

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

Decision Notice

Date: 30 August 2011

Public Authority: Gwynedd Council
Address: Council Offices
Shirehall Street
Caernarfon
Gwynedd
LL55 1SH

Summary

The complainant requested information relating to legal advice obtained by Gwynedd Council ("the Council") in relation to a planning issue. The Council refused to disclose the information by virtue of regulations 12(5)(b) and 12(5)(d) of the EIR. The Commissioner has found that regulation 12(5)(b) was engaged and that the public interest favoured maintaining the exception. Therefore he has decided that the Council was correct to withhold the information in question and he requires no 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 (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.

The Request

3. On 21 January 2011 the complainant wrote to the Council and made the following request for information:

"Gwynedd council recently used public funds to get legal advice from a London based lawyer, to establish the legality of local occupancy section 106 agreements. I am led to believe they were found not to be legal, but no further information has been released. As you are a public body and have used public funds to get this advice, I, as a member of the Welsh public, would like to see those findings".

4. On 8 February 2011 the Council wrote to the complainant and stated that the requested legal advice was exempt from disclosure by virtue of regulations 12(5)(b) and 12(5)(d) of the EIR. The Council stated that disclosure of the legal advice would adversely affect the course of justice, and the confidentiality of legal proceedings.
5. On 8 February 2011 the complainant requested an internal review of the Council's decision.
6. The Council wrote to the complainant on 28 February 2011 and provided the outcome of its internal review, upholding its decision to withhold the information by virtue of regulation 12(5)(b) of the EIR. The Council made no further mention of its reliance on regulation 12(5)(d) at this stage.

The Investigation

Scope of the case

7. On 22 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council should publish the legal advice requested.

Chronology

8. On 6 April 2011, the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for formal consideration and to request copies of the withheld information.
9. On 4 May 2011 the Council wrote to the Commissioner and provided copies of the withheld information. The Council also provided the

Commissioner with detailed arguments to support its reliance on regulations 12(5)(b) and 12(5)(d).

Analysis

Exceptions

Regulation 12(5)(b)

Is the exception engaged?

10. Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

11. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated 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 recognised as an integral part of our adversarial system".

12. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] 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 litigation¹".

13. 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.
14. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
15. In this case, the Council considers the withheld information is subject to legal professional privilege and release of the withheld information would adversely affect the course of justice. The Council has claimed litigation privilege in relation to the withheld information, on the basis that the withheld information (i.e. the advice) was created for the dominant purpose of conducting or giving advice in relation to litigation. The Council has argued that disclosure would prejudice the Council's position in respect of ongoing litigation relating to the property in question.
16. From the content of the withheld information, it is clear to the Commissioner that there was a real prospect of litigation at the time the document was created. The Council confirmed that litigation relating to the property remained ongoing at the time of the request. The communication, which was created by an external solicitor to provide advice to the Council, was created in order to advise the Council on planning issues subject to ongoing litigation.
17. After considering the arguments presented to him by the Council and having reviewed the withheld information, the Commissioner is satisfied that litigation privilege applies in this case. Having assessed the information the Commissioner has concluded that the Council is the party entitled to legal professional privilege and that this privilege has not been waived in this case. He has therefore gone on to consider whether disclosure would have an adverse affect on the course of justice, with particular reference to legal professional privilege.

¹ EA/2005/0023, para 9

Adverse effect

18. In *Archer v ICO & Salisbury District Council* [EA/2006/0037] the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out above; the effect must be “adverse” and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure “would” have an adverse effect and that any statement that it could or might have such an effect was insufficient. The information is then subject to the public interest test and the Tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.
19. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word “would”. It is the Commissioner’s view that the Tribunal’s comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & EA/2005/0030] in relation to the wording of “would prejudice” are transferable to the interpretation of the word “would” when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term “would prejudice” that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
20. The Council argued that disclosure would adversely affect the course of justice because:
 - It would weaken the principle of legal professional privilege.
 - This in turn would inhibit frank discussions between lawyers and their clients, and consequently the Council’s willingness to seek advice in future cases.
 - In this instance there is ongoing litigation relating to the property and the Council’s position would be weakened if the advice were to be disclosed.
21. In reaching a view on the Council’s arguments in relation to the adverse effect of disclosure the Commissioner has again noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], in which the Tribunal considered whether the disclosure of legal advice obtained by the public authority would have an adverse effect on the course of justice. In that case the public authority argued that:

- It was currently engaged in litigation where the subject of the legal advice had been raised. Disclosure would adversely affect its ability to defend its legal rights by disclosing advice that was the subject of current and potential future litigation.
 - It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.
 - It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
 - Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.
 - Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.
 - Disclosure would prejudice the Council's prospects of successfully pursuing and defending litigation as these issues remain live.
22. After considering these arguments the Tribunal was satisfied that these matters related to the course of justice, and that disclosure would have an adverse effect upon them².
23. The Commissioner has noted the views of the Tribunal as recorded above, and the similarities in the arguments presented by the public authorities in those cases and this one. The Council considers that as well as weakening its position in respect of the current, ongoing litigation, disclosure of the requested information would be prejudicial to it in any future legal disputes.
24. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice. This is because the principle of legal professional privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. He considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of

² EA/2008/0020, paras 33-34

justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

25. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test

26. 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

27. The Commissioner believes that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He believes that this is especially the case where the public authority's actions have a direct effect on the environment.
28. The Commissioner also notes that, to some extent, disclosure would provide a degree of transparency and reassurance to interested parties that the Council's actions were in the best interests of the community and may assist the public in understanding the legal basis for this particular decision.
29. The complainant wrote to the Commissioner on a number of occasions and set out, in his view, the strong public interest in the information in question. The complainant argued that since the Council is a public body and has used public funds to obtain the advice in question, that the advice should be available for any member of the Welsh public to view. The complainant also described some of the general issues surrounding the local occupancy agreements – including the difficulty that people subject to these agreements can have in obtaining a mortgage. The complainant pointed out that this issue affected every person subject to such an agreement who was resident in Gwynedd. He considered that the public interest test ought to be decided on a scale with the local area – i.e. that whilst the actual number of individuals affected may be relatively low in comparison with other issues previously considered by the Commissioner, the smaller size of the local area means that, proportionally, the issues are affecting a large number of people.

30. The complainant stated that there were 400 homes with these agreements in place, stating that the agreements were making these homes worthless. The complainant suggested therefore that based on the value of the properties in question, this added up to £100 million in "Council Taxpayer detriment". In the complainant's view, this position would be indefensible if the legal opinion being sought supported his claim that the agreements were not legally enforceable.
31. The complainant provided a link to a local newspaper article which reported on the issues in question, along with a letter from the Welsh Government on the same subject. The complainant went on to point out previous decisions made by the Commissioner, where the public interest in disclosing the information would outweigh the public interest in maintaining the exemption "*where the privilege holder no longer has a recognised interest to protect*", where the subject matter would affect "*a significant group of people*", or "*when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming*".
32. During the course of the Commissioner's investigation, the complainant wrote to him to point out that the appeal in question had been allowed, and the planning obligation had been discharged. Therefore, in his view, the opinion should be published since there was no longer a legal claim ongoing.
33. The Council provided the following factors, which it took into account in favour of disclosing the requested information:
 - the strong public interest in a public authority conducting its business in a transparent and open manner
 - the accountability of public authorities to the electorate
 - the need to be clear about the basis of decisions, particularly planning decisions which are generally taken in public and also decisions concerning the expenditure of public money

Public interest arguments in favour of maintaining the exception

34. The Council provided the following factors, which it took into account in favour of withholding the requested information:
 - the strong element of confidentiality attached to legal professional privilege
 - the public interest in maintaining the confidentiality of client/lawyer communications

- the likelihood that disclosure would inhibit the Council's ability to seek full and frank legal advice
 - the need for public authorities to base decisions on proper advice
 - the fact that the subject matter of the advice is a live issue
 - The fact that the planning decision is currently subject to appeal
 - The potential disadvantage to the Council if advice on litigation is put into the public arena before the litigation is completed
35. The Commissioner considers that the preservation of the Council's general ability to seek and obtain informed legal advice, and the protection of the Council's ability to communicate freely with its legal advisors are relevant in this case, as well as the fact that the litigation is currently ongoing. The Commissioner also notes the strong element of public interest inbuilt in legal professional privilege, which has long been recognised by the courts.

Balance of the public interest arguments

36. In considering the opposing factors in this case, the Commissioner is mindful of the overriding presumption in favour of disclosure. Even in cases where an exception applies, the information must still be disclosed unless "in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". The threshold to justify non-disclosure is consequently high.
37. The Commissioner has also taken into account the Information Tribunal's comments in *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023]:
- "The fact that there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption".*
38. In deciding the weight to attribute to each of the factors on the competing sides of the public interest test and determining where the overall balance lies the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people and the timing of the request and the status of the advice.

39. The Council has been transparent about the fact that it received legal advice on this matter and published in Council minutes that it had decided to seek legal advice on this matter and any subsequent appeal. The Commissioner has also taken into account that, at the time of the request, the advice was recent and was being relied upon. The matter remained subject to litigation. It is important that the Council should be able to consult freely and frankly with its lawyers in relation to such questions and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
40. The Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exception. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. Whilst the Commissioner accepts that the issues involved in this case have the potential to affect up to 400 people (based on the complainant's estimation), he does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exception.
41. The Commissioner is not persuaded by the complainant's arguments at paragraph 32 above, where the complainant maintained that since the appeal has now been decided, there is no ongoing legal claim and therefore the public interest in disclosure outweighs the public interest in maintaining the exception. The Commissioner is only able to investigate the application of the exception to the information in question at the time of the request. He does not consider that a change in circumstances five months after the request was made could have any effect on the public interest at the time of the request.
42. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice. The Commissioner is also satisfied that disclosure would be likely to weaken the Council's position in respect of current, ongoing litigation in this matter.
43. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight he has determined that, in the circumstances of this particular case they are outweighed by the

arguments in favour of maintaining the exception under regulation 12(5)(b).

44. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege, particularly the breaching of a trust between parties that may go on to undermine the possibility of frank and candid discussions.
45. Having established that the requested information is exempt from disclosure by virtue of regulation 12(5)(b), the Commissioner has not gone on to consider the Council's application of regulation 12(5)(d).

The Decision

46. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act.

Steps Required

47. The Commissioner requires no steps to be taken.

Right of Appeal

48. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

49. 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.
50. 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 30th day of August 2011

Signed

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

Legal Annex

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.