

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

Decision Notice

Date: 7 September 2011

Public Authority: Cambridgeshire County Council
Address: Shire Hall
Castle Hill
Cambridge
CB3 0AP

Summary

The complainant contacted the Council to ask it to release copies of all correspondence between its solicitors and the contractor's solicitors relating to Busway scheme. The Council responded refusing to disclose the information under regulation 12(5)(b) of the EIR. As the complainant remained dissatisfied, he approached the Commissioner. During the Commissioner's investigation it was established that the majority of the information requested was "without prejudice" correspondence relating to an ongoing dispute between the two parties. The complainant accepted that regulation 12(5)(b) of the EIR applied to this information and withdrew this element of his complaint. A small amount of other correspondence between the two parties' solicitor is held by the Council which does not fall within the definition of "without prejudice" correspondence. The Commissioner considered the application of regulations 12(5)(b) and 12(5)(e) to this information and concluded that neither applied. He has therefore ordered the Council to release this information to the complainant within 35 days of this notice.

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. The complainant contacted the Council on 9 March 2010 to request the following information:

"Regarding the Busway contract and the report to Cabinet (agenda item no.9 dated 16th March 2010). Please [provide] copies of all correspondence between BNL [BAM Nuttall] and the Council sent or received by solicitors (whether BNL's or the Council's)."
4. The Council responded on 25 March 2010 refusing to release the requested information under regulation 12(5)(b) of the EIR.
5. The complainant contacted the Council on 26 March 2010 to request an internal review.
6. The Council responded on 23 August 2010. It informed the complainant that it remained of the opinion that the requested information is exempt from disclosure under regulation 12(5)(b) of the EIR. It also advised the complainant that it considered regulation 12(5)(e) of the EIR was applicable.

The Investigation

Scope of the case

7. On 2 September 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 Council had acted appropriately by withholding the requested information under regulations 12(5)(b) and 12(5)(e) of the EIR.
8. During the Commissioner's investigation it was established that the majority of withheld information was "without prejudice" correspondence between the two parties' solicitors relating to a Construction Industry Council (CIC) adjudication process which commenced in February 2009 dealing with delays and defects in the Busway scheme. The Commissioner informed the complainant that he considered regulation 12(5)(b) of the EIR applied to this correspondence. The complainant

accepted this view and confirmed that he was happy to withdraw his complaint for this part of the withheld information.

9. The remaining part of the Commissioner's investigation focussed on any other correspondence that the Council holds between the two parties' solicitors which related to the Busway scheme. From the disc the Council provided on 10 June 2011, it was identified that a limited amount of other correspondence is held, this being:
- all emails and correspondence headed "performance bond";
 - all emails and correspondence headed "supplemental agreement";
 - all emails and correspondence headed "sectional completion – draft completion"; and
 - all emails and correspondence headed "[name of adjudicator redacted]".

The remainder of this notice will focus on this information and the Council's application of regulation 12(5)(b) and 12(5)(e) of the EIR.

Chronology

10. The Commissioner wrote to the Council on 8 November 2010 to request a copy of the withheld information and for further arguments to be submitted in support of its application of regulations 12(5)(b) and 12(5)(e) of the Environmental Information Regulations (the EIR).
11. The Council responded on 3 December 2010. It reiterated that it considered the withheld information was exempt from disclosure under regulations 12(5)(b) and 12(5)(e) of the EIR but refused to provide a copy of this information to the Commissioner, as it considered such action would constitute a waiver of legal professional privilege.
12. The Commissioner contacted the Council on 7 December 2010 to explain in more detail why a copy of the withheld information was required and to reassure it that the information would be treated in the strictest confidence. The Commissioner gave the Council 7 days to respond.
13. As the Commissioner received no reply, he wrote to the Council again on 15 December 2010.
14. The Council replied on 16 December 2010 and apologised for the delay. It assured the Commissioner that a response would be issued no later than 21 December 2010.

15. The Council responded on 23 December 2010. The Council explained that it was unwilling to provide a copy of all the withheld information, as it was extensive. As an alternative the Council provided a sample.
16. The Commissioner reviewed the complaint in further detail. He then wrote to the Council on 31 January 2011 to request more detailed arguments to support its application of regulation 12(5)(b) of the EIR. He requested a response by 14 February 2011.
17. As the Council failed to respond, the Commissioner wrote to the Council on 16 February 2011 to chase this matter up. The Commissioner granted an extension to 23 February 2010.
18. As the Council failed to respond to the Commissioner's extended deadline, he wrote to the Council again on 28 February 2011. He gave the Council a final deadline of 7 March 2011 and advised the Council that he would issue an Information Notice if he did not receive the outstanding information by this date.
19. The Council responded on 4 March 2011 providing the additional information the Commissioner requested.
20. The Commissioner then tried to contact the Council by telephone on 23 March 2011 to discuss the scope of the complainant's request. He left two messages but the Council did not return his calls.
21. The Commissioner then wrote to the Council on 29 March 2011 to request the Council to call him back.
22. The Council responded to this request later that day (29 March 2011). The scope of the complainant's request was discussed and the Commissioner informed the Council that he considered the request to be limited to the correspondence between the Council's solicitors and BAM Nuttall's solicitors relating to the current "without prejudice" negotiations that were ongoing regarding the Busway contract. The Commissioner advised the Council that he intended to write to the complainant to outline his preliminary view that regulation 12(5)(b) of the EIR applied to this correspondence.
23. The Commissioner wrote to the complainant on 4 April 2011 to outline his preliminary view and to invite him to withdraw his complaint.
24. The complainant responded later that day (4 April 2011). He informed the Commissioner that he was happy to accept the "without prejudice" correspondence relating to the ongoing negotiations between the Council's solicitors and BAM Nuttall's solicitors relating to the Busway contract is exempt from disclosure. However, the complainant referred back to his initial request and advised the Commissioner that he

requested all correspondence between the two parties; not just the "without prejudice" correspondence relating to the ongoing dispute. He asked the Commissioner to consider whether all other correspondence between the two parties should be released.

25. The Commissioner contacted the Council by telephone on 6 April 2011 to update it of the current situation. He informed the Council that the complainant was willing to accept that all "without prejudice" correspondence relating to the ongoing dispute should not be disclosed and that this element of his request had been resolved. The Commissioner informed the Council that the complainant's request was not limited to just this correspondence and the remainder of his investigation would therefore focus on any other correspondence that may be held by the Council between the two parties relating to the Busway contract. The Council advised the Commissioner to put any further requests for information in writing.
26. The Commissioner wrote to the Council on 13 April 2011 to request it to establish if it holds any other correspondence between the Council's solicitors and BAM Nuttall's solicitors relating to the Busway contract and if so to provide a copy. He advised the Council that a sample would be sufficient at this stage if it is established that the remaining information is voluminous. The Council was asked to respond no later than 27 April 2011.
27. As the Commissioner received no response, he wrote to the Council on 3 May 2011 to chase the matter up. The Commissioner gave the Council a final deadline of 10 May 2011 and informed it that if no response was received by this date an Information Notice would be served.
28. The Council responded on 10 May 2011 providing a further sample of information.
29. The Commissioner reviewed the sample. He identified that the sample appeared to be yet further "without prejudice" correspondence relating to the ongoing dispute between the two parties. The Council's response of 10 May 2011 did not therefore appear to address the Commissioner's request for further information dated 13 April 2011.
30. The Commissioner served an Information Notice on the Council on 18 May 2011 requesting all outstanding information be provided within 35 days. Specifically, the Notice requested the Council to establish if it holds any other correspondence between the two parties' solicitors relating to the Busway contract (other than "without prejudice" correspondence" and, if it does, to provide the Commissioner with a copy. In addition, the Commissioner asked the Council to submit any

final submissions it wishes to make in respect of its application of regulations 12(5)(b) and 12(5)(e) of the EIR.

31. The Council responded on 10 June 2011. It provided a disc attaching copies of numerous communications between the two parties' solicitors. The Commissioner noted that the majority of this information was further "without prejudice" correspondence relating to the ongoing adjudication process. He, however, noted that a small selection of documents did not directly refer to adjudication process. He therefore wrote to the Council again on 9 August 2011 to seek further clarification.
32. The Council responded briefly on 17 August 2011. It confirmed that the small selection of documents listed in paragraph 9 of this notice do not contain information or relate to matters discussed or part of the CIC adjudication process.

Analysis

Exceptions

Regulation 12(5)(b)

33. Under this regulation 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".
34. As stated above, the remaining withheld information is not "without prejudice" correspondence between the two parties' solicitors relating to the ongoing adjudication process but other correspondence between the two parties concerning other matters relating to the Busway scheme which required intervention from a legal prospective to be resolved.
35. The only argument the Commissioner has received from the Council in support of the application of this exception is that the remaining information is subject to legal professional privilege. The Commissioner will now consider whether the exception incorporates information which is legally professionally privileged and if it does whether the remaining information itself attracts such privilege.
36. In the Information Tribunal hearing of *Kirkaldie v Information Commissioner and Thanet District Council (EA2006/001)* the Tribunal stated that the purpose of this exception was reasonably clear and that:

“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”.

In this hearing the Tribunal decided that legal professional privilege is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

37. As the Commissioner is satisfied that regulation 12(5)(b) of the EIR covers information which is subject to legal professional privilege, it is now necessary for him to consider whether the remaining withheld information in this case attracts such privilege.
38. There are two types of legal professional privilege; advice privilege and litigation privilege. The Council claimed in this case that both types of privilege applied.
39. For advice privilege to apply, the Council must demonstrate that each communication was written with the dominant purpose of giving or the receiving of legal advice.
40. Firstly, the Commissioner notes that the remaining correspondence is a series of communications between the Council's solicitor and the contractor's solicitor. Regardless of whether there is an ongoing dispute or not, the Commissioner does not accept that one party's solicitor would ask for or indeed provide legal advice to an opposing side. The purpose of legal professional privilege is to protect the confidentiality of communications between lawyer and client. There is no lawyer/client relationship in this particular case for the remaining information.
41. The Commissioner accepts that internal communications within the Council involving its Legal Department and communications between the Council and an external legal adviser would attract privilege, provided these communications are confidential and were created for the dominant purpose of obtaining or receiving legal advice. However, this is not the information being considered here.
42. The Commissioner notes that the Council argued that it considered the lawyer/client relationship was created once its Legal Department was instructed by another internal department to contact the contractor's solicitor to carry out a particular function. However, the Commissioner does not accept this argument. As stated above, no lawyer/client relationship exists for correspondence between the Council's solicitor and the contractor's solicitor. There may be an internal lawyer/client relationship in relation to instructions or correspondence with its own

Legal Department but again this is not the information the subject of the complainant's request.

43. Turning now to litigation privilege, the Commissioner considers this applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. The Commissioner accepts that litigation privilege is a little wider in scope to advice privilege and that it also incorporates information or material that is gathered to assist or aid the conduct of litigation.
44. While the Commissioner accepts that litigation was likely at the time of the request considering the alleged delays and defects with the project, it still remains the case that the remaining withheld information was not created within a confidential lawyer/client relationship for the dominant purpose of obtaining or providing advice. The Council also confirmed that not all aspects of the project have resulted in a potential litigation situation and some contact has been made between the two parties' solicitors to deal with other matters that required a legal perspective. The Commissioner considers the remaining information to be of this type of communication and as these communications took place outside of the adjudication process they cannot be regarded to be information or material which has been gathered to aid the contemplated litigation.
45. For the above reasons, the Commissioner is satisfied that the remaining information does not fall within the definition of either advice or litigation privilege. As the information is not subject to legal professional privilege he has concluded that regulation 12(5)(b) of the EIR is not engaged in this case.
46. As he has found that regulation 12(5)(b) of the EIR is not engaged in this case there is no need for him to go on to consider whether disclosure would have an adverse affect on the elements cited in this regulation or the public interest test.

Regulation 12(5)(e)

47. This regulation states that a public authority may refuse to disclose information to the extent that it disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
48. For the Commissioner to agree that regulation 12(5)(e) applies, the Council must demonstrate that:
 - the information is commercial or industrial in nature;
 - that information is subject to confidentiality provided by law;

- the confidentiality is provided to protect a legitimate economic interest; and
 - the confidentiality would be adversely affected by disclosure.
49. The Council would then need to consider the public interest test and demonstrate clearly that the public interest in disclosing this information is outweighed by the public interest in maintaining the exception.
50. The only argument the Council submitted in support of this exception was that disclosure would confirm that the Council was considering taking legal action against the contractor concerned and this confirmation would prejudice the economic interests of the contractor, for example, by impacting on its share prices.
51. The Commissioner invited the Council to provide more detailed arguments to support its position on 8 November 2010 and 18 May 2011 but it failed to do so.
52. The argument presented in paragraph 50 is insufficient to demonstrate that regulation 12(5)(e) of the EIR is engaged in this case. It is not for the Commissioner to argue a point on a public authority's behalf. It is for the public authority to provide detailed submissions and evidence to support the application of an exception for the Commissioner to consider.
53. In this case, the Commissioner has concluded that regulation 12(5)(e) of the EIR does not apply. As he has found that the exception is not engaged, there is no need for him to go on to consider the public interest test.

Procedural Requirements

54. The Commissioner notes that the Council failed to carry out an internal review within 40 working days of the date it received the complainant's representations. He therefore finds the Council in breach of regulation 11(4) of the EIR in this case.

The Decision

55. The Commissioner's decision is that the Council did not deal with the following aspects of the request for information in accordance with the EIR:
- it incorrectly relied on regulation 12(5)(b) and 12(5)(e) of the EIR for the non disclosure of the remaining withheld information; and

- it breached regulation 11(4) of the EIR by failing to carry out an internal review within 40 working days.

Steps Required

56. The Commissioner requires the Council to take the following steps to ensure compliance with the EIR:
- the Council should release the remaining withheld information as detailed in paragraph 9 of this notice.
57. The Council must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

58. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

59. 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

60. 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.
61. 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 7th day of September 2011

Signed

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

Legal Annex

Freedom of Information Act – general right of access

Section 1(1)

Provides that -

“Any person making a request for information to a public authority is entitled

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(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Environmental Information Regulations

Regulation 11 - Representation and reconsideration

Regulation 11(1)

Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2)

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3)

The public authority shall on receipt of the representations and free of charge

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- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4)

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 12 - Exceptions to the duty to disclose environmental information

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.