

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 24 October 2012

Public Authority: Department of Regional Development
Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

The complainant has requested information relating to the proposed vesting of land at the Glenshesk site at Ballycastle, County Antrim. The Department of Regional Development (DRD) disclosed some of the information, however it withheld the remainder (the withheld information) citing the exceptions under regulations 12(4)(e) and 12(5)(b) of the EIR as a basis for non-disclosure. The Commissioner considers that the DRD has correctly applied the specified exceptions to the withheld information. The Commissioner therefore orders no steps to be taken.

Request and response

1. The complainant has requested the following information from the DRD in relation to the proposed vesting of the land at the Glenshesk site: -
 1. Copies of any documents/minutes/notes of whatsoever description considered by the Department in the making of the decision.
 2. Confirmation of the identity of the decision-maker
 3. Confirmation of what written material/oral submissions or meetings held and those present leading to the decision.
2. The DRD responded disclosing information in response to part 2 of the complainant's request. It directed the complainant as to where to locate publicly available documents in relation to part 1 of his request and disclosed some further information in relation to parts 1 and 3 of his request. Some of that information was redacted as it contained

personal data. The DRD provided a schedule detailing the remaining information and the basis on which it was refusing to disclose it, i.e. the exceptions set out in regulations 12(4)(e) and 12(5)(b) of EIR. The specific documents being withheld under each exception are set out in an annex to this notice.

3. Following an internal review (requested by the complainant on 23 August 2011) the DRD wrote to the complainant on 31 January 2012. It stated that it was upholding its initial application of the exceptions in the above regulations of the EIR to the withheld information.

Scope of the case

4. The complainant contacted the Commissioner to complain about the way his request for information had been handled, specifically the DRD's application of the specified exceptions to the withheld information.
5. The Commissioner has considered the DRD's use of the above exceptions in relation to the withheld information.

Reasons for decision

Regulation 12(4)(e) of the EIR

6. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
7. An internal communication is a communication within one public authority. The information being withheld under regulation 12(4)(e) consists of correspondence between different departments, all within the DRD. That correspondence is set out in an annex to this Notice. As all of the information being withheld under the above regulation consists of internal communications within one public authority, the DRD, the Commissioner is satisfied that the exception as set out in regulation 12(4)(e) is engaged and has gone on to consider the public interest arguments for and against disclosure of the information.

Public interest arguments in favour of disclosing the withheld information

8. The DRD recognised the general public interest in accountability and transparency in public authorities and their decision-making

processes. The Commissioner agrees with this and considers that, together with the presumption in EIR in favour of disclosure, this is a strong argument in favour of disclosure of the withheld information.

9. The Commissioner also considers that the proposed vesting of the land is a matter which interests the public and that disclosure of the information would inform public debate on the matter and inform the public about the processes and discussions gone through in order to make such a decision.

Public interest arguments in favour of maintaining the exception

10. The arguments put forward by the DRD in support of maintaining the exception relate to the need for free and frank discussion and the exploration of options in any decision-making process carried out by a government department.
11. Inherent in the exception provided by regulation 12(4)(e) is the argument which says that a public authority should be afforded private space for staff, in which issues can be considered and debated away from the hindrance of outside external comment and interference.
12. Whilst recognising the importance of protecting a public authority's thinking space, the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure once a decision has been made and, accordingly, the need for space in which to operate is no longer required by a public authority.
13. In this case the DRD has argued that at the time of the request a formal decision had not been made regarding the proposed vesting of the land. Instead, the withheld information refers to discussions relating to that proposal. The DRD argues that there is a need in such a situation for senior management to think through the implications of options and risks. Premature disclosure of preliminary thinking in relation to the vesting could limit the number of options open to the DRD and therefore impair the decision-making process.

Balance of the public interest arguments

14. The Commissioner appreciates that there is a general public interest in public authorities being as accountable and transparent as possible regarding their decision-making processes, particularly in matters such as the proposed vesting of land, which are of interest to the public. However, he also recognises the strong public interest in affording a

public authority safe space in which to deliberate over important issues, options and risks, and to make decisions accordingly.

15. The Commissioner, given that the issues in this case are 'live' and the policy deliberations are ongoing, attaches a great deal of weight to the 'safe space' arguments, as he believes that it is of great importance not to impair the quality of decision-making by premature disclosure of preliminary thinking, which may limit the final available options. The Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure of the information withheld under that exception.

Regulation 12(5)(b) – Course of justice

16. Under this exception, a public authority can refuse to disclose information to the extent that 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege in the same way as the exemption under section 42 of FOIA.
17. The Commissioner has seen a copy of the information being withheld under the above regulation. The withheld information consists of or refers to legal advice provided by legal advisers from both the legal department of NI Water and the Departmental Solicitor's Office. The Commissioner was therefore satisfied that the information represents legal advice from legally qualified persons. The Commissioner was also satisfied that there was no evidence to indicate that the legal advice had lost its confidential character and it was therefore covered by legal advice privilege.
18. In the decision of *Archer v Information Commissioner and Salisbury District Council*¹ the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
19. In accordance with another Tribunal decision *Hogan and Oxford City*

¹ EA/2006/0037

*Council v Information Commissioner*² and the interpretation of the word "would" is "more probable than not".

20. He also considers that disclosure of the legal advice would adversely affect the DRD's ability to defend its position if it ever faced a legal challenge in connection with the proposed vesting. The DRD should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
21. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant legal advice.

Public interest arguments in favour of disclosing the withheld information

22. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
23. Disclosure in this case would help the public to understand more about the decision-making process undertaken by the DRD regarding the proposed vesting. This is a strong public interest argument in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

24. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*³

² EA/2005/0026 and EA/2005/030

³ EA/2005/0026 and EA/2005/030

the Information Tribunal described legal professional privilege as, “a fundamental condition on which the administration of justice as a whole rests”.

25. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner’s published guidance on legal professional privilege states the following:

“Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice”.

26. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance. The Information Tribunal in the case of *Kirkcaldie v Information Commissioner and Thanet District Council*⁴ stated that the purpose of the exception under regulation 12(5)(b) 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.

27. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

“...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”

28. The above does not mean that the counter arguments favouring public

⁴ EA/2006/001

disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

29. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the DRD's ability to defend itself fairly in any legal challenge. Therefore, the Commissioner considers that the public interest in maintaining the exception under regulation 12(5)(b) outweighs that in disclosure of the information in all the circumstances of the case.

Right of appeal

30. 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,
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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Documents withheld under regulation 12(4)(e)

1. Approval from DRD Private Office to Water Policy Division dated 5 July 2011.
2. Letter regarding Ballycastle vesting issue from Water Policy Division to DRD Minister dated 30 June 2011.
3. Water Policy Division internal e-mail re vesting dated 24 June 2011.
4. Communication re vesting from Roads Service to Water Policy Division dated 21 April 2011.
5. E-mail re planning from Planning Service to Water Policy Division dated 20 October 2010.
6. Northern Ireland Water Environmental Report.
7. Internal minute of ministerial meeting dated 29 June 2010.
8. Northern Ireland Water Background Summary.
9. Northern Ireland Water Sewerage Appraisal Report.

Documents withheld under regulation 12(5)(b)

1. Legal advice from DSO to Water Policy Division dated 3 May 2011.
2. Response to vesting Northern Ireland Water to Water Policy Division dated 11 April 2011.
3. Legal advice from DSO to Water Policy Division dated 1 November 2010.
4. Internal correspondence Water Policy Division dated 8 October 2010.
5. Legal advice from DSO to Water Policy Division dated 7 July 2010.
6. Legal advice from DSO to Water Policy Division dated 1 July 2009.
7. Correspondence from Northern Ireland Water to Water Policy Division re land acquisition issue dated 12 June 2009.