

Freedom of Information Act 2000 (Section 50)

Decision Notice

17 October 2006

Public Authority: Department of the Environment (Northern Ireland)
Address: Clarence Court
10 – 18 Adelaide Street
Belfast
BT2 8GB

Summary

The complainant, on 3 May 2005, requested information from the Department of the Environment for Northern Ireland (“the Department”) in respect of the legal opinion provided to the Department in relation to the demolition of the building known as “Rock Castle.” The Department withheld the information on the basis that it is exempt under section 42 of the Freedom of Information Act 2000 (“the Act”). The Commissioner is satisfied that the withheld information falls within the terms of this exemption and that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Commissioner is satisfied that the Department did not comply with section 17(3)(b) of the Act in that it did not state in its refusal notice to the complainant the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner is satisfied that the Department did not demonstrate, in its refusal notice, any consideration of the public interest arguments in favour of disclosure. However, in other respects, the Commissioner finds that it has dealt with the complainant's request in accordance with Part 1 of the Act. In the light of this, the Commissioner requires no steps to be taken to achieve compliance with the requirements of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision in respect of the complainant's request dated 3 May 2005.

The Request

2. On 3 May 2005 the complainant wrote to the Planning Service, an agency of the Department of the Environment (Northern Ireland) (“the Department”), to request information in relation to that building known as Rock Castle seeking “copies of

the statutory consultations and legal opinion leading to the Planning Service's decision in this case."

3. The Department subsequently wrote to the complainant acknowledging its request and advising that a response would be sent to it by 1 June 2005.
4. On 6 June 2005 the Department responded to the complainant. The Department advised that the *"only statutory consultation carried out in relation to Rock castle, Portstewart was carried out by Environment and Heritage Service (EHS)."* A copy of this information was provided to the complainant.
5. In that letter the Department further advised the complainant that it had decided not to release to it the opinion of counsel on the relevant case. The Department stated that this opinion fell within the exemption under section 42 of the Act, dealing with legal professional privilege.
6. The Department went on to advise the complainant that *"There is a very substantial public interest in maintaining the confidentiality of legally privileged material, as it is in the public interest that the decisions taken by government are taken in a fully informed legal context and that the legal advice is not disclosed. Having carried out the relevant balancing exercise, the Department's view is that it would not be appropriate to disclose this information."*
7. On 17 June 2005 the complainant sought an internal review by the Department of that decision. On 24 June 2005 the Department acknowledged that request for review.
8. On 18 August 2005 the Department reported the result of that internal review to the complainant. The Department upheld its original decision to withhold the legal advice obtained by the Department in relation to this matter. The Department claimed that the information did fall under the terms of section 42 of the Act stating *"it is clear that the information requested falls within the term litigation privilege, as the legal advice was obtained in the context, and for the purpose, of prospective litigation."*
9. The Department advised that the public interest had been considered and that in this case the Department considered that *"the legal advice obtained by the Department has a relevance to its enforcement functions extending considerably wider than the particular circumstances of Rock Castle. Consequently, I have concluded that the balance of the public interest lies in favour of withholding the information, and that the Department was correct in doing so."*
10. On 14 October 2005 the complainant contacted the Commissioner to complain about the way its request for information of 3 May 2005 had been handled by the Department.

The Investigation

Scope of the case

11. Following the Department's decision not to pursue a prosecution arising from the demolition of the Rock Castle building, the complainant requested copies of the statutory consultations and counsel's opinion that led to this decision. As stated above, by letter dated 6 June 2005 the Department provided a copy of "*the only statutory consultation carried out in relation to the demolition of the building*" and stated in that letter that the opinion of counsel would not be released as it fell under section 42 of the Act.
12. The complainant advised the Commissioner of the complainant's view *that "widespread speculation about the case... is harmful to both the [Department] and to [the Complainant]. ...the public interest would be served by adopting the lesser of two evils approach, hence it would be in favour of disclosing rather than withholding the information in this case."*
13. The complainant also raised an issue with the Commissioner concerning a request for information made by the complainant to the Department on 10 June 2005. This request was for information relating to the gathering of evidence in support of any prosecution in relation to this matter, the 'enforcement file.' The Department refused to provide the 'enforcement file' on the basis that it fell within the terms of the exemption under section 30 (1)(b) of the Act. The Department issued a refusal notice in relation to that request on 10 August 2005. No internal review by the Department was sought by the complainant in relation to this request. The Commissioner is satisfied that the handling of this separate request should not be considered in this Decision Notice.
14. The Commissioner in this Decision Notice will consider only the response of the Department to that request for information which was made by the Complainant on 3 May 2005 and which was the subject of internal review by the Department at the complainant's request.

Chronology

15. On 24 May 2006 the Commissioner wrote to the Department and requested sight of a copy of the information which formed the subject of the complainant's request. The Commissioner also requested that the Department explain how it had reached its decision to withhold the requested information from the complainant.
16. In response, the Department provided the Commissioner with copies of the requested legal advice under cover of its letter dated 25 May 2005 and advised that the reasons for withholding the information were as set out in the Department's letter to the complainant dated 18 August.
17. Having considered the Department's response and perused the documents provided by it, the Commissioner wrote to the Department on 26 May 2006 requesting further detailed submissions on the impact of the release of the information upon the enforcement functions of the Department. The

Commissioner also asked the Department to provide further information on its consideration of the balance of the public interest in this case.

18. In addition the Commissioner contacted the Department by telephone to enable the Commissioner to better understand the Department's consideration of the public interest and on 21 June 2006 the Department wrote to the Commissioner with further submissions in support of its decision to withhold the information.
19. In response to the Commissioner's request for further clarification, the Department provided the Commissioner with further detailed submissions on 3 August and 21 August 2006.

Findings of fact

20. In summary, the Department submitted to the Commissioner that the withheld information was information in respect of which a claim to legal professional privilege could be maintained. The Department stated that the information attracted litigation privilege. The Department confirmed that the information, the legal opinion of counsel, was obtained in the context and for the purpose of prospective litigation. The Commissioner accepts these submissions and is satisfied that the information therefore falls under the terms of the exemption under section 42 of the Act. Section 42 of the Act is set out in the Appendix to this Notice.

Analysis

21. As section 42 of the Act is a qualified exemption the Department considered whether the public interest would best be served by the disclosure of the information or by maintaining the exemption. In its consideration of the balance of the public interest the Department has submitted to the Commissioner that the release of the withheld information would have a direct and detrimental impact upon the enforcement functions of the Department in respect of Article 44 of the Planning (NI) Order 1991 (as amended). The Commissioner has considered the potential impact of the disclosure of the opinion of the Department and is satisfied that disclosure of the opinion would have a detrimental impact on the enforcement function of the Department.

Procedural matters

22. In its refusal notice to the complainant dated 6 June 2005, the Department stated that the information requested fell *"within the terms of the exemption under section 42 of the Freedom of Information Act"*

The Department went on to state that *"There is a very substantial public interest in maintaining the confidentiality of legally privileged material , as it is in the public interest that the decisions taken by government are taken in a fully informed legal context and that the legal advice is not disclosed. Having carried out the relevant balancing exercise, the Department's view is that it would not be appropriate to disclose this information."*

23. Section 17 of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain what exemption or exemptions have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. While the Department did state which exemption it sought to rely upon the Commissioner is of the view that it did not state with sufficient clarity why the withheld information fell under the terms of the exemption under section 42.
24. The Department was required, by virtue of sections 17(3)(b) of the Act, to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Department did not demonstrate in its refusal notice any consideration of the public interest arguments in favour of disclosure.
25. The Department has advised the Commissioner that it did subsequently address this issue in its letter to the complainant dated 18 August 2005. However, the Commissioner finds that the consideration of the public interest reflected in this correspondence was not adequate and that the purpose of this letter was to advise the complainant of the outcome of the internal review and not to provide a refusal notice as required by section 17 of the Act.
26. Accordingly, the Commissioner finds that the Department has failed to meet the obligations imposed upon it by section 17 of the Act.

Application of the exemption under section 42

27. Legal professional privilege is a common law principle which protects from disclosure communications between a professional legal adviser and his/her client reflecting the special nature of the relationship between legal adviser and client. There are two categories of legal professional privilege: litigation privilege, where litigation is contemplated or pending, and advice privilege, where litigation is not in contemplation. The Commissioner has carefully examined the withheld information and is satisfied that litigation privilege attaches to the withheld information and that the exemption under section 42 of the Act is engaged.

Consideration of the public interest

28. The Commissioner, being satisfied that the exemption under section 42 is engaged in relation the withheld information, has considered the public interest arguments in relation to that exemption.
29. The Commissioner is of the view that that there are arguments both for maintaining the exemption and in favour of disclosing the withheld information.
30. The Commissioner recognises that there is an inherent public interest in the transparency of the decision making of public authorities. There is a strong argument that such transparency will improve the quality of future decisions and promote accountability.

31. The Commissioner recognises that there is a strong public interest in disclosing information where to do so would determine and demonstrate whether public authorities have acted appropriately.
32. The Commissioner recognises that it is in the public interest to disclose information where such disclosure will encourage public participation in and improve understanding of participation in public debate of important issues of the day and that, where public authorities must give reasoned explanations for their decisions, the quality of such decisions may be improved. The Commissioner recognises the issues in this matter have been the subject of public debate and speculation.
33. The Commissioner considers that there is also a strong public interest in the protection of the established principle of legal professional privilege. This principle allows clients to confidently seek legal advice and allows for full and frank exchange between advisor and client. The Commissioner accepts that if such advice was to be routinely disclosed, public authorities may be reluctant to seek advice for fear of damaging their position in relation to future proceedings.
34. The Commissioner recognises that it is important that, in the particular circumstances of this case, the Department was, and remains, able to obtain full and frank legal advice on this issue. As legal advice in contemplation of legal proceedings must be fair, frank and reasoned, the Commissioner recognises that it will inevitably highlight the strengths and weaknesses of the client's position.
35. The Commissioner is satisfied that, in the particular circumstances of this case, the disclosure of the withheld information would compromise the ability of the Department to exercise its functions in respect of section 44 of the Planning (NI) Order 1991 (as amended).
36. The Commissioner recognises the strong public interest in the Department exercising its enforcement functions with the benefit of free and frank legal advice and accepts that the release of the withheld information would have a direct and detrimental impact upon those functions.
37. The Commissioner is mindful of the strong public interest in protecting the established principle of legal professional privilege. In considering the public interest in this case the Commissioner has had regard to the view of the Information Tribunal as expressed in matter of Bellamy v The Information Commissioner (Appeal Number EA/2005/0023). At paragraph 35 of that judgment the Tribunal commented as follows:

“As can be seen from the citation of the legal authorities regarding legal professional privilege, 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”.
38. The Commissioner is not satisfied that in the present case the countervailing considerations outlined above are of sufficient weight to override the “inbuilt

public interest” in protecting privileged communications between legal advisor and client. The Commissioner recognises that at the time of the request there was a public interest in the Department protecting its position in relation to its functions in respect of section 44 of the Planning (NI) Order 1991 (as amended). The Commissioner recognises the strong public interest in protecting the established principle of legal professional privilege. The Commissioner is satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption does outweigh the public interest in disclosure of the withheld information.

39. In conclusion, the Commissioner is satisfied that the withheld information is exempt information in the context of section 42 of the Act and that the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

The Decision

40. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The application of the exemption under section 42 of the Act
41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with section 17 of the Act:
- The Department did not give sufficient consideration, in all the circumstances of the case, to whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
 - The Department did not give notice to the complainant of the reasons for claiming that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Steps Required

42. The Commissioner requires no steps to be taken.

Other matters

43. Although it does not form part of this Decision Notice, the Commissioner recommends that the Department review its practice in relation to future requests for information where the Department seeks to withhold information on the grounds of a qualified exemption. The Commissioner recommends that the Department takes such steps as are necessary to ensure that public interest

arguments in favour of disclosure are fully considered in addition to those public interest arguments which might be made in favour of maintaining the exemption at issue.

Right of Appeal

44. 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

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 17th day of October 2006

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annexe

1. **Section 1(1)** provides that –

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

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

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

2. **Section 17 (1)** provides that –

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or*
- on a claim that information is exempt information*

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

3. **Section 17(3)** provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.’

4. **Section 2(2)(b)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

5. **Section 42** provides that:

“42. – (1) Information in which a claim to legal professional privilege or, in Scotland, to confidentiality of communication 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.”