

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

Date 14 November 2006

Public Authority: Stafford Borough Council
Address: Civic Centre
Riverside
Stafford
ST16 3AQ

Summary

The complainant asked Stafford Borough Council for a copy of legal advice supplied to it by its legal adviser, in connection with a planning dispute. The request was declined by the Council on the basis that the information was subject to legal professional privilege and was therefore exempt under section 42 of the Freedom of Information Act 2000. After requesting a copy of the withheld information and further information about the refusal, the Information Commissioner concluded that although the request should have been dealt with under the Environmental Information Regulations 2004, the claim that the information was subject to legal professional privilege nevertheless applied and the information was exempt from disclosure by virtue of regulation 12(5)(b).

The Commissioner's Role

1. The Environmental Information Regulations (the "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. The complainant made the following request for information dated 16 May 2005, to Stafford Borough Council:

“...I request that you forward to me a copy of the barrister’s report and the brief served by the Council. I make this request under the Freedom of Information Act 2000 and require the document to be submitted within 20 working days.”

3. The Council refused the request under section 42 of the Act in a letter dated 26 May 2005, stating:

“Your request for a copy of the barrister’s report and instructions in accordance with the Freedom of Information Act 2000 subject to legal professional privilege are exempt from disclosure under the Act. I can confirm that the advice is still current and it would not be in the public interest to disclose such information.”

4. The complainant asked the Council for an internal review of the decision in a letter dated 16 June 2005.
5. The Council confirmed its decision not to release the information in a letter dated 7 July 2005. The Council argued that it must be free to consult its legal advisers in confidence and that it was not in the public interest to disclose the advice given in this case. It also commented that as the matter related to enforcement action by the Council, the advice may also be exempt under section 31 of the Act (law enforcement). The letter advised the complainant of his right to complain to the Information Commissioner if he remained unhappy with the outcome.

The Investigation

Scope of the case

6. The Commissioner has identified that the advice provided by Counsel relates to a statement in the Planning Inspectorate’s report concerning a planning application for a development on a residential property. Following the decision of the Tribunal in case *EA/2006/001 Kirkaldie v IC and Thanet District Council*, the Information Commissioner believes that this information falls within the scope of the EIR as the advice relates to an issue which is likely to affect the environment. He has therefore considered whether the Council handled the request in accordance with the EIR.
7. The complainant specifically asked the Commissioner to consider whether the Council’s refusal to supply the requested information was appropriate. Although the complainant originally requested two items of information (the Council’s brief to its barrister and his resultant advice), it is evident from his subsequent correspondence with the Council that he is concerned with the contents of the barrister’s advice, and so the Information Commissioner’s investigation has focussed on access to this.
8. The complainant also raised other issues that are not addressed in this Notice because they are not relevant to the requirements of Part 2 and 3 of the Regulations and fall outside the Commissioner’s powers.

Chronology

9. The Information Commissioner contacted the Council on 1 August 2006, and explained that the request should have been treated as an EIR request. The Council was asked for further information about the decision to refuse the request and for a copy of the withheld information.
10. The Council responded in a letter dated 8 August 2006, enclosing the withheld information and explaining that it contained legal advice from its barrister in relation to a planning matter for which enforcement action had been considered. The advice was provided confidentially by the barrister and was given in connection with the Council's development control regulatory function. It was envisaged that the advice would be pertinent when considering other, similar cases. The Council restated the belief that because of the nature of the information and the circumstances in which it was obtained, it was subject to legal professional privilege.
11. Following a review of the withheld information and internal discussions about the issues raised by the case, on 22 August 2006 the Information Commissioner asked the Council whether the content of the barrister's advice had ever been disclosed to a third party. He also asked for clarification about the status of the other individual involved in the planning dispute, who the complainant alleged was a Council employee.
12. The Council replied in a letter dated 20 September 2006 that the barrister's advice had not been disclosed to any third parties. It also explained that the other individual involved in the planning dispute was part of a joint working initiative with officers of the Council, and as such had worked on Council premises, but was not a Council employee and had not had access to the barrister's advice.

Analysis

13. The full text of the relevant regulations can be found in the legal annex, however the salient points are summarised below.

Procedural matters

14. The Council's initial refusal notice was inadequate. It failed to give sufficient information about the exception, about how the public interest had been considered in the decision to withhold the information and about the complainant's right of appeal. The Information Commissioner has dealt with the matter by drawing the Council's attention to the requirements of regulation 14.

Exception

15. In considering whether the exception is valid, the Commissioner has taken into account that the EIR is designed to be applicant blind and that disclosure should be considered in the widest sense; that is, to the public at large. In view of this,

the Commissioner has proceeded with the investigation on the basis that if the information were to be disclosed it should be available to any member of the public.

16. When examining the arguments in favour of disclosure of the information requested and the maintenance of the exception, the Commissioner has taken into account evidence gathered from the complainant and the Council, as well as advice provided during internal discussions and legal advice.

Regulation 12(5)(b)

17. The Council has argued that the information requested is subject to legal professional privilege, for which an exemption is provided in the Freedom of Information Act at section 42.
18. However the Information Commissioner considers that the information falls within the scope of the EIR. The EIR contain no direct equivalent of section 42, however in case EA/2006/001 *Kirkaldie v IC and Thanet District Council* (para 22) the Information Tribunal decided that regulation 12(5)(b) is similar in purpose to section 42. The Commissioner accepts this view.
19. The Tribunal further noted that where an initial refusal has been issued under the wrong legal instrument it would be reluctant to prevent a public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime (para 44). The Information Commissioner has therefore followed the Tribunal's findings and treated the Council's refusal to supply the information as a claim that regulation 12(5)(b) applies.
20. The Commissioner has considered whether the Council was correct to apply the exception at regulation 12(5)(b) of the EIR. He has firstly considered whether the information is subject to legal professional privilege.
21. The Commissioner has seen the barrister's advice and is satisfied that the information contained within it constitutes legal advice to the Council. The advice discusses points of law in relation to the General Permitted Development Order 1995 and was supplied to the Council in confidence.
22. The Commissioner is satisfied that the information was supplied by legal counsel. The document itself is in the standard format used to provide Counsel's Opinion, and includes the name of the barrister who provided the advice and the name of the Chambers where he practices from. The Commissioner is therefore satisfied that the legal adviser was competent to provide the Opinion.
23. In determining whether legal professional privilege continues to apply to the requested information, the Commissioner has considered whether the Council has waived legal professional privilege by publicly disclosing the legal advice. The Council has provided an assurance that the advice has not been disclosed to any third parties. There is no evidence to suggest that this is not the case therefore the Commissioner is satisfied with this assurance.

24. The Commissioner therefore believes that this advice is subject to legal professional privilege and that the privilege has not been waived.

Public Interest

25. Under subparagraph 12(1)(b) all the exceptions provided by the Regulations are subject to a public interest test. So, it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest – in favour of disclosure

26. The Commissioner recognises that there is an inherent public interest in public authorities being transparent in the decisions they take in relation to planning matters in order to promote accountability. If reasons for decisions are made public, there is a strong argument that this should improve the quality of future decisions.
27. The Commissioner accepts there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them were taken by public authorities and in them having the ability to challenge those decisions. In this case, access to the definition of “adjacent” contained in the barrister’s advice would give the public a better understanding of the basis of that decision.
28. The Commissioner accepts that there is a public interest in disclosing information which will help determine whether public authorities are acting appropriately. In this case the third party involved in the planning dispute has a separate working relationship with the Council (although there is no suggestion here that he has exerted undue influence). So, it is in the public interest that as much information relating to the planning dispute as possible be available for public scrutiny, so as not to undermine public confidence in the Council.

Public interest – in favour of maintaining the exemption

29. However, the Commissioner also acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In case EA/2005/0023 *Bellamy v the Information Commissioner and the DTI* (para. 35), the Tribunal stated that “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.
30. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. This reflects the decision in *Bellamy* (para. 35) where the Tribunal observed “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...”

31. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. English law considers “privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned” (Bellamy, para. 8). Therefore, there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.
32. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of legal professional privilege in this case outweighs the factors in favour of disclosure.
33. The Commissioner found the exception at regulation 12(5)(b) to be relevant and so he has not considered whether section 31 of the Act, as suggested by the Council, also applies.

The Decision

34. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the EIR.

Steps Required

35. The Commissioner requires no steps to be taken.

Right of Appeal

36. 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@dca.gsi.gov.uk

37. 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 14th day of November 2006

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

31. - (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2) The purposes referred to in subsection (1)(g) to (i) are-
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and

- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

42. - (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

Environmental Information Regulations 2004

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.