

**The Environmental Information Regulations 2004**

Heard on papers at Procession House London  
On 23 June 2006

**Decision Promulgated**

4<sup>th</sup> July 2006

**Before**

**JOHN ANGEL**  
Chairman  
**PAUL TAYLOR and IVAN WILSON**  
Lay Members

**Between**

**MALCOLM KIRKALDIE**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

and

**THANET DISTRICT COUNCIL**

Additional Party

**Decision**

The Tribunal finds that the Appellant made a valid request under the Environmental Information Regulations 2004 (EIR) and that the legal professional privilege exception does not apply.

The Tribunal, therefore, requires that Thanet District Council allow the Appellant to view and examine the legal Opinion dated 12 January 2005 given by Toby Davey at their offices in Cecil Street Margate Kent CT9 1XZ within 10 working days of the date of this decision (the substituted Decision Notice).

## Reasons for Decision

### The Background

1. The request the subject of this appeal was submitted to Thanet District Council (TDC) by Mr Kirkaldie by email on the 5 January 2005. The request, which was one of a series relating to Kent International Airport (KIA), asked for access to “...view the legal advice that TDC sought regarding the night flying policy at KIA [Kent International Airport] – also known as Manston Airport”.
2. On 18 January 2005, Mr Daniel Aramide (Mr Aramide) the Legal Services Manager at TDC, issued a refusal notice by email claiming that although the information in question did indeed exist, that:

*“... Under the common law that advice would be subject to legal professional privilege... S.42 of the Act ensures that the communication between lawyer and client is protected. The Council will not be willing to disclose legal advice obtained in this matter”.*

3. Mr. Aramide also set out TDC’s decision regarding the application of the public interest test in relation to this exemption –

*“... given the very substantial public interest in maintaining the confidentiality of legal proceedings and the fact that the Council’s decision could still be challenged in court, these facts clearly outweigh the public interest in disclosure”.*

4. An internal review regarding the decision not to disclose the information was subsequently requested by Mr. Kirkaldie by email dated 19 January 2005.
5. Following an internal review by a Mr Sean Clark (Mr Clark) the Head of Resources at TDC, the initial decision not to disclose was upheld. In an email to Mr Kirkaldie dated 18 February 2005, Mr Clark explained that: -

*“My decision is to uphold the decision not to disclose to you the information you had requested. I have noted that you did not state any additional reasons for me to take into account as to why the legal advice should be disclosed to you when you requested this review. I have reached this decision for the reasons as set out previously.*

*Although I have not found in your favour in this case, I have made a fresh decision on the matter.”*

6. On 31 May 2005 Mr Kirkaldie complained by email to the Information Commissioner (IC). Following an investigation by the IC’s Complaints Resolution Officer under

s 50(1) of FOIA Mr Kirkaldie's complaint was dismissed. The IC's Decision Notice dated 30 November 2005 (the Decision Notice) sets out the reasons for this outcome and concludes that -

*"After careful consideration of all the relevant facts of this case, the Commissioner concludes that the Section 42 exemption is valid and that the public interest in maintaining this exemption currently overrides the public interest in disclosing the requested information... Therefore, Thanet DC is not obliged to disclose the information requested."*

## **Material Facts**

7. The legal advice at the centre of this case surrounds KIA. In particular, the implications of proposed night-time flights on an existing agreement under s.106 of the Town and Country Planning Act 1990. The particular subsections of this section which are relevant to this case are as follows:

*(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement.*

*(2) Any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.*

8. The agreement in question was entered into on a voluntary basis between TDC and the commercial owners of KIA, Wiggins plc, on the 14 September 2000. The agreement ran for a term of three years. On expiry of the agreement (i.e. September 2003), a request was made by TDC to the airport operator (then known as Planestation) to extend this on a voluntary basis. This was agreed and the arrangement was in operation at the time of the submission of the request, the subject of this appeal, by Mr. Kirkaldie on 5 January 2005.
9. In a report prepared by Mr Brian White (Mr White) Head of Environmental Services at TDC for the full Council meeting of 21 October 2004, in relation to the proposed new draft of the agreement, it described the purpose of the s.106 Agreement as follows:

*"...to build on this successful foundation by ensuring that the current and medium term operational plans (of) the operator achieve a balance between economic and environmental factors in such a way that the best interests of local communities are protected." (Item 1.3).*

10. The agreement in question sets out the obligations of the operator and TDC in the Second Schedule. These are referred to under the following headings:
1. Night-time Flying Noise Policy
  2. General Noise Limitations
  3. Dwelling Insulation Scheme

4. Preferred Departure Runway
  5. Noise Abatement Routes
  6. Noise Monitoring Terminals
  7. Pollution Monitoring
  8. Noise Monitoring
  9. Engine Testing
  10. Green Travel Strategy
  11. Environmental Statement
  12. Payments
  13. Third Parties
11. At a meeting of the TDC Cabinet on 16 December 2004 (December Cabinet meeting), a report was presented by Mr White outlining a request from the airport operator dated 13 December 2004. This request involved a proposal to incorporate several scheduled flight arrivals each week beyond the time of 23:00 hours into the operator's programme for April to September 2005. It also covered these flights being considered in the context of the s.106 agreement between Planestation and TDC, which under paragraph 1 of the Second Schedule required a night-time flying policy to be prepared and a copy lodged with TDC before any regular night flying operations took place.
12. Item 4.2.1 of the minutes of the December Cabinet meeting, under the heading of "Legal Implications", recorded that -

*"Variation of the existing Section 106 Agreement will be investigated and implemented, if the recommendations in this report are approved."*

It appears that it was in this context that the legal advice (Legal Advice), the subject of the request in this appeal, was sought.

### **Which law applies**

13. Under Regulation 2 of the EIR "*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;*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."*

14. The Legal Advice, which was provided to the Tribunal in confidence, related to the enforceability of the s.106 Agreement, land usage and other planning matters. The Tribunal finds that for the purposes of Regulation 2(c) EIR this agreement was an "environmental agreement" under the Town and Country Planning Act 1990 and Local Government Act 1972. Entering into and extending such an agreement is the sort of measure envisaged by the rule which is "likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements." In particular the elements of the environment covered by the agreement are land, air and atmosphere and the factors covered are noise and emissions. Also noise and emissions could affect the state of human health and safety.
15. It follows that we find that the request is caught by the EIR and that it is not a request under FOIA as found by the IC. It should be pointed out that where a request for information is made under FOIA there is an exemption under s.39 where the EIR apply, and the public authority is obliged to deal with the request under EIR. In this case Mr Kirkaldie did not state under which provision he was making his request and he is under no duty to do so. However in communications with TDC and the IC he raised the possibility that it was an EIR request. Although TDC considered both provisions they incorrectly concluded that it was a FOIA request, as did the IC.

### **Whether there is a valid request**

16. The request was made by email dated 5 January. The legal advice to which it refers is dated 12 January 2005. Therefore it appears that the request was made before the information was held by TDC. It had become known to Mr Kirkaldie that TDC was taking legal advice from counsel, hence his request. No doubt instructions had been given and the advice was in the process of being prepared but it was not until 12 or 13 January that it was received by TDC. TDC did not take this point when dealing with the request and on 18 January issued a refusal notice confirming that it held the information, which of course it did by then. The point was also not taken by the IC.
17. This appeal is to be considered under the EIR. Under Regulation 5(1) "a public authority that holds environmental information shall make it available on request". Under Regulation 5(2) "information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request". TDC confirmed it held the information within the 20 day time limit, although it claimed an exemption under FOIA. It is not clear from the EIR whether the information has to be held by the public authority at the date of receipt of the request or whether it has to be held at the date when, say an exception is claimed, within the 20 day time limit. It would not make much sense for a public authority to

respond that it did not hold the information when it had just received it before sending the response. Also the public authority would no doubt be under a duty to advise and assist the applicant under Regulation 9 EIR that the information was not in its possession at the time the request was received although knowing that it was about to be received so that the applicant could then make a new request, if necessary, when the information was then held by the public authority. Alternatively the public authority could take the sensible and pragmatic approach and accept the request under the EIR and deal with it accordingly. This is what TDC did in this case, albeit under FOIA, and therefore we find that it was a valid request.

### **Legal professional privilege**

18. TDC refused to provide the information requested by Mr Kirkaldie on the grounds that the Legal Advice was exempt as legal professional privilege under s.42 FOIA and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The IC, in effect, agreed with this position.
19. The first question the Tribunal needs to consider is where a refusal notice issued under the wrong legislative provision still enables the public authority to claim an exemption or exception under the correct law, particularly where the exemption or exception is the same or similar. Under Regulation 12(1) EIR

*A public authority may refuse to disclose environmental information requested if*  
*(a) an exception to disclose applies under paragraphs ..(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.*

20. Under Regulation 12(5) EIR *a public authority may refuse to disclose information to the extent that the disclosure would adversely affect -*  
*(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;*
21. 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.
22. Therefore this exception is similar to the exemption under s.42 FOIA.
23. For the moment let us assume that TDC is allowed to switch to the Regulation 12(5)(b) EIR exception. This Tribunal in the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* May 2006 sets out the various authorities relating to legal professional privilege and describes it as “a fundamental condition on which the administration of justice as a whole rest”.

### **Waiver of the privilege**

24. However privilege can be waived in a number of ways. The most obvious is where one party to legal proceedings seeks to rely on material that is privileged and

therefore discloses it. Where all the material relating to the matter in issue is disclosed, no real difficulty arises. The position is more complicated where some material that attracts privilege is disclosed but other material relating to the same matter is not. Although the courts recognise that each party is free to choose whether and to what extent he or she waives privilege they also recognise that there is an obvious unfairness if the parties to litigation are allowed to “cherry-pick” the material they choose to disclose (the phrase used in *R v Secretary of State for Transport, ex parte Factortame Ltd* [1997] 9 Admin LR 591).

25. The general rule is that if a party voluntarily seeks to put part of a privileged document or part of a sequence of privileged documents before a court, he or she must also put before the court the rest of the document or sequence of documents to ensure fairness to his/her adversary: “A party cannot deliberately subject a relationship to scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it” (Lord Bingham in *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183 at p.1188 F-G).
26. The test for waiver is whether the *contents* of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver (*Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901). Publication of privileged information to the general public will deprive the information of any privilege which previously existed. So, for example, any press release which makes use of privileged information will almost certainly result in a waiver of that privilege (*Chandris Lines v Wilson & Horton Ltd* [1981] 2 NZLR 600).

### Whether waiver applies in this case

27. One of the contentions in Mr Kirkaldie’s appeal is that TDC waived legal professional privilege by publicly disclosing the Legal Advice. In the Decision Notice the IC concluded that -

*“In determining whether legal professional privilege continues to apply to the requested information, the Commissioner has carefully considered whether Thanet DC has waived legal professional privilege by publicly disclosing the legal advice. Thanet DC has provided an assurance that the advice has not been disclosed to the public. The Commissioner is satisfied with this assurance and believes that privilege has not been waived.”*

The Tribunal has considered this TDC assurance and the further evidence provided on this matter.

28. It was first raised by Mr Stephen Middleton (Mr Middleton) for the IC in a letter dated 28 June 2005 to Mr Clark at TDC. One of the questions in Mr Middleton’s letter was

*“Whether information already disclosed ... I would appreciate it if you would clarify whether any part of the legal advice has been disclosed publicly, e.g. at meetings, in minutes, etc.”*

29. Having received no response from Mr Clark on this point, despite reminders, Mr Middleton put the question again, in exactly the same words, to Mr Aramide in the Legal Department at TDC, in an email dated 21 September 2005. Following a further reminder, Mr Aramide replied some five weeks later, on 26 October 2005, in the following terms:

*“The contents of the legal opinion have not been disclosed to members or subject of a report to the members.”*

30. The Tribunal notes that this reply did not deal directly or specifically with Mr Middleton’s question. The Tribunal has seen no further evidence or exchange on this matter between the IC and TDC until the Decision Notice.

31. Mr Kirkaldie appealed to the Tribunal on 3 January 2006. The IC’s reply served on 8 February 2006 in accordance with rule 8 of the Information Tribunal (Enforcement Appeals) Rules 2005, maintained the IC’s position on this issue in the following terms:

***“iv. That the legal advice had been shared with other local authorities and/or the new owners.***

*While information may cease to be privileged if it is shared widely with third parties, there is no evidence that this has occurred in this instance and the Appellant is put to strict proof thereof. The Commissioner did consider the issue as to whether privilege had been waived by the Council by disclosing the advice and was satisfied that the advice in question has not been disclosed.”*

32. Mr Kirkaldie commented on this conclusion in his reply received by the Tribunal on 24 February 2006

*“The information has ceased to be privileged as it has been shared widely with third parties. Evidence that this has occurred in this instance is being furnished in strict proof.”*

33. On 14 March 2006, following a Directions Hearing, the Tribunal ordered TDC to be joined as a party to the appeal. The Tribunal also ordered, inter alia, that TDC should provide a copy of the minutes and/or notes taken at the public meeting held at Ramsgate in late 2004/early 2005 as part of the s106 consultation, if any. In addition the Tribunal ordered, in effect, that Daniel Aramide, the Legal Services Manager of TDC and possibly Brian White, Head of Development Services at TDC should provide witness statements, which they duly did.



34. Mr Aramide's witness statement addressed the point in relation to waiver of privilege in the following way –

*“The legal opinion in question has not been disclosed to any member of the Council. It has not been a subject of a report to committee or cabinet. For example, a Councillor requested for the Legal Opinion to be disclosed to him but his request was refused.”*

35. Mr Aramide's evidence appears to be at variance with the evidence of Mr White, who, in his witness statement, in referring to the public question and answers session of the full Council meeting held in public on 13 January 2005, said -

*“Mr Britton's question queried the status of the airport in planning law with the introduction of night time flying. To address this issue and others the council had to take the step of taking Counsel's advice. The advice was received on the 13<sup>th</sup> January, the same day as the meeting of the Full Council, and was used by Councillor Kirby, who is the Cabinet Member for Development Services in his reply to Mr Britton.”*

36. Mr White attached to his statement a transcript of part of this Council meeting which the Tribunal accept as compliance with the Direction Order referred to above.

37. Mr Kirkaldie, in his final response dated 16 May 2006, picked up the point:

*“4. In Brian White's witness statement in paragraph 7 he confirms that the advice was used publicly at a meeting where the public attended and in fact the entire council (excepting those that did not attend) listened to Councillor Kirby elaborate on the legal advice obtained.*

*5. The appellant has submitted the minutes of this meeting as evidence and the fact that TDC in relying on this as part of their witness statement means they can be assumed as an accurate reflection of what was stated at this meeting.”*

38. In a further document dated 5 June, headed “Reply To The Appellant's Paragraph 4 of the Final Response”, Mr Aramide stated:

*“The Cabinet Member for Development Services with responsibility for the airport was made aware of the contents of the legal opinion received and the line taken in public by the authority was in accordance with the advice obtained. Councillor Kirby's answered questions in public with respect to the use of the airport in line with numerous legal advice obtained.”*

39. The Tribunal found it difficult to reconcile this evidence, which appears to support Mr White's witness statement, with the earlier evidence of Mr Aramide. The Tribunal notes that the IC appears to have based his Decision Notice finding that legal privilege had not been waived solely upon this earlier assurance of Mr Aramide.

40. The transcript of the public session of the Full Council on 13 January stated -

*“Councillor Kirby Thank you Chairman. Thank you Mr Britton for your question. The Council has taken legal advice on this matter and whether or not the introduction of the 11 night time arrivals constitutes a change of use requiring planning permission. The advice is that it **may** as a matter of fact and degree. Officers recommend prior approval is not required because – three points actually – the degree of the proposal for a policy enabling 11 arrivals each week, only four of which are between midnight and 0055 and with nothing beyond that time. The arrivals are sought for a six months period and nothing more. Comprehensive consultations are about to commence on the existing 106 Agreement, and the success of the 106 Agreement will shape the framework and develop the airport. The officers report that their conclusion that a planning application is not required for this degree of activity was **not** a borderline decision. It is clear that only a limited change in terms of degree and time scale is proposed.”*

41. The Tribunal has compared Councillor Kirby’s reply with the full text of Counsel’s Advice provided to the Tribunal in confidence. The Tribunal finds that the basis on which the advice had been sought and the main opinion given in that advice, were mentioned by Councillor Kirby at the public meeting.
42. Waiver is an objective not subjective principle. Whether a party intended to waive privilege in a particular document is not the question. What matters is an objective analysis of what the party has done (*Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529). Applying the test set out in the *Dunlop Slazenger International Ltd* case referred to above, by providing a summary of the legal advice at a full Council meeting on 13 January 2005 followed by the recording of the disclosure in the minutes of the meeting, the Tribunal finds that the legal professional privilege exception had indeed been waived by TDC.
43. So if the exception is, in effect, waived then there is no need to apply the public interest test under Regulation 12(1)(b) EIR and the information must be disclosed.

### **The transfer of exemptions/exceptions between jurisdictions**

44. If TDC is not able to transfer to the EIR exception because it, in effect, backed the wrong horse in the first place, then again the information must be disclosed. The legislation is complicated and public authorities can easily mistake which legislative provision applies. Even the IC did so in this case and he issues well considered guidance in the area which no doubt has been subject to legal scrutiny. Therefore we would be reluctant to find that a public authority could not argue that a similar exemption or exception could not be applied under the correct legal instrument. However we would not necessarily extend this finding to other exemptions or exceptions which had no relationship to the original exemption or exception claimed.

### **Validity of the refusal notice**

45. It should be noted that the initial refusal notice from TDC dated 18 January 2005 did not comply with the prescribed format set out under s.17 (7) FOIA (which was at the time the statutory access framework considered by TDC to be invoked).
46. The notice did not include any detail as to the internal appeal procedure offered by TDC (or absence thereof) or that a complaint could be made to the IC under s.50 of FOIA
47. It would have been prudent for Mr Middleton on behalf of the IC to have included reference to this in his letter of the 28 June 2005 addressed to Mr Clark of TDC. However as this appeal has been considered under the EIR we do not intend to make any finding in relation to the matter, but only to point out the inadequacies of the refusal notice.

Signed

Date 4<sup>th</sup> July 2006

JOHN ANGEL  
Chairman