

Environmental Information Regulations 2004

Decision Notice

Date: 18 November 2009

Public Authority: Department for Communities & Local Government
Address: Eland House
Bressenden Place
London
SW1E 5DU

Summary

The complainant wrote to the Department for Communities and Local Government (“the public authority”) to request copies of submissions made by departmental officials to the Secretary of State in respect of a planning application by Brighton and Hove Albion Football Club. In response the public authority disclosed to the complainant redacted copies of the submissions. The redacted information was withheld under regulation 12(4)(e) (internal communications) of the Environmental Information Regulations 2004 (EIR). At the internal review stage the public authority said that regulation 12(5) (prejudice to the course of justice etc.) also applied to some of the redacted information.

The Commissioner has investigated the public authority’s handling of the request and has found that, with two minor exceptions, the information was correctly withheld under regulations 12(5)(b) and 12(4)(e). In addition the Commissioner has found that the names of officials featured in the submissions are covered by the exception in regulation 13 (personal information). However, the Commissioner also found that in its handling of the request the public authority committed several procedural breaches of the EIR. The Commissioner requires the public authority to provide to the complainant the two redacted pieces of information which the public authority now acknowledges should have been disclosed.

The Commissioner’s Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the “Commissioner”). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the “Act”) are imported into the EIR.

The Request

2. On 15 June 2007 the complainant wrote to the public authority to request information relating to a planning application by Brighton and Hove Albion Football club. The request read as follows:

“...I formally request, pursuant to the Environmental Information Regulations 2004, to be provided with copies of any and all submissions made by government officials to the Deputy Prime Minister, including written minutes of meetings relevant to his previous determination of the abovementioned applications. For the avoidance of doubt this request also extends to documents relating to the decision of the Deputy Prime Minister to re-open the public inquiry in February 2005.”

“In addition, I would also request to be provided with copies of any and all written submissions made by government officials to the Secretary of State for Communities and Local Government and minutes of meetings relevant to her determination of these current applications, including her decision to invite further representations dated 20 November 2006.”
3. The public authority responded on 18 July 2007 and explained that it was dealing with the request under the EIR as the requested information fell within the definition of environmental information in regulation 2(1)(c). The public authority confirmed that it held information falling within the scope of the request but reached the view that the information, which it said included submissions from officials to Ministers as well as legal advice, fell within the terms of the exception in regulation 12(4)(e) as it comprised ‘internal communications’. The public authority concluded that the public interest in favour of disclosing the information was outweighed by the public interest in maintaining the exception. In carrying out the public interest test the public authority said that it had taken into account the fact that a decision regarding the planning application had not yet been taken and considered that premature disclosure would undermine and delay the planning process. Noting that the information included legal advice, the public authority outlined the public interest arguments in favour of maintaining legal professional privilege.
4. On 25 July 2007 the complainant wrote back to the public authority to ask that it carry out an internal review of its handling of his request. The complainant now clarified that his request did not extend to any legal advice although he noted that any legal privilege attached to such advice could be waived. The complainant went on to say that the information he was seeking was that which related to the decision of the Secretary of State to re-open the planning inquiry and the decision to grant planning permission. He argued that the public authority’s reasons for refusing to disclose this information did not apply. The complainant also pointed to the fact that the Secretary of State had now issued her decision on the planning application and therefore the reasons for not disclosing the information did not apply.

5. The public authority did not present the findings of its internal review until 11 March 2008. Having reviewed the case the public authority concluded that its original decision to refuse the request was correct at the time it was made since at that time the decision whether or not to grant planning permission was still under active consideration by ministers.
6. The public authority went on to acknowledge that the Secretary of State had now reached a decision on the planning application and therefore it said that it was now of the opinion that the sensitivity of some of the papers had declined. However it said that the sensitivity of parts of or whole documents consisting of advice to ministers, including legal advice or information relating to identified or identifiable individuals had not declined.
7. The public authority disclosed to the complainant a series of documents relating to the decision of the then Secretary of State to re-open the planning inquiry and the decision to grant planning permission, redacted where portions of the documents related to advice from officials to ministers, legal advice or named individuals. It explained that it was continuing to withhold this information under regulation 12(4)(e) (internal communications) and regulation 12(5)(b) (prejudice to the course of justice etc.). It concluded that the public interest in maintaining the exceptions and thereby “protecting the integrity and candour of advice to Ministers and the confidentiality of the relationship between officials and Ministers and their legal advisors” outweighed the public interest in the disclosure of the redacted elements.
8. The public authority added that a draft submission document from September 2005, prior to the Secretary of State’s decision to grant planning permission, was being withheld in its entirety. It explained that this document was not placed before the Secretary of State and therefore did not form part of his consideration of the case. As such it said that it believed that there was very little public interest in the disclosure of this document and said that disclosure of draft documents had the capacity to be damaging to the process of communicating between officials and the ministers, particularly by inhibiting the free and frank exchange of views. It confirmed that this document was also being withheld under regulation 12(4)(e).

The Investigation

Scope of the case

9. The complainant originally contacted the Commissioner to complain that his request for information had been refused and that the public authority had not yet carried out an internal review. The Commissioner received the complaint on 11 December 2007 and deemed it eligible for consideration. At this point the public authority had not yet completed the internal review and this did not take place until 11 March 2008.
10. At the internal review stage the public authority said that as the Secretary of State had by this point reached a decision on the planning application it was now

prepared to release further information falling within the scope of the request, subject to redactions.

11. After receiving the outcome of the internal review the complainant subsequently clarified his grounds for complaint to the Commissioner and explained that he wished to challenge the public authority's decision to redact the information under regulation 12(4)(e) and 12(5)(b).
12. In this decision notice the Commissioner will only consider whether the public authority was correct to withhold the remaining redacted information. The Commissioner does not intend to make a decision on whether the public authority should have disclosed when it initially received the request, the information it subsequently disclosed at the internal review stage, as this would be a purely academic exercise which would not be in line with his robust approach to complaints handling.¹
13. However, in relation to the remaining redacted information, in making his decision the Commissioner will consider the facts as they were at the time the request was received by the public authority. Whilst the public authority disclosed further information at the internal review stage because by this point the Secretary of State had reached a decision on the planning application, it maintained that its original response was correct at the time the request was received. The public authority did not overturn its original decision. In this sense the decision to release this information was separate from the internal review which should correctly be viewed as an opportunity for the public authority to reconsider its initial response to a request for information in relation to the circumstances as they applied at the time of that request. Having said this, the Commissioner would stress a public authority cannot delay an internal review until circumstances change in order to use this as an excuse to change its decision.

Chronology

14. The Commissioner initially contacted the public authority on 2 October 2008. At this stage the Commissioner was not aware that the public authority had by this point completed its internal review and so invited the public authority to clarify its position. The Commissioner also asked the public authority to explain why section 12(4)(e) applied and why the public interest in maintaining the exception outweighed the public interest in disclosure. Noting that the public authority had withheld some information on the grounds that it constituted legal advice, the Commissioner asked the public authority for a response to the following points:
 - Confirmation as to whether the content of any withheld legal advice has been made public.
 - Confirmation as to whether any action or decision was taken on the basis of such legal advice.

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/forms/a_%20robust_%20approach_%20to_%20foi_%20complaint_%20cases001.pdf

- If so, whether the fact that a decision was taken on the basis of legal advice was made public.
- 15. Furthermore, the Commissioner invited the public authority to make any additional representations in support of its handling of the complainant's request and asked it to supply him with copies of the information it had withheld.
- 16. The public authority responded to the Commissioner's enquiries on 16 October 2008 and notified him that the internal review had now been completed and its findings presented on 11 March 2008.
- 17. The Commissioner now contacted the complainant on 30 October 2008 to clarify how he wished to proceed with his complaint and he responded in the terms noted at paragraph 11 above.
- 18. Given that the complainant had now confirmed that he wished to proceed with his complaint on the basis of the outcome of the internal review the Commissioner contacted the public authority again on 5 November 2008. The Commissioner now asked the public authority to provide him with all of the information that it was continuing to withhold from the complainant, clearly marked to show where each exception applies. Noting that the public authority had at the internal review stage also applied regulation 12(5)(b) the Commissioner now asked the public authority to fully explain why this exception applies and why the public interest in maintaining this exception outweighs the public interest in disclosure.
- 19. The public authority responded to the Commissioner on 23 December 2008. It provided the Commissioner with both redacted and un-redacted copies of the information it had disclosed to the complainant. It elaborated on its reasons for withholding the redacted information and confirmed to the Commissioner that the legal advice which had been redacted under regulation 12(5)(b) had not been made public.
- 20. On 9 January 2009 the Commissioner contacted the public authority to clarify what information it considered to fall within the scope of the request. On 15 January 2009 the Commissioner contacted the public authority again for further information on its application of regulation 12(5)(b). In providing the Commissioner with un-redacted copies of the requested information the public authority had highlighted which sections contained legal advice and the Commissioner now asked the public authority to clarify how this information attracted legal professional privilege. In particular the Commissioner asked the public authority to explain what input its legal advisers had in the planning decision making process and how this was reflected in the information that was redacted from the submissions under regulation 12(5)(b).
- 21. The public authority responded to the Commissioner on 20 February 2009. The public authority now provided further details of how the department's legal team engages with policy officials in planning decisions. It explained that following a planning enquiry a Planning Inspector will prepare a report to officials within the public authority's Planning Central Casework (PCC) team who are responsible for obtaining advice on issues arising from the report and preparing the submissions

to the Secretary of State. The public authority has said that in the majority of cases the PCC staff will engage the services of the department's legal team to assist them. The public authority explained that the legal advice that is typically sought would include the following, repeated here as a direct quotation:

- "Whether the Inspector has correctly interpreted Government and local planning policies that are relevant to that decision;
 - What weight may be given to particular national and local planning policies;
 - The legal implications arising from any recommendations put before the Secretary of State together with advice on how these may be addressed; and
 - An assessment of the risk of a successful legal challenge to a particular option being considered by the Secretary of State were it to be implemented."
22. The public authority added that in most cases the involvement of its lawyers is in the form of written advice. However, it said that its lawyers may also give advice orally at meetings or, occasionally, directly to the Secretary of State. It confirmed that in this case its legal advisers would have been "intricately involved throughout the decision-making process" which it said included having sight of, and commenting on, the submissions made to Ministers.
23. For each redaction made under regulation 12(5)(b) the public authority provided the Commissioner with a specific explanation of how the information related to legal advice. However, for two redactions the public authority now said that on further consideration it believed that the information should have been released.

Findings of fact

How the Planning system works

24. Applications for planning permission are made in the first instance, to local planning authorities. However, under section 77 of the Town and Country Planning Act 1990 ("the 1990 Act") the Secretary of State may direct local planning authorities to refer certain cases to him for decision, instead of being dealt with by the planning authority. This is known as the power to "call-in" an application.
25. The calling in of an application is usually triggered by the local planning authority notifying the Secretary of State of certain types of planning applications, or as a result of representations made by other interested parties. However the Commissioner understands that it is the policy of Government to leave decisions to the local planning authority wherever possible.²
26. The decision of a local planning authority may be appealed to the Secretary of State. Such appeals are usually heard and determined by a planning inspector although in certain circumstances the Secretary of State may recover an appeal

² The call-in policy is set out in Hansard in Richard Caborn's statement of 16 June 1999, col 138.

for his own decision. All call-ins and virtually all appeals recovered by the Secretary of State are the subject of a local inquiry.

27. Where the Secretary of State is making the final decision the Planning Inspector prepares a report after the inquiry setting out his conclusions and making a recommendation to the Secretary of State. Once the Inspector's report is received it is considered by officials within the public authority. They consider the report and post-inquiry evidence and prepare advice for Ministers on the decision. The Secretary of State may choose to accept or reject any recommendations in the Inspector's report. A decision made by the Secretary of State is set out in a Decision Letter issued to the relevant parties.
28. There is a right of appeal against the Secretary of State's decision to the High Court under section 288 of the 1990 Act.

The Planning Application

29. The complainant's request relates to applications by Brighton and Hove Albion Football Club for a new community stadium at Falmer. The applications were made to Brighton and Hove City Council and Lewes District Council but before the councils could reach a decision on the applications the Secretary of State called in the proposals for his determination.
30. The Planning Inspectorate made arrangements to hold the inquiry which was held between 18 February and 23 October 2003. A report was prepared by the (first) inspector which recommended that the application be refused.
31. Having considered the submissions the Secretary of State chose to defer a final decision on the case and instead asked for further information on the issue of whether there were any more feasible sites than the proposed site at Falmer.
32. A second public inquiry, which focused on issues of alternative sites, was held between 2 February and 5 May 2005. The second Inspector's report concluded that there were no potential alternative sites.
33. Having considered the two reports and advice from officials the Secretary of State decided to reject the recommendations of the first inspector, that the application be refused and agreed with the view of the second inspector that there were no potential alternative sites to that proposed. The decision was communicated to relevant parties by decision letter on 27 October 2005. This letter is available at the following link:

<http://www.communities.gov.uk/documents/planning-callins/pdf/191724.pdf>
34. The decision was subsequently appealed by Lewes District Council, Falmer Parish Council and the South Downs Society. As a result the decision was quashed and the Secretary of State agreed to re-determine the application.
35. The Secretary of State's decision to grant planning permission was issued on 23 July 2007. A copy of the decision letter is available at the following link:

<http://www.communities.gov.uk/documents/planning-callins/pdf/518275.pdf>

36. The Office of the Deputy Prime Minister, upon its creation in 2001, took over responsibility for planning issues. After the announcement of constitutional changes on 5 May 2006 this responsibility passed to the public authority and the Secretary of State for Communities and Local Government.³ In this decision Notice, references to the Secretary of State are references to the Secretary of State for Communities and Local Government and, for matters in advance of 5 May 2006, the Deputy Prime Minister and First secretary of State.

Analysis

37. A full text of the relevant provisions of the Regulations referred to in this section is contained within the legal annex.

Procedural Matters

Regulation 5 – Duty to make environmental information in request

38. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Regulation 5(2) provides that a public authority should make environmental information available within 20 working days of receiving a request.
39. In the course of the Commissioner's investigation the public authority, as noted at paragraph 23 above, acknowledged that some information, previously redacted under regulation 12(5)(b), should have been disclosed to the complainant. Consequently the public authority breached regulation 5(1) by failing to make this information available to the complainant and regulation 5(2) by failing to make this information available within 20 working days.

Regulation 11 – Representations and reconsideration

40. Regulation 11 provides that where an applicant makes representations to a public authority where it appears that the public authority has failed to comply with a requirement of the EIR:

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

41. In this case the complainant wrote to the public authority on 25 July 2007 to ask that it carry out an internal review of his request for information. In particular the complainant said that he disagreed with the public authority's application of the exception in regulation 12(4)(e). However, the public authority only presented the

³ Source: <http://www.number10.gov.uk/Page9391>

findings of its internal review on 13 March 2008. This constitutes a breach of regulation 11(4).

Regulation 14 – Refusal to disclose information

42. Regulation 14 provides that if a request for environmental information is refused the public authority shall specify the reasons not to disclose the information requested, including:

any exception relied on under regulations 12(4), 12(5) or 13; and the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b).

43. The public authority initially informed the complainant that his request was being refused under regulation 12(4)(e). It was only at the internal review stage that it said that it was withholding legal advice under regulation 12(5)(b). This constitutes a breach of regulation 14(3).

Exception

44. At the internal review stage the public authority identified the following information as falling within the scope of the request. Information which constituted legal advice was redacted and withheld under regulation 12(5)(b) (prejudice to the course of justice etc.). Some information which constituted advice from officials to Ministers was redacted and withheld under regulation 12(4)(e) (internal communications).

- Submission dated 26 January 2004 (redacted)
- Note dated 2 February 2004 – update note (redacted)
- Submission dated 10 February 2004 – main submission on the merits of the case (redacted)
- Minute dated 23 February 2004 – recording a meeting between the Deputy Prime Minister and officials (redacted)
- Submission dated 24 June 2004 (redacted)
- Final submission from 2 September 2005 prior to Deputy Prime Minister's decision to grant permission (redacted)

45. At this point the public authority had indicated that it also held a draft submission dating from September 2005. The public authority has now made it clear to the Commissioner that because this is a draft document it was never placed before the Secretary of State and therefore it does not consider it to fall within the scope of the complainant's request. For the avoidance of doubt, the Commissioner agrees that this information is not covered by the request and therefore he has not considered whether or not this information should have been disclosed.

Regulation 12(4)(e) –Internal communications

46. Regulation 12(4)(e) provides that a request for information may be refused if it involves the disclosure of internal communications.
47. The information which was redacted from the documents disclosed to the complainant under regulation 12(4)(e) records advice from officials within the public authority to their Minister regarding the planning application. The Commissioner is satisfied that such information constitutes internal communications and therefore finds that this exception is engaged.

Public Interest Test

48. However, under regulation 12(1)(b) information may only be refused if an exception applies and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Therefore the Commissioner has undertaken a public interest test in respect of the information redacted under 12(4)(e).
49. The public authority has suggested that were it to disclose the redacted information it could have the effect of re-opening the debate on the application. In this respect, the timing of the request is relevant. This is because at the time the complainant made his request the Secretary of State had agreed to re-determine the application but a final decision had not yet been made and this did not take place until 23 July 2007. The Commissioner notes that the application had already been the subject of two inquiries, an appeal and representations had been made by all relevant parties. He accepts that were the debate to have been re-opened at this point it would have served to undermine the systems the government has in place to ensure the effective and efficient running of the planning system. This is because disclosure would be likely to lead to the parties making further submissions which, despite the fact that both parties had had every opportunity to participate in the planning process, would need to be considered, thus delaying a final decision being made. The Commissioner is of the opinion that this would not be in the public interest.
50. The public authority has also argued that disclosure of the redacted information would undermine the ability of officials to give free and frank advice to Ministers and that this would not be in the public interest. The Commissioner is prepared to attribute some weight to this argument and is of the view that in relation to this particular planning decision, it is in the public interest for officials to have a safe space in which to make recommendations to Ministers. However the Commissioner is less inclined to accept that disclosure would have a wider deterrent effect on the frankness of advice provided by officials to Ministers. The Commissioner considers that public officials should not easily be discouraged from doing their jobs properly by the prospect that information could be released. The Commissioner is not entirely convinced that professional civil servants would in future stop providing free and frank recommendations to Ministers were limited information about a planning application disclosed. In commenting on this point the Information Tribunal has said:

“...In judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil services since the Northcote – Trevelyan reforms.”⁴

51. The Commissioner recognises that the application to which the complainant’s request relates was controversial and accepts that there is a legitimate interest in the process by which the decision was arrived at. The Commissioner is also of the view that there is strong public interest in the transparency and accountability of the planning process. However, the Commissioner is satisfied that the public interest in the transparency of the system has been met in this case because at all stages of the process the reasons why the application has progressed in the way it has have been made available, via the inquiry, the report of the planning Inspector and via the decision letter. In particular the decision letter explains in significant detail why the Secretary of State decided to reject the findings of the first Inspector and order a second inquiry. Furthermore, the fact that the Secretary of State’s decision may be appealed ensures that there is accountability in the system. Of course accountability is reduced if an appellant is unable to make a fully informed appeal but the Commissioner does not believe this is a relevant consideration in light of the information already disclosed to the complainant.
52. The Commissioner is of the view that in terms of the public interest it is the Secretary of State’s decision and knowing what factors it was based on, that is relevant. It is the Secretary of State who is responsible and accountable for the decision rather than his or her officials. As regards any potential appeal it is the Secretary of State’s decision rather than any internal considerations that carry legal weight. Having reviewed the redacted information the Commissioner finds that disclosure would add nothing to public understanding of the reasoning behind the decision and that therefore the public interest in this information being released is very much reduced. If disclosure of the redacted information would reveal any impropriety or irregularity in the manner in which the planning application was handled then it is likely that the public interest would weigh more heavily in favour of disclosure. However, the Commissioner has found no evidence of this.
53. In light of the above, the Commissioner finds that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. In reaching this view the Commissioner has attributed particular weight to the importance in allowing the officials and ministers within the public authority a safe space to determine the application without the risk of reopening the debate whilst the issue was still ‘live’.
54. Under the cover of this notice the Commissioner is also providing the public authority with a short confidential annex which elaborates on his reasons for concluding that the public interest in maintaining the exception outweighs the public interest in disclosure. It is not possible to include this extra analysis within the main body of the notice as to do so would reveal the nature of the withheld information.

⁴ Department for Education and Skills v Information Commissioner and The Evening Standard [EA/2006/0006], para. 75.

Regulation 13 – Personal information

55. The public authority has also redacted the names of some officials from the information supplied to the complainant. It appears to the Commissioner that names of both officials within the public authority and from other government departments have been withheld. The public authority has not commented specifically on its decision to redact these names but the Commissioner has considered whether disclosure would be justified under regulation 13(1). This provides that information shall not be disclosed if it is the personal data of which the applicant is not the data subject and one of either two conditions is satisfied. The first condition provides that information shall not be disclosed if it would breach any of the data protection principles.

56. The Commissioner is satisfied that the names of officials featured in the requested information constitute personal data. Personal data is defined in the Data Protection Act 1998 as:

...data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

57. The Commissioner considers that it is the first data protection principle which is relevant in this case. The first data protection principle provides that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.

58. Having considered the context in which the submissions were made to government, the Commissioner has decided that disclosure of the names of officials which were redacted from these submissions would be unfair. The Commissioner's decision is based on the following analysis.

- The Commissioner does not consider there to have been a reasonable expectation that Officials who are recorded in the documents falling within the scope of the request would be likely to have their names released as part of the disclosure of internal communications about the planning application. This is particularly the case because disclosure of these names would not increase the public's understanding of the matter in question; otherwise it would be less likely to be the case that these officials could reasonably expect their names to not be disclosed in connection with this material.
- The Commissioner does not consider that these officials who feature in the submissions should be publicly responsible or accountable for their involvement in Ministerial decisions of the Department. The Commissioner

considers that relating these officials' names to the information released to the complainant would have this consequence and that, given the high profile and contentious nature of this particular application, disclosure would be unfair as those officials may be asked to account for their own views and involvement as well as the actual decision. Rather, he believes that in this case, accountability for the decision properly rests with the Secretary of State.

- The Commissioner notes that the name of the Decision Officer, the official within the public authority responsible for dealing with the case on the Secretary of State's behalf, was included in the decision letter sent to all parties on 27 October 2005. The Commissioner considers that there is a greater public interest in knowing the name of the Decision Officer rather than the names of any further officials within the department who may have made recommendations to the Secretary of State but who were not responsible for the decision.

59. The Commissioner is satisfied that disclosure of the names of officials would be unfair. Therefore he has not gone on to consider whether disclosure would meet one of the conditions in schedule 2 of the Data Protection Act 1998.

Regulation 12(5)(b)

60. In his request for an internal review of 25 July 2007 the complainant said that his request did not extend to information which constituted legal advice provided to Ministers. However, the complainant noted that any legal professional privilege which the information attracts could be waived. In any event, the complainant subsequently challenged the public authority's decision to withhold information under regulation 12(5)(b) and for this reason the Commissioner has gone on to consider the public authority's application of this exception.

61. Regulation 12(5)(b) provides that a public authority may 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 enquiry of a criminal or disciplinary nature. The Commissioner is of the view that this exception may also be relied on to refuse to disclose information to which a claim for legal professional privilege could be maintained in legal proceedings. The Information Tribunal has supported this approach when it said that it considered that this exception:

"...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 rights of individuals or organisations to a fair trial." It added that to do this, the exception *"...covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation"*.⁵

62. Firstly, the Commissioner has considered whether the information redacted under this exception is covered by legal professional privilege and secondly, whether there would be an adverse effect as a result of disclosure.

⁵ *Kircaldie v The Information Commissioner & Thanet Borough Council* [EA/2006/001], para.21.

Legal professional privilege

63. Legal professional privilege is a common law concept designed to protect the confidential relationship between a legal advisor and client. The Information Tribunal described legal professional privilege 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, or hers 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.”⁶

64. Information will attract privilege where it constitutes legal advice between a legal advisor and a client in a professional capacity and is held for the dominant purpose of providing legal advice. There are two types of legal professional privilege. Legal advice privilege can be claimed where no litigation is contemplated or pending. Litigation privilege can be claimed where litigation is contemplated or pending.
65. The public authority has argued that legal professional privilege extends beyond just an assessment of legal risk and includes legal views on the validity of different options, the interpretation of policies and the approach taken by the Inspector. The Commissioner agrees with this interpretation. Having reviewed the redacted information, and bearing in mind the role of the public authority’s legal team in determining planning decisions as described in paragraphs 21 and 22 above, the Commissioner is satisfied that this information attracts legal advice privilege as it reflects legal advice provided by the public authority’s legal advisors in a professional capacity. As such the Commissioner finds that the information redacted under regulation 12(5)(b) constitutes information to which a claim for legal professional privilege could be maintained in legal proceedings.
66. It is noted that legal professional privilege can be waived where the party which owns the information decides to waive the privilege. Waiver of legal profession privilege occurs where permission is given by a client to make the information available to a third party without restriction or where the information is treated or presented in such a way that it can be implied from that action that privilege has been waived. However, the Commissioner has seen no evidence to suggest that legal professional privilege has been waived in respect of any of the information that has been withheld from the complainant under this exception.

Adverse effect

67. Even if information is subject to legal professional privilege, regulation 12(5)(b) will only be engaged if disclosure of that information would have an adverse affect on any of the factors listed in the exception. Arguments that disclosure “might” or “could” have an adverse affect will not be sufficient.

⁶ Bellamy v Information Commissioner & The Secretary of State for Trade and Industry [EA/2005/0023], para.9.

68. The Commissioner has considered the interpretation of the word “would”. In doing so the Commissioner believes that the Information Tribunal’s interpretation of “would prejudice” is relevant in this context.⁷ The Information Tribunal has explained that in considering “would prejudice” it may not be possible to prove that prejudice would occur beyond any doubt whatsoever but that the likelihood of prejudice must at least be more probable than not.
69. The public authority has argued that disclosure of the redacted information would prejudice the government’s ability to defend its legal interests by unfairly exposing its legal position to challenge. The Commissioner also considers that disclosure would put the government at an unfair advantage in any potential legal proceedings. Given that the Secretary of State’s final decision on the application is subject to appeal, in which both sides should be treated fairly, the Commissioner is in agreement that this amounts to an adverse effect resulting from disclosure and therefore finds that the exception is engaged.

Public Interest Test

70. As noted in the previous section, under regulation 12(1)(b) information may only be refused if an exception applies and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner therefore also undertook a public interest test in respect of the information withheld under this exception.
71. The Commissioner believes that there is a strong element of public interest inbuilt in legal professional privilege and notes the comments of the Information Tribunal when it stated that:
- “...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public 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 cut case...”⁸*
72. In that case legal professional privilege was described as “a fundamental condition” of justice and “a fundamental human right”.
73. Therefore the Commissioner’s approach is to adduce an initial weighting in favour of maintaining this exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. However there are also factors specific to this case that favour maintaining the public interest.
74. First of all, the public authority has argued, in addition to its claim that disclosure would prejudice its ability to defend its legal interests, that it is in the public

⁷ Hogan & Oxford City Council v Information Commissioner [EA/2005/0026 & EA/2005/0030]

⁸ Bellamy, para.35.

interest that decisions on planning applications are taken in a fully informed legal context. This is because, the public authority has suggested, officials advising the Secretary of State need to be able to rely on comprehensive and fully informed legal advice in order to make effective recommendations. The Commissioner is satisfied that were the redacted legal advice disclosed, at the time the request was made, this would undermine the public authority's ability to rely on legal advice and therefore make effective recommendations which he accepts would not be in the public interest.

75. The Commissioner recognises that the public interest in maintaining the exemption would be somewhat diminished in cases where the legal advice can be said to be "stale". However, in this case, at the time the complainant made his request the Secretary of State had agreed to re-determine the application and a final decision had yet to be made. In this sense the legal advice was still "live" as it was still being relied upon and any decision made would be open to legal challenge. Furthermore the Commissioner notes that the redacted legal advice was still recent in so far as it had been generated in the course of considering this particular planning application. The Commissioner is of the view that the public interest in protecting legal professional privilege will also be stronger in cases where the advice is recent. This is because the advice is still likely to be used in a variety of decision-making processes and the Commissioner accepts that such processes would be likely to be affected by disclosure.
76. As noted in the previous section, there is a public interest in greater transparency and accountability in the planning process and especially with regard to a high profile and controversial application such as this. However, disclosure of the redacted information would reveal little about why the Secretary of State decided to re-open the inquiry and subsequently decided to grant planning permission. The Commissioner considers that in terms of the public interest this is the most relevant factor and so in the absence of this type of information the Commissioner finds that the public interest in disclosure is reduced.
77. As well as the general public interest in promoting transparency and accountability in the way government operates, the Commissioner accepts that there is a specific public interest in showing whether the Government takes decisions based on sound legal advice in important cases such as this. However the Commissioner does not accept that the arguments in favour of disclosure are sufficiently strong as to warrant disclosure. This is because there is a strong public interest in protecting legal professional privilege, both in general and on the particular circumstances of this case, and disclosure would reveal little about how the Secretary of State arrived at the decision on this application.
78. The Commissioner finds that in all the circumstances of the case the public interest in maintaining the exception in regulation 12(5)(b) outweighs the public interest in disclosure.

The Decision

79. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
- The public authority correctly withheld the parts of the submissions covered by regulation 12(4)(e).
 - The public authority correctly withheld the parts of the submissions covered by regulation 12(5)(b).
 - The names of officials featured in the submissions are covered by the exception in regulation 13.
80. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR.
- The public authority breached regulation 11(4) by failing to carry out an internal review within 40 working days.
 - The public authority breached regulation 14(3) by failing to specify that it was also relying on the exception in regulation (12)(5)(b) when refusing the request.
 - The public authority breached regulation 5(1) by failing to make available to the complainant the information it had identified as not being covered by regulation 12(5)(b).
 - The public authority breached regulation 5(2) by failing to make available to the complainant, within 20 working days, the information it had identified as not being covered by regulation 12(5)(b).

Steps Required

81. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The public authority shall make available to the complainant the information previously redacted under regulation 12(5)(b) but which it now acknowledges should have been disclosed, namely:
- Paragraph 33 of the 26 January 2004 submission.
 - Paragraph 3 of the 2 February 2004 submission.
82. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

83. 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.

Other matters

84. Part XII, paragraph 63 of the Code Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004, explains that authorities must consider complaints, decide whether they have complied with their requirements under EIR, and respond to the complainant within 40 working days from the time when the complaint was received.

In this case, it appears to the Commissioner that the authority took over eight months to respond to the complainants representations. In his view, this suggests non-conformity with part XII, paragraph 63 of the EIR Code.

The Commissioner has previously highlighted his concerns about delays in conducting internal reviews in this, and other cases as part of the practice recommendation issued to the authority on the 3 November 2008.⁹

⁹ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/dclg_pr_03_11_08.pdf

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

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

Dated the 18th day of November 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Regulation 5 - Duty to make available environmental information on request

5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 11 - Representation and reconsideration

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.

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.

11(3) The public authority shall on receipt of the representations and free of charge –
(a) consider them and any supporting evidence produced by the applicant; and
(b) decide if it has complied with the requirement.

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.

11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –
(a) the failure to comply;
(b) the action the authority has decided to take to comply with the requirement;
and
(c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental information

12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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.

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 the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 13 - Personal data

13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 14 - Refusal to disclose information

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.

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.

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).