

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 12 February 2007

**Public Authority:** Harlow Council  
**Address:** Civic Centre  
The Water Gardens  
Harlow  
Essex  
CM20 1WG

### Summary

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The complainant asked the public authority for a copy of legal advice supplied to it by its legal adviser in connection with a planning issue. The public authority withheld it under section 42 of the Freedom of Information Act 2000 (section 42) claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner found that the requested information should have been considered under the Environmental Information Regulations 2004. Nevertheless the claim that the information was subject to legal professional privilege still applied and the information was exempt from disclosure by virtue of regulation 12(5)(b).

### The Commissioner's Role

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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.

### The Request

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2. On 29 June 2005 the complainant made the following request: *' I would like all copies of emails, correspondence and information relating to either our neighbours pergola or his extension ... other than those items already sent. This should include any internal correspondence with Mr Thurston or any other elected members as well as other council officers'.*

3. On 27 July 2005 the public authority declined to disclose the information relying upon the section 42 exemption.
4. On 13 August 2005 the complainant requested an internal review.
6. On 21 September 2005 the public authority confirmed that an internal review had taken place and upheld the original decision on the same ground.

## The Investigation

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### Scope of the case

7. On 11 October 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He particularly wanted to know if in this instance the Commissioner considered that: *'legal/professional privilege over-rides the public interest test'* and asked him to consider the following: that it was unhelpful of the public authority not to disclose information post-dating the complainant's request as it goes against the spirit of the Act.
8. The Commissioner has identified that the advice provided by the public authority's in house lawyer relates to a planning application and specific trees. Following the decision of the Information Tribunal in *Kirkaldie v Information Commissioner and Thanet District Council (Appeal Number: EA/2006/001)* the Commissioner believes that this advice falls within the scope of the EIR as the advice relates to issues likely to affect the environment.

### Chronology

9. On 12 October 2006 the Commissioner asked the public authority to clarify which privilege it was relying upon and to provide a copy of the legal advice. The public authority responded clarifying it was claiming advice privilege and providing the requested copy.
10. On 29 November 2006 the Commissioner informed the public authority that the request should have been considered under the Environmental Information Regulations 2004 (the Regulations) and that the public authority would need to do this. The Commissioner also asked for clarification about what exactly was being withheld.
11. On 6 December 2006 the public authority responded, relying upon regulation 12(5)(b) to withhold the requested information, identifying the specific information it was withholding.

### Findings of fact

12. The Commissioner reviewed the information provided in this case, including the exempt information and arguments put forward by both parties, within the relevant background context.
13. The complainant had made two previous requests for information about a planning application and problems with specific trees. Some information had been disclosed but not the legal advice.

## Analysis

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14. The Commissioner will now deal with this case by considering firstly a procedural breach and secondly, the public authority's use of the regulation 12(5)(b) exception, including its application of the public interest test. A full text of the relevant statutes referred to is contained in the legal annex.

## Procedural matters

15. Regulation 14(3)(a) and (b) of the EIR provides that where a request for information is refused upon the basis of an exception, the public authority must explain what exception it has relied upon and what matters it considered with regard to the public interest under regulation 12(1)(b) which is: in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
16. The public authority did not provide any arguments in favour of disclosure and accordingly the Commissioner finds that the public authority has failed to meet the obligations imposed upon it by regulation 14 of the EIR.

## Exception

17. Initially the public authority had claimed that the requested information attracted legal professional privilege and was exempt from disclosure under s42 Freedom of Information Act 2000.
18. However the Commissioner considers that the information falls within the scope of the Regulations. Although there is no equivalent exception under the Regulations, the Information Tribunal has decided that regulation 12(5)(b) provides the same protection. In *Kirkaldie v Information Commissioner and Thanet District Council (Appeal Number: EA/2006/001)* the Tribunal stated that the purpose of regulation 12(5)(b) was: *'reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice .... In order to achieve this it covers legal professional privilege ... Therefore this exemption is similar to the exemption under s42 FOIA'*.
19. Further the Tribunal noted that while the public authority had initially dealt with the request for information under the wrong legislation, it was reluctant to prevent a public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime.

20. The Commissioner has considered whether the public authority was correct to apply the regulation 12(5)(b) exception. He firstly considered whether the information is subject to legal professional privilege.
21. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
22. There are two separate categories within this privilege known as advice privilege and litigation privilege.
23. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
24. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes not only communications between a professional legal adviser and her/his client but also extends to communications with third parties and may cover a variety of documents.
25. The public authority has claimed that the requested information attracts advice privilege.
26. The Commissioner has seen the information and is satisfied that it was provided to the public authority by its own legal adviser with the sole purpose of providing legal advice. The advice deals with tree preservation orders and town and country legislation and was supplied to the public authority in confidence.

### **Public interest**

27. The public authority argued that the requested information should not be disclosed as, because it was legal advice obtained from a legal adviser, it was exempt under section 42. Further it was of 'paramount importance' that Officers were able to share information fully and frankly with its legal advisers in confidence.
28. The Commissioner accepts that the public interest in disclosing the requested information lies in creating accountability and transparency in actions and decisions being taken by the public authority.
29. In addition the Commissioner also considers that disclosure of the legal advice may further the public's understanding of the basis on which the public authority made its decision about this planning application and the trees.

30. However the Commissioner also accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
31. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice highlights the strengths and weaknesses of a particular position; therefore if it was routinely disclosed public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. English law considers "*privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned*". (*Bellamy para 8*). Therefore there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties so that they are on a level footing.
32. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of legal professional privilege in this case outweighs the factors in favour of disclosure.

## The Decision

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33. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
  - the application of the regulation 12(5)(b) exception.
34. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
  - the public authority did not give sufficient consideration in all the circumstances of the case, to whether the public interest in maintaining the exception outweighed the public interest in disclosing the information as discussed in paragraphs 16 and 17.

## Steps Required

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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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36. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 12<sup>th</sup> day of February 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### **Section 42 provides-**

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

### **Regulation 12(5) provides-**

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(b) the course of justice, the ability of person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

### **Regulation 14(3) provides-**

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).