

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

Decision Notice

Date: 11 November 2010

Public Authority: City and County of Swansea
Address: Civic Centre
Oystermouth Road
Swansea
SA1 3SN

Summary

The complainant requested information relating to legal advice obtained by the Council regarding two planning applications or Lawful Development Certificates. The Council initially refused to disclose the information by virtue of section 42 of the Act. During his investigation the Commissioner determined that the request should have been handled under the provisions of EIR and the Council agreed. The Council then applied the exception to disclosure provided by regulation 12(5)(b). The Commissioner found that the exception was engaged and the public interest favoured maintaining the exception. The Commissioner has also identified a number of procedural shortcomings in the way the Council handled the complainant's request but he has not ordered 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.

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. The request in this case relates to legal advice which the Council sought as a result of two planning applications submitted by the complainant for Lawful Development Certificates ('LDC').
3. An LDC is legally binding confirmation that a 'development' is or would be lawful and therefore immune from planning enforcement action. An LDC can be issued for either development which has already taken place or for proposed development. The system of LDCs enables local planning authorities to grant a certificate stating that:
 - An existing use of land, or some operational development, or some activity in breach of a planning condition, is lawful; or
 - A proposed use of buildings or other land, or some operations proposed to be carried out in, on, over or under land, would be lawful.
4. The system is based on the provisions in Part VII of the Town and Country Planning Act 1990 ('the TCPA'), as amended by the Planning and Compensation Act 1991. It works together with other provisions in the TCPA which enable the local planning authority to control or stop unauthorised development of land in their area. An LDC cannot be granted if the planning authority is entitled to take any enforcement action within the strict limits specified in Part VII of the TCPA.
5. The two planning applications for LDCs in this case were submitted to the Council by the complainant and relate to the proposed use or development for use of two sites for Class B2 (general industrial) purposes (to repair, recycle, break up marine units, including ships). The applications were refused on the basis that they would not have a lawful Class B2 use and that the applications, if approved, would create a separate planning unit and therefore require planning permission.

The Request

6. On 4 May 2010, the complainant wrote to the Council in relation to two particular planning appeals and requested "the letter from [named

- individual] and the Instructions to Counsel and Counsel's advice". He also requested access to view the relevant planning records.
7. The Council responded to the request on 12 May 2010 and provided a copy of the requested letter. The Council advised the complainant that the advice it had received from Counsel was in conference and there was no document held relating to this advice. The Council also confirmed the arrangements by which the complainant could inspect the relevant planning records. The Commissioner understands that the complainant subsequently viewed these planning records at the Council's offices.
 8. On 14 May 2010, the complainant wrote a further letter to the Council repeating his request for a copy of any Instructions issued by the Council to Counsel, and he also made a new request for "any record ... of the oral opinion of the barrister".
 9. The Council issued a refusal notice on 1 June 2010 confirming that it held the information requested but considered it to be exempt under section 42 of the Act and the public interest favoured non disclosure.
 10. On 8 June 2010, the complainant requested an internal review of the Council's decision not to disclose the information requested.
 11. The Council provided the outcome of its internal review on 17 June 2010 and upheld its decision not to release the information requested by virtue of section 42 of the Act.

The Investigation

Scope of the case

12. On 24 June 2010 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 information he had requested should be disclosed.
13. On 6 September 2010, the Commissioner wrote to the Council and the complainant confirming that the scope of his investigation would focus on the withheld information falling within the scope of the requests dated 4 and 14 May 2010, as detailed in paragraphs 6 and 8 of this Notice.

Chronology

14. On 6 September 2010, the Commissioner wrote to the Council requesting copies of the withheld information. At this point, the Commissioner made the Council aware of his view that the information should have been considered under the provisions of the EIR rather than the Act. The Commissioner asked the Council to consider its position in light of his view, to clarify if it considered the information to be exempt under the EIR and, if so, to provide him with representations to support that view.
15. The Council provided copies of the withheld information to the Commissioner on 11 October 2010.
16. On 25 October 2010, the Council responded to the Commissioner and agreed that the correct access regime was the EIR. The Council stated that it considered the information requested to be exempt under regulation 12(5)(b). The Council provided representations in support of its application of regulation 12(5)(b) and details of its public interest test considerations.

Analysis

Correct Access Regime

17. The Council originally processed the complainant's request for information under the Act and considered the information to be exempt under section 42. However, the Commissioner considers that the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR.
18. In coming to this view, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information ...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment.
19. The Commissioner has determined that the requested data would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

“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—

(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.”
The full text of regulation 2(1) is included in the legal annex to this notice.

20. The information requested in this case refers to legal advice in relation to two planning applications for LDCs for the proposed use or development for use of two sites for Class B2 (general industrial) purposes (to repair, recycle, break up marine units, including ships). The Commissioner is satisfied that the withheld information falls within regulation 2(1)(c) because it is information on, or relating to, a measure which is likely to affect the elements of the environment as set out in regulation 2(1)(a); in particular, land and landscape.

Exceptions

Regulation 12(5)(b)

Is the exception engaged?

21. 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”.

22. 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 recognized as an integral part of our adversarial system".

23. Legal professional privilege ('LPP') protects the confidentiality of communications between a lawyer and 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 litigation"¹ (paragraph 9). *The Commissioner assumes this should read [third parties].
24. 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.
25. 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.
26. The Council believes that the requested information in this case is subject to legal advice privilege. The Council has confirmed that it contacted Counsel for the sole purpose of requesting legal advice in relation to the two particular LDCs relevant to this case. The Council used the legal advice obtained to assist it in determining whether the LDCs should be granted. The withheld information comprises Instructions to Counsel, correspondence with Counsel and a note of a meeting in conference with Counsel.

¹ EA/2005/0023, para 9

27. The Commissioner has reviewed the withheld information, and is satisfied that it constitutes communications between a client and its legal advisers for the sole or dominant purpose of obtaining legal advice. Therefore he is satisfied that the withheld information is subject to legal advice privilege.
28. Having satisfied himself that the relevant information was covered by legal advice privilege, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived in this case. Even if information is privileged, this can be lost (waived) if the client has shared it with third parties and it has lost its confidentiality. When the Council was asked about this, it stated that it was not aware that the information had been shared with anyone else apart from the Council officers concerned. In the absence of any evidence to the contrary, the Commissioner accepts that the Council is the party entitled to legal professional privilege and that this privilege has not been waived in this case.

Adverse effect

29. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice, with particular reference to legal professional privilege.
30. 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.
31. The Council argued that disclosure would adversely affect the course of justice because:
 - The principle of LPP would be weakened if information subject to LPP were to be disclosed under the EIR. This would lead to reduced confidence that discussions between the Council and its legal advisors would remain private and those discussions may become inhibited.

- Disclosure would affect the Council's ability to obtain legal advice on the merits of its arguments and a full and frank analysis of the pros and cons of planning applications.
 - Disclosure would affect the Council's position on future cases and inhibit it from seeking legal advice.
 - Disclosure could lead to reluctance in the future to record fully any such legal advice, or legal advice may not be sought, leading to decisions being made that could potentially be legally flawed.
32. 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 privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. The confidence that discussions between clients and their advisers will remain private would become weaker and their discussions may therefore become inhibited. The Commissioner considers the likelihood of this happening to be more probable than not and is satisfied that disclosure of that information would have an adverse effect on the course of justice. The Commissioner therefore finds that the exception at regulation 12(5)(b) is engaged.
33. 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

34. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, 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 was mindful the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

35. The complainant provided the Commissioner with a number of reasons regarding the public interest in disclosure. The complainant advised the Commissioner that decisions relating to LDCs can only be made based on the facts of the case. In the complainant's view, the requested information can only show that the Council approached and considered the matter in accordance with the relevant statutes and legislation and,

as such, the complainant cannot understand why it would be in the public interest to withhold it.

36. The Information Tribunal has previously found that there is a clear public interest in planning decisions being taken by public authorities in an open and transparent way. The Commissioner therefore considers that a disclosure of the information in this case would be generally in the public interest in a similar way. A disclosure of the legal advice in this case 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.
37. 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.

Public interest arguments in favour of maintaining the exemption

38. Having viewed the withheld information, taken into account the circumstances of this case and the submissions from the Council, the Commissioner has determined that the following factors in favour of maintaining the exemption are relevant:
 - Protecting the ability of the Council to communicate freely with its legal advisors in order to obtain advice in confidence regarding planning and legal matters.
 - Preserving the Council's general ability to seek and obtain informed legal advice about matters related to its general functions, duties and responsibilities. The Council argues that disclosure would inhibit it from obtaining legal advice in the future and it is in the public interest that the Council maintains its ability to seek full and frank legal advice, without the inhibition which would result from disclosure.
 - Ensuring that public authorities make decisions on the basis of fully informed and thorough legal advice.
 - The relative age of the legal opinion; the matter is live in that there are currently ongoing planning appeals relating to the applications. Disclosure would undermine the Council's case in an appeal. This is not a case where time has reduced the inbuilt weight of the privilege.
 - There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.

Balance of the public interest arguments

39. 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 the 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.

40. 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 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.'

41. In deciding the weight to attribute to each of the factors on either side of the scale 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.

42. The Council has been transparent about the fact that it received legal advice on the LDCs in question and in its decision letters it explained why the proposed use was considered not to be lawful within the meaning of Section 192 of the TCPA. Having considered the nature of the advice, the Commissioner can see no obvious signs of wrong doing or evidence that the Council has misrepresented the advice it received in any way. He has also taken into account that at the time of the request, the advice was recent and was being relied upon. 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.

43. 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. The Commissioner does not believe that in this case the Council's decision affects a substantial number of people.

44. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisors 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.
45. 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).
46. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would harm the candour between the Council and its legal advisors. The advice was obtained relatively recently, in March 2010, and at the time of the request it remained live, in that the planning applications for which the legal advice was sought were subject to appeal.

Procedural Requirements

Regulation 14

47. Regulation 14 of the EIR requires a public authority to inform a complainant in writing as soon as possible and no later than 20 working days from the date of the request if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (and appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner.

48. The Council failed to consider the request under the EIR. As such, the Commissioner concludes that the Council breached regulations 14(1), 14(2) and 14(3) of the EIR for failing to issue a refusal notice no later than 20 working days after receipt of the request stating the exception being relied on and the matters considered in reaching its decision with respect to the public interest under regulation 12(1)(b).

The Decision

49. The Commissioner's decision is that the public authority dealt with the following aspects request for information in accordance with the requirements of the EIR.
- The Council correctly applied regulation 12(5)(b) to withhold the requested information and the public interest in maintaining the exception outweighs the public interest in disclosing the information.
50. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Council breached regulations 14(1), 14(2) and 14(3) for failing to issue a proper refusal notice under the EIR within 20 working days.

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: 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 11th day of November 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 12 - Exceptions to the duty to disclose environmental information

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.