

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

Decision Notice

Date: 22 June 2011

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

Summary

The complainant requested information provided by the Department to its legal adviser when seeking legal advice on a planning issue. The Department withheld the requested information in reliance on the exception at regulation 12(4)(e) of the EIR. The Commissioner finds that the exception was correctly applied, and does not require any steps to be taken.

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 (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 Act are imported into the EIR.

Background

3. The complainant in this case is involved in a dispute with the Planning Service over a housing development in Waringstown, Co Armagh. The Planning Service is part of the Department of the Environment Northern

Ireland (the Department). The dispute concerns the Department's decision to grant planning permission for a development within the grounds of a listed building. The complainant is of the view that planning approval in this case was against planning policy and should not have been granted. The complainant, along with other objectors and elected representatives, has been in correspondence with the Department on this issue for a number of years.

4. An audit investigation in 2006 indicated that a series of errors or omissions on the part of the Planning Service may have resulted in the destruction of some underground remains of a rath and failed to ensure that provision could be made for rescue archaeology where appropriate.
5. The Commissioner understands that, in October 2006, the complainant and his representative met with the Department to discuss concerns about the development. At this meeting the Department agreed to consider whether planning permission for the development should be discontinued, and advised that it would need to seek legal advice on this issue. Subsequently the Department advised the complainant that the original decision to grant planning permission had been "soundly based" and no grounds existed to justify the discontinuation of planning permission.
6. A complaint was also made to the Assembly Ombudsman for Northern Ireland by an elected representative acting on behalf of the complainant in relation to this issue. The Ombudsman noted that the Department had accepted its failings in the matter, but was of the view that there was no action he could require the Department to take.
7. In March 2010 the Commissioner issued a Decision Notice in relation to another request made by the complainant to the Department¹. That request was for the legal advice provided to the Department as referred to above, and the Commissioner found that the Department had correctly refused the request. The complainant subsequently submitted the information request which is the subject of this Notice.

The Request

8. On 12 March 2010 the complainant made the following request to the Department:

¹ Case reference FER0174998

"I now wish to have a copy of the recorded questions put to the lawyers as per PSE: 0406.06".

9. The request was for correspondence between the Department and the Departmental Solicitors Office (the DSO), requesting legal advice.
10. The Department responded to the complainant's request on 20 April 2010. The Department advised that the requested information could not be released as it was exempt under regulation 12(4)(e) of the EIR (which relates to internal communications). The Department argued that the withheld information in this case, ie the request for legal advice, attracted legal professional privilege (LPP).
11. On 14 May 2010 the complainant requested an internal review of the Department's decision to refuse his request.
12. On 6 July 2010 the Department advised the complainant that it had now completed the internal review. The Department explained that the internal review had concluded that the Department was correct to refuse the request under regulation 12(4)(e) of the EIR.

The Investigation

Scope of the case

13. On 7 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant was of the view that the Department ought to have released the information he requested.
14. The complainant provided the Commissioner with a substantial amount of correspondence and background information relating to the dispute. The complainant also telephoned and emailed the Commissioner on a number of occasions to set out his views. The Commissioner is mindful of the complainant's dispute with the Department, however the EIR provide a means for information to be disclosed into the public domain (i.e. without restriction). The Commissioner is required to make a decision as to whether a public authority has dealt with a particular request in accordance with the EIR. Therefore the Commissioner's decision in this case relates solely to the information requested on 12 March 2010 as detailed above.

Chronology

15. The Commissioner wrote to the Department on 5 August 2010 to advise it of the complaint.

16. Following allocation of the complaint to a case officer, the Commissioner wrote to the Department on 25 February 2011 to request further information regarding its handling of the complainant's request.
17. The Department responded to the Commissioner on 25 March 2011. The Department had previously provided the Commissioner with a copy of all the relevant correspondence between the Department and the DSO, as well as the complete planning application file upon which the Department had sought the legal advice. Therefore the Commissioner already had a copy of the withheld information in this case.

Analysis

Exception claimed

Regulation 12(4)(e) - internal communications

18. The Department claimed that all of the requested information was exempt from disclosure under the exception at regulation 12(4)(e) of the EIR. This exception states that:

" 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. "

19. The Commissioner has first considered whether the withheld information, which consists of correspondence between the Department and the DSO, constitutes an 'internal communication'.

20. Regulation 12(8) of the EIR provides that:

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

21. The Commissioner considers it appropriate to follow the reasoning he set out in the previous decision referred to above². In that case the Commissioner examined the relationship between the Department and the DSO.

22. The Commissioner notes that the DSO is a division of the Department of Finance and Personnel (Northern Ireland) (DFPNI). DFPNI provides shared services across the Northern Ireland government departments in

² Case reference FER0174998

areas including finance, personnel services, procurement and legal advice. The DSO provides legal advice to the Northern Ireland Executive and ministers and departments; represents departments in litigation and in property and commercial transactions; and develops proposals for civil law reform.

23. In the previous case the Commissioner was satisfied that communications between the Department and the DSO are internal communications. In this case the Commissioner also concludes that the withheld information constitutes internal communications, as it comprises communications between the Department and the DSO. Therefore the Commissioner is satisfied that the exception at regulation 12(4)(e) is engaged.

The public interest test

24. The public interest test is set out at regulation 12(1) of the EIR. This states that a public authority can only rely on an exception contained within regulation 12(4) or 12(5) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. In addition, regulation 12(2) requires that the public authority apply an explicit presumption in favour of disclosure.

Public interest factors favouring disclosure of the information

25. The complainant argued to the Commissioner that there were overwhelming arguments in favour of disclosing the information. The complainant pointed out that the legal advice had been obtained by the Department in an effort to reassure the complainant and others that proper process had been followed with regard to the planning issue.
26. The complainant expressed the view that the public was entitled to be informed exactly what advice was sought from DSO, so that they may be assured that the Department presented all the relevant facts to the DSO. Without disclosure of the request for legal advice, the complainant felt that the public could not be satisfied that the Department followed through on its commitment to consider whether planning permission could be discontinued.
27. The complainant drew the Commissioner's attention to extensive correspondence between himself, elected representatives, Departmental officials and Ministers, as well as Departmental documentation concerning the planning matter. The complainant argued that this information demonstrated fraud and this was a strong argument in favour of the disclosure of all relevant information.

28. The complainant also argued that, as the Department had advised him that the decision to grant planning permission was “soundly based”, the Department had partially disclosed the legal advice. On this basis the complainant argued that LPP had been “waived” and the information ought to be disclosed in full.
29. The Department recognised the inherent public interest in transparency and in the accountability of public authorities. The Department also acknowledged the importance of furthering public understanding of the decisions made by public authorities.
30. The Commissioner considers that there is a strong public interest in fully informing the public’s understanding of decisions made by public authorities, particularly those decisions that may have an impact upon the environment. The Commissioner also believes that disclosure of internal communications may serve to increase public confidence in the Department’s exercise of its statutory duties in relation to enforcement. Disclosure of the request for legal advice would provide a degree of transparency and reassurance to interested parties that the Department’s actions were in the best interests of the community.
31. In addition, the Commissioner considers that Parliament did not intend the principle of LPP to be used as an absolute exception. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel*³ the Information Tribunal confirmed this point. In that case the Tribunal’s decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people.

Public interest factors favouring maintaining the exception

32. The Department relied on the Commissioner’s decision in the previous case to support its view that the existence of LPP created a strong argument in favour of maintaining the exception at regulation 12(4)(e). The Commissioner is satisfied that the withheld information in this case constitutes a communication between the Department and its legal advisers, the DSO, for the sole purpose of seeking legal advice. The Commissioner recognises that LPP can attach to information created for the purpose of giving or obtaining legal advice. The Commissioner considers that this would include requests for legal advice as well as the advice itself. Therefore the Commissioner accepts that the withheld information attracts legal advice privilege.

³ Appeal no EA/2007/0052

33. However, the Commissioner's interpretation of the EIR has developed over time, and the Commissioner has reached the view that where a public authority seeks to rely on LPP as an argument against disclosure, it is more appropriate to apply the exception at regulation 12(5)(b).
34. However this does not mean that, in this particular case, the Department was wrong to rely on the exception at regulation 12(4)(e). In considering the public interest in this case the Commissioner considers it important to focus on the importance of protecting the quality and candour of internal debates and decision making, as this is inherent in regulation 12(4)(e). The Commissioner finds that it is relevant to give weight to some LPP factors, but he is of the view that the basis of this exception is to protect a safe space for internal deliberation and to protect the provision of frank and candid advice.
35. The Department has argued that there is a strong public interest in protecting the ability of public authorities to consult advisers in confidence, to be able to share information fully and frankly and to seek and obtain advice with the knowledge that such advice is protected from disclosure. The Commissioner considers that this argument is relevant under regulation 12(4)(e) to the extent that the quality of the Department's internal debate and decision making processes would be damaged if public authorities were deterred, by the prospect of disclosure, from seeking legal advice. There is a strong public interest in public authorities being able to debate different views and advice given. Where disclosure of information would have an adverse impact on this ability, there is more likely to be a strong public interest in maintaining the exception.
36. The Department also argued that the legal advice in question was relatively recent, and not limited in relevance to this particular case. The Department explained that the legislation under which it operated had not changed since the legal advice was sought, and therefore the issues discussed may well prove relevant in other situations. Therefore the Department was of the view that disclosing the withheld information in this case could prejudice the Department's position in future cases, for example applications for judicial review in relation to planning decisions. The Commissioner accepts that any chilling effect upon a public authority's willingness to seek legal advice would be likely to be more pronounced if the advice, or request for advice, disclosed were live. He also accepts that the Department's ability to use its internal processes to fully evaluate all available options would be limited by external knowledge of its current concerns as to the legality of any course of action or relevant matter.

The balance of the public interest

37. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure. The Commissioner has also taken into account the presumption of disclosure as set down by regulation 12(2).
38. The Commissioner appreciates the complainant's concerns in relation to the nature of the advice sought. The Department has accepted that serious mistakes were made in the planning process in this case, but the complainant does not accept the Department's explanation in relation to the legal advice. Rather, the complainant is of the view that disclosure is required to ensure that proper procedures were followed.
39. The Commissioner is also mindful of the complainant's contention that the Department can not claim reliance on LPP because it had advised him that the planning decision was "soundly based". Bearing in mind his comments on the applicability of LPP with regard to regulation 12(4)(e), the Commissioner recognises that LPP applies to confidential communications between a legal adviser and their client. When the confidentiality of these communications is lost so is the ability to claim privilege in respect of that information. However the Commissioner is not persuaded that the confidentiality of the information has been lost, as the Department's comment that the planning decision was "soundly based" is not sufficiently detailed to result in a loss of confidentiality. Therefore the Commissioner can not support the complainant's view on this point.
40. The Commissioner has been assisted by the Tribunal's comments with regard to LPP in so far as they relate to the chilling effect on the internal debate and decision making process. For example, in the case of the *Foreign and Commonwealth Office v Information Commissioner* the Tribunal commented:

"...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 public 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..."⁴.

41. The Commissioner is mindful that all parties agree that errors and failings have occurred in relation to the planning issue. Indeed the

⁴ Appeal no EA/2007/0092, paras 29 and 33

Department agreed to consider whether planning permission should be discontinued and advised the complainant that it would seek legal advice on this issue.

42. However the Commissioner has found no evidence to suggest to any extent that the Department failed to pursue this assurance. The Department did seek legal advice as it said it would, and having inspected the request for legal advice the Commissioner is satisfied that the Department did not misrepresent the facts or omit relevant information. In addition there is no evidence to suggest that the Department subsequently misrepresented the advice it received, pursued a policy that appeared illegal, or ignored unequivocal advice.
43. Therefore the Commissioner does not afford the public interest in disclosure the substantial weight that he would have given it had there been cogent evidence of misrepresentation as indicated by the Tribunal.
44. The Commissioner accepts the Department's argument about the advice being relevant to other cases, and the fact that the advice remained live as at the date of the request adds considerable weight to the public interest in maintaining the exception. The Commissioner is of the view that it is important to ensure that public authorities be able to obtain free and frank legal advice to support them in the effective and appropriate exercise of their functions.
45. In *Mersey Tunnels Users Association* disclosure was ordered by the Tribunal, partly because the issue in question affected many thousands of people. The Commissioner does recognise the views of the complainant in this case and is aware that there are a number of local objectors to the planning development. However he considers that the planning decision in effect impacts on a relatively small number of people. In line with the Tribunal's decision in *Gillingham v the Information Commissioner and the Crown Prosecution Service*⁵, which concerned a decision about a public footpath, the Commissioner does not consider the number of people affected in this case to be a significant factor in favour of disclosure.
46. In light of the above, whilst recognising the complainant's arguments, the Commissioner believes it is of fundamental importance that a public authority should be able to seek and discuss legal advice in confidence when making decisions. Therefore the Commissioner considers that there is significant public interest in protecting the ability of public authorities to do so.

⁵ Appeal no EA/2007/0028

47. The Commissioner is not satisfied that in the present case the arguments in favour of disclosure as outlined above are of sufficient weight to override the public interest in maintaining the quality of the internal decision making processes of public authorities and the need for these to be properly informed by appropriate legal advice. Therefore, having considered all the arguments put forward, the Commissioner is satisfied that, in all the circumstances of the case, the balance of the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Procedural requirements

Regulation 14(2) – refusal notice

48. Regulation 14(2) of the EIR states that if a public authority wishes to withhold any information in response to a request it must issue a refusal notice no later than 20 working days after the request is received.
49. In this case the complainant made his request on 12 March 2010, and the Department issued a refusal notice on 20 April 2010. This equates to 26 working days, which exceeds the statutory timescale. Therefore the Commissioner finds that the Department breached regulation 14(2).

The Decision

50. The Commissioner's decision is that the public authority largely dealt with the request for information in accordance with the Act, albeit that it breached regulation 14(2) in failing to issue the refusal notice within the statutory timescale.

Steps Required

51. The Commissioner requires no steps to be taken.

Right of Appeal

52. 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: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

53. 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.
54. 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 22nd day of June 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

Regulation 12 provides that –

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

...

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

information to the extent that –

...

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

Regulation 14 provides that –

(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.

(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.