

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

Decision Notice

Date: 01 June 2011

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

Summary

The complainant requested information relating to a legal opinion obtained by Gwynedd Council ("the Council") regarding the possibility of challenging a planning inspector's decision in relation to local occupancy clauses. The Council refused to disclose the information by virtue of regulations 12(5)(b) and 12(5)(d) of the EIR. The Commissioner has found that regulation 12(5)(b) was engaged and that the public interest favoured maintaining the exception. Therefore he has decided that the Council was correct to withhold the information in question and he requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. On 11 November 2010 the complainant wrote to the Council and made the following request for information:

"[...] we are making this request in respect of a barristers opinion obtained by the Council for an appeal granted at [named property]. We refer to [...] the minutes of the Dwyfor Area Planning Committee [...], where mention is made of the opinion which has been used to inform the Council's future actions.

We would be grateful if, under the provisions of the above act, you forward a copy of the opinion to us".

4. On 8 December 2010 the Council wrote to the complainant and stated that the requested legal opinion was exempt from disclosure by virtue of regulations 12(5)(b) and 12(5)(d) of the EIR. The Council stated that disclosure of the legal opinion would adversely affect the course of justice, and the confidentiality of legal proceedings.
5. On 8 December 2010 the complainant requested an internal review of the Council's decision.
6. The Council wrote to the complainant on 21 December 2010 and provided the outcome of its internal review, upholding its decision to withhold the information by virtue of regulation 12(5)(b) of the EIR. The Council made no further mention of its reliance on regulation 12(5)(d) at this stage.

The Investigation

Scope of the case

7. On 19 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council should publish the legal opinion requested.

Chronology

8. On 18 February 2011, the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for formal consideration and to request copies of the withheld information.
9. On 21 February 2011 the Council provided the Commissioner with copies of the withheld information and some further arguments to support its

reliance on regulations 12(5)(b) and 12(5)(d) of the Act in withholding the requested information.

Analysis

Exceptions

Regulation 12(5)(b)

Is the exception engaged?

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

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

11. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

“...the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system”.

12. Legal professional privilege (“LPP”) protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and

his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation¹".

13. There are two types of privilege – legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
14. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
15. In this case, the Council considers the withheld information is subject to legal professional privilege and release of the withheld information would adversely affect the course of justice. The Council has claimed litigation privilege in relation to the withheld information, on the basis that the withheld information was created for the dominant purpose of conducting or giving advice in relation to litigation.
16. From the content of the withheld information, it is clear to the Commissioner that there was a real prospect of litigation at the time the document was created. The document itself makes mention of a "proposed action in the High Court of Justice". The communication, which was created by an external solicitor to provide advice to the Council, was created during a period when the Council was deciding whether to challenge the decision of a planning inspector in relation to a specified premises.
17. After considering the arguments presented to him by the Council and having reviewed the withheld information, the Commissioner is satisfied that litigation privilege applies in this case. Having assessed the information the Commissioner has concluded that the Council is the party entitled to legal professional privilege and that this privilege has not been waived in this case. He has therefore gone on to consider whether disclosure would have an adverse affect on the course of justice, with particular reference to legal professional privilege.

¹ EA/2005/0023, para 9

Adverse effect

18. In *Archer v ICO & Salisbury District Council* [EA/2006/0037] the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out above; the effect must be “adverse” and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure “would” have an adverse effect and that any statement that it could or might have such an effect was insufficient. The information is then subject to the public interest test and the Tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.
19. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word “would”. It is the Commissioner’s view that the Tribunal’s comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & EA/2005/0030] in relation to the wording of “would prejudice” are transferable to the interpretation of the word “would” when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term “would prejudice” that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
20. The Council argued that disclosure would adversely affect the course of justice because:
 - It would effectively deprive the Council of legal professional privilege.
 - It would make it more likely that a Council would hesitate before seeking such opinions in future.
 - It would adversely affect the Council’s willingness to seek advice in other cases since it could no longer be certain that its correspondence with its legal adviser would be protected by legal professional privilege.
21. In reaching a view on the Council’s arguments in relation to the adverse effect of disclosure the Commissioner has again noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], in which the Tribunal considered whether the disclosure of legal advice obtained by the public authority would have an adverse effect on the course of justice. In that case the public authority argued that:

- It was currently engaged in litigation where the subject of the legal advice had been raised. Disclosure would adversely affect its ability to defend its legal rights by disclosing advice that was the subject of current and potential future litigation.
 - It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.
 - It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
 - Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.
 - Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.
 - Disclosure would prejudice the Council's prospects of successfully pursuing and defending litigation as these issues remain live.
22. After considering these arguments the Tribunal was satisfied that these matters related to the course of justice, and that disclosure would have an adverse effect upon them².
23. The Commissioner has noted the views of the Tribunal as recorded above, and the similarities in the arguments presented by the public authorities in those cases and this one. Although the subject matter of this request never reached the Courts, the Council considers that disclosure of the requested information would be prejudicial to it in any future legal disputes.
24. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice. This is because the principle of legal professional privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. He considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of

² EA/2008/0020, paras 33-34

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

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

The public interest test

26. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

27. The Commissioner believes that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He believes that this is especially the case where the public authority's actions have a direct effect on the environment.
28. The Commissioner also notes that, to some extent, disclosure would provide a degree of transparency and reassurance to interested parties that the Council's actions were in the best interests of the community and may assist the public in understanding the legal basis for this particular decision.
29. The complainant provided the Commissioner with his representations to explain why, in his view, the public interest in this case favoured disclosure of the information in question. The complainant argued that the legal advice in question was a public document pertaining to a planning policy. In the complainant's view, since the legal advice was a document paid for out of the public purse, and since it was created simply to ascertain whether a legal challenge could be mounted against the decision of a planning inspector, the information should be made public.
30. The complainant argued that due to his understanding that the document in question advised the Council that no challenge should be made to the planning inspector's decision; the legal opinion would call into question the wider policy issue surrounding local needs occupancy. The complainant argued that the public have a right to know whether

the Council are legitimately pursuing this policy under present planning legislation.

31. The complainant also argued that in refusing to release the withheld information, the Council is denying the public knowledge of the proper assessment of the relevant planning policies, the way the Council handles their applications, and the relevant policies adopted by the Council.
32. The Council provided the following factors, which it took into account in favour of disclosing the requested information:
 - The strong public interest in a public authority conducting its business in a transparent and open manner
 - The accountability of public authorities to the electorate
 - The need to be clear about the basis of decisions, particularly planning decisions which are generally taken in public and also decisions concerning the expenditure of public money

Public interest arguments in favour of maintaining the exception

33. The Council provided the following factors, which it took into account in favour of withholding the requested information:
 - The importance of preserving confidentiality in respect of the advice, so that the Council is in a position to effectively pursue or defend litigation.
 - Disclosure would effectively deprive the Council of legal professional privilege.
 - Disclosure would deprive the Council of the confidentiality it requires to instruct and obtain full and honest legal advice on contentious issues.
 - Disclosure would provide potential litigants an unfair advantage of being able to scrutinise advice given to the Council; an advantage which would not be open to those litigants if they were instead bringing proceedings against a private organisation or individual.
 - Disclosure would deprive the Council of equality of arms in any litigation.
34. The Commissioner considers that the preservation of the Council's general ability to seek and obtain informed legal advice, and the protection of the Council's ability to communicate freely with its legal

advisors are relevant in this case. The Commissioner also notes the strong element of public interest inbuilt in legal professional privilege, which has long been recognised by the courts.

Balance of the public interest arguments

35. In considering the opposing factors in this case, the Commissioner is mindful of the overriding presumption in favour of disclosure. Even in cases where an exception applies, the information must still be disclosed unless "in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". The threshold to justify non-disclosure is consequently high.
36. The Commissioner has also taken into account the Information Tribunal's comments in *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023]:

"The fact that there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption".
37. In deciding the weight to attribute to each of the factors on the competing sides of the public interest test and determining where the overall balance lies the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people and the timing of the request and the status of the advice.
38. The Council has been transparent about the fact that it received legal advice on this matter and published in Council minutes that it had decided not to challenge the decision of the planning inspector. The Commissioner 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.
39. 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 has not been supplied with sufficient evidence to suggest that in this case the Council's decision affects a substantial number of people. The Commissioner considers that the decision would affect a limited number of people; those living within the local authority area with an interest in, or an involvement in, planning issues similar to the ones described within the withheld legal opinion.

40. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
41. 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).
42. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege, particularly the breaching of a trust between parties that may go on to undermine the possibility of frank and candid discussions.
43. Having established that the requested information is exempt from disclosure by virtue of regulation 12(5)(b), the Commissioner has not gone on to consider the Council's application of regulation 12(5)(d).

The Decision

44. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

47. 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.
48. 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 1st day of June 2011

Signed

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Cambrian Buildings
Mount Stuart Square
Cardiff
CF10 5FL

Legal Annex

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.