interest in allowing decisions to be taken on a fully informed basis.

Regulation 14(2)

55. Regulation 14(2) provides that any refusal notice will be issued within 20 working days following receipt of a request.
56. The complainant's original request was submitted on 11 March 2010. The MoJ did not respond until 9 July 2010. The MoJ has therefore breached regulation 14(2).
57. The delay in providing a response is partly due to the MoJ's initial reluctance to deal with the request under the Act or the EIR, and instead treat it as a 'general enquiry'. The Commissioner does not accept that the complainant's request could be interpreted as anything other than a request for 'held' or 'recorded' information. He is consequently of the opinion that the MoJ should have been dealt with the request under the EIR when it was received, rather than refer it to another department for a 'course of business' response.

Regulation 14(3)

58. Regulation 14(3)(a) provides that a public authority should specify the specific exception it relies upon in any refusal notice issued.
59. In its refusal notice of 9 July 2010, the MoJ confirms that the requested information is exempt under section 42 of the Act. As the Commissioner has determined that the request should have been dealt with under the EIR, he finds that the MoJ has breached regulation 14(3)(a) by failing to inform the complainant that the requested information was exempt under the exception at regulation 12(5)(b).
60. Regulation 14(3)(b) provides that a public authority must detail any matters it considered in reaching its conclusions on the public interest in whether to disclose information. The MoJ failed to do this in relation to the application of 12(5)(b) and so the Commissioner finds a breach of regulation 14(3)(b)

The Decision

61. The Commissioner's decision is that the MoJ correctly applied the exception at regulation 12(5)(b) to the requested information.
62. However, he finds that the MoJ breached regulation 14(2) by failing to provide a refusal notice within 20 working days. It also breached regulation 14(3)(a) by failing to cite the specific exception it relied upon in withholding the information, and 14(3)(b) in failing to cite the matters it took into account when considering its public interest test in relation to the application of 12(5)(b).

Steps Required

63. The Commissioner does not require the MoJ to take any further action.

Right of Appeal

64. 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 23rd day of February 2011

Signed

**Gerrard Tracey
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SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 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.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(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 course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 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 proceedings 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 interests 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.

Regulation 14 - Refusal to disclose information

Regulation 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.

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.

Regulation 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).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.