

Environmental Information Regulations 2004

Decision Notice

Date: 3 July 2007

Public Authority: City of Bradford Metropolitan District Council
Address: City Hall
Centenary Square
Bradford
BD1 1HY

Summary

The complainant requested a copy of Counsel's advice that the authority had obtained in relation to a planning application and the documents that the authority had provided Counsel with the instructions. The authority refused to supply the complainant with the information citing section 42 of the Act, legal professional privilege. The authority did however, refer the complainant to a summary of the advice that it had circulated. The Commissioner finds that the information requested falls within the definition of environmental information and so is dealt with under the Environmental Information Regulations 2004. In this case, there is no difference in outcome resulting from the application of the Regulations as opposed to the Act. The Commissioner also finds that by referencing the advice received from Counsel in the publicly available summary, the authority have waived privilege and the relevant exception, 12(5)(b), is therefore, not engaged. Furthermore, the enclosures are separate, discrete documents and are not just part of the instructions and so again, the exception is not engaged. The authority is required to provide the complainant with the information requested.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for environmental information made to a public authority has been dealt with in accordance with the requirements of Parts 2 and 3 of the Environmental Information Regulations 2004. This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. In a letter to the City of Bradford Metropolitan District Council (the "Council") dated 3 March 2005, the complainant requested the following,
 - *'a copy of the written advice received to date [in relation to the development of the Low Secure Psychiatric Hospital on Bierley Lane, Bradford BD4] from Frances Patterson Q.C.'*
4. The Council acknowledged this request in a letter dated 16 March 2005. The Council also informed the complainant that, *'A summary of the advice of Counsel has already been released.'*
5. The complainant sent a follow up request on 18 March 2005 asking for,
 - *'a copy of any documentation that BMDC (the Council) sent to legal counsel, accompanying BMDC's instructions to same.'*
6. The Council sent an acknowledgement to the complainant on 22 March 2005 explaining that it would deal with both of the requests together.
7. On 24 March 2005, the Council issued a refusal notice to the complainant claiming that, *'...both sets of documentation form part of a request for and the obtaining of legal advice that could potentially be used in legal proceedings. As such, there is a qualified exemption from disclosure under the Freedom of Information Act 2000. The Council has considered the circumstances of this case, and takes the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested. The Council has released a public briefing note that summarises the conclusions of Counsel on all material issues that have been raised. This has been widely circulated however, I enclose with this letter a further copy.'*
8. The complainant wrote to the Council in a letter dated 14 April 2005 challenging the Council's refusal to supply the information requested. The complainant offered the following reasoning.
9. *'I have been advised that HLS's (Head of Legal Services) analysis in this regard is seriously flawed and that I should ask you to reconsider HLS's position. If HLS's analysis is right then the Council could effectively use the ground she has cited as a basis for refusing to disclose any documents under any circumstances on the basis that those documents might subsequently be relevant in legal proceedings. Such a position is wholly untenable. At present litigation is not in contemplation.'*
10. *The present position is that the Council was asked to make a decision on whether or not the development at Bierley required a change of use from the Class C2 to Sui Generis before it could be used as a low secure hospital. The Council has relied, without further explanation or the giving of detailed reasons, on the advice of Frances Patterson QC to state that no change of use was required. It follows,*

in the interests of open government, public accountability and transparency that there is a very clear and demonstrable public interest in the public having sight of the opinion so that we can all be made aware of the actual reasoning and analysis that apparently underlies the Council's decision on this issue. I am well aware that Frances Patterson's opinion is a legally privileged document. However, under the Freedom of Information Act that is not, in itself, a bar to disclosure. Instead there is a clear duty on the Council to consider whether or not disclosure of the opinion should be made. In this case where the opinion has clearly been expressly relied on by the Council and cited as the basis for a decision without further reasons being given as to how the Council's decision has been reached, the case for disclosure would appear to be overwhelming.

11. *The case for disclosure of the actual documents sent to Frances Patterson is even more compelling. Apart from any formal instructions to Counsel sent by the Council's Legal Services Department, the other documents sent to Frances Patterson cannot have been privileged in any way. Furthermore, none of those documents can be said to have in any way been prepared in contemplation of litigation. It follows that they are all documents which can and should properly be disclosed by the Council without objection...*
12. *...Once again, it is self evident that there is a clear and powerful public interest in such documents being disclosed so that the public in Bradford and in Bierley at large can assess for themselves the information that the Council has relied on and the information that it has sent to its Barrister so that she can advise...'*
13. The complainant wrote again to the Council on 26 April 2005 to ask when an acknowledgement or a response could be expected.
14. On 3 May 2005 the Council replied, apologising for *'the delay in answering your request for a review of our FOI decision, we should be in a position to complete this shortly after the general election.'*
15. The complainant found it necessary to write a further letter to the Council, dated 20 June 2005, requesting a response to his appeal.
16. The complainant eventually received a response to the appeal in a letter from the Council dated 12 August 2005. The Council argued that, *'The concept of legal advice privilege is not new and it has been clearly defined in a number of recent court judgements that would clearly prevent the application of the exemption in the manner you indicate ... The instructions given to counsel are also clearly a legally privileged document. The concept of legal privilege extends to confidential communications between a client and their professional legal advisor and includes all documents forming a part of any request for and the obtaining of legal advice.'* It added that the public interest arguments in favour of disclosure put forward by the complainant had been considered alongside the public interest in *'maintaining legal advice privilege to ensure full and frank communication between a client and their lawyer in the interests of the administration of the law and the proper conduct of public and private business.'* The Council also mentioned that it had taken into account the public briefing note that summarised

the opinion. However, it maintained reliance on the exemption and upheld the original decision to withhold the information requested.

The Investigation

Scope of the case

17. On 28 June 2005, the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 1. *'Refusal by City of Bradford Metropolitan Council to disclose the requested information. I believe that, for the reasons set out in my letters to the Council of 14th and 26th April 2005, the reason given for the Council's decision not to accede to my request is fundamentally flawed under the Freedom of Information Act 2000 and therefore the Council should be required under the Act to disclose the information that I have requested.'*
18. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
 2. *'Unacceptable delay in response from the Council's FOI Officer to my request for a review of the Council's decision in (1) above.'*

The Act does not set any statutory time limit in respect to how long a public authority should take to conduct a review. The Commissioner's duty under regulation 18, section 50 of the Act, is to make decisions on whether a request had been dealt with in accordance with Part I of the Act. This matter is therefore, addressed in the 'Other Matters' section at the end of this notice.

Chronology

19. On 1 September 2005, the complainant forwarded to the Commissioner a copy of the review outcome that had been received from the Council subsequent to the complaint to the Commissioner. A letter that the complainant had written to the Council in response, dated 31 August 2005, was also included.
20. In this letter, the complainant draws attention to two further points as to why the Council should release the information. The first being that, *'... the mere existence of legal privilege is not a public interest ground for non-disclosure'* and the second referring to the fact that the Council had published a summary and had stated that the advice received from Counsel was *'very clear'*. Therefore, if *'her advice does not deviate from the summary of it that you published, why, given your obligations under the Act, are you not prepared to disclose that advice in full?'*
21. The Council replied to the complainant's letter on 4 October 2005 stating that it saw no reason to depart from its previous decision.

22. The Commissioner contacted the Council by letter dated 27 November 2006, asking specifically why it felt that by providing a summary it had not in effect waived legal privilege in this instance. The Council were provided with a copy of the Information Tribunal's decision, Appeal Number: EA/2006/0001 [Mr M S Kirkaldie v Information Commissioner](#) (4 July 2006). The Tribunal had found that Thanet District Council had waived legal professional privilege because a Councillor had mentioned '*the basis on which the advice was sought and the main opinion given in that advice*' in a public meeting. The Council were also asked to comment further on its reasons for refusing to disclose the enclosures that had been provided to Counsel along with the instructions.
23. The Council responded to the Commissioner on 11 December 2006 sending copies of the enclosures that had been requested. The Council noted that the appeal decision referred to was decided under the Environmental Information Regulations 2004 and not the Act and stated its belief that the EIR did not apply to the information. In respect of the issuing of a summary of the advice the Council stated, that it does not '*consider the question of waiver applies in this case. The Council's briefing note merely sets out the Council officer's summary view of the legal position having taken Counsel's opinion. It did not set out in detail the rationale behind Counsel's legal advice nor the possible legal consequences of any decision or action that the Council might make.*'
24. In relation to the enclosures supplied to Counsel with the instructions, the Council responded that, '*They were specifically listed in the Instructions and appended thereto. The Council took the view that they therefore formed part of a privileged document.*'
25. The Council was contacted again on 13 December 2006 and informed that the Commissioner was not persuaded by the arguments presented thus far and asked for clarification as to whether the Council were claiming advice privilege or litigation privilege. The Commissioner requested that the Council demonstrate that the enclosures were either created and existed solely as part of, or for the purposes of legal advice; or were originally created in contemplation of litigation.
26. In its reply dated 19 December 2006 the Council sent a copy of the legal advice subject to the request. The Council argued that the summary, '*...does not, nor does it purport, to fully detail the possible legal implications of any final decision the Council might make*'. Furthermore that the Council was informed by the case of *Balabel v Air India* in that, "*legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context*".
27. In respect of the enclosures, the Council confirmed that it was claiming advice privilege and that, '*The Council does not contend that any of the requested enclosures were individually either created or existed solely for the purpose of legal advice. Rather, that the papers formed part of document i.e. the Instructions to Counsel, created for this purpose (sic).*'
28. The Commissioner wrote to the Council once more on 17 April 2007, explaining that he was minded to find that privilege had been waived, and invited the Council

to release the information to the complainant voluntarily. He informed the Council that unless this informal resolution could be achieved by 4 May 2007, he would proceed with issuing a decision notice.

Analysis

29. The information requested consists of legal advice in relation to planning law. The Commissioner finds that this type of information falls with the definition of environmental information as set out regulation 2(1)(c). Enclosures included with the instructions to Counsel are also subject to the request. Upon examination, the Commissioner is satisfied that the enclosures can also be classified as environmental information under regulation 2(1)(c). The Council dealt with this information request under the Act, however, the exemption cited, namely section 42 legal professional privilege, has a broadly equivalent exception within the EIR at regulation 12(5)(b). In this instance, the authority's application of the Act as opposed to the EIR has not affected the arguments or the outcome.
30. The Commissioner notes that in Appeal Number: EA/2006/0001 [Mr M S Kirkaldie v Information Commissioner](#) (4 July 2006) the Information Tribunal concluded that regulation 12(5)(b) is similar in purpose to section 42. This appeal also considered the implications of the request being addressed under the incorrect legislation. The Tribunal confirmed that it would be reluctant to prevent a public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime. The Commissioner has accepted these findings and therefore treated the Council's refusal to supply the information in this case as a claim that regulation 12(5)(b) applies.

Procedural matters

31. When the Council issued the refusal notice dated 24 March 2005, it stated that, in its view, the public interest in maintaining the exemption outweighed the public interest in disclosing the information requested. However, it neglected to put forward its reasons, or the matters considered, when reaching this decision as is required by regulation 14(3)(b) of the EIR, and in the Act, section 17(3)(b).

Exception

32. In order to determine whether the Council's claim to legal professional privilege in respect of the information requested is valid, the Commissioner must be satisfied that (amongst other things) the information consists of communication between legal advisor and client and the client has not deliberately, or inadvertently, waived the privilege.

Counsel's Advice

33. It is clear to the Commissioner that the Counsel's advice, sought and received by the Council, constitutes communication between legal advisor and client.

34. The other main issue to resolve in this matter is whether the Council waived that privilege by publicly referring to the content of the advice.
35. The Council have freely admitted from the outset that a summary of advice given by Counsel was released and freely available, indeed, describing it as a '*public briefing note*' that has been '*widely circulated*'. However, the Council claim that the briefing note is the Council officer's summary of the legal position after having taken Counsel's opinion, and that the note did not reproduce the advice in detail.
36. The Commissioner is not persuaded by these arguments. The Commissioner does not accept that the summary is that of the Council officer's opinion rather than Counsel's advice. Quoting one sentence from the summary as an example, '*She also assesses whether the Council would any credible case to revoke or modify the operative planning permission and concludes that it would not*'. This is quite clearly Counsel's opinion, not the opinion of the Council officer.
37. Having compared the summary briefing note and Counsel's advice, the Commissioner finds the summary to be an accurate reflection of the advice given and finds nothing substantial in the advice that is not referred to in the summary. To compare the advice line by line with a summary would be neither practical nor productive. A summary is exactly that, and cannot ever be expected to reproduce every nuance of the original text. Besides, a party cannot 'cherry-pick' the parts of legal advice they choose to disclose. If a party discloses privileged information in part, then it is considered that privilege has been waived in its entirety.
38. Therefore, by publicly releasing the findings of Counsel in the briefing note, the Commissioner finds that the Council has indeed waived its claim to legal professional privilege in respect of Counsel's advice.
39. The Commissioner has considered whether disclosure would have an adverse effect for the purposes of regulation 12(5)(b) and if so to what extent. If this cannot be substantiated, the exception cannot apply. It is the Commissioner's view that the Information Tribunal's comments in Appeal Number: EA/2005/0026 and EA/2005/0030 [Mr C M Hogan and Oxford City Council v Information Commissioner](#) (17 October 2006) in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
40. As the Commissioner has concluded that the Council has waived its privilege there can be no adverse effect to the course of justice and so the exception cannot apply.
41. As privilege has been waived and there is consequently no adverse affect, the exception is not engaged and there is no need for the Commissioner to consider the public interest under regulation 12(1)(b).

Enclosures included with the instructions to Counsel

42. The documents the Council sent with the instructions to Counsel have also been requested and refused on the grounds of legal professional privilege. The Commissioner considers that these documents also satisfy the definition of environmental information and so has assessed the case for disclosure under EIR rather than the Act. The Council admit that the documents neither were created nor existed solely for the purpose of legal advice, preferring instead to claim that they all formed part of the same document that was subject to legal privilege, namely the instructions to Counsel.
43. When deciding whether information is subject to legal professional privilege, the 'purpose test' is applied. This is explained further in the Commissioner's Freedom of Information Awareness Guidance No 4, it states, 'For legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or the seeking or provision of legal advice'.
44. Therefore, the Commissioner needs to form a view as to whether the enclosures could be said to be part of the instructions or supplemental. The Commissioner is not persuaded by the Council's argument. The enclosures are considered separate, discrete documents appended to the instructions. The fact that they are referred to and listed in the instructions to Counsel does not automatically make them part of the same. Therefore, the Commissioner finds that the claim to legal professional privilege in respect of the enclosures fails.
45. Again, the Commissioner has been informed by Appeal Number: EA/2006/0001 [Mr M S Kirkaldie v Information Commissioner](#) (4 July 2006) and Appeal Number: EA/2005/0026 and EA/2005/0030 [Mr C M Hogan and Oxford City Council v Information Commissioner](#) (17 October 2006), and has considered the adverse effect that would be caused by release of the information in question. Considering that the Commissioner finds that the claim to legal professional privilege fails, there is no adverse effect in this regard and therefore, the exception is not engaged in respect of the enclosures included with the instructions to Counsel.
46. As the exception is not engaged there is no need for the Commissioner to consider the public interest under regulation 12(1)(b).

The Decision

47. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR.
- The public authority failed to satisfy the requirements of regulation 14(3)(b) in that it issued an inadequate refusal notice.
 - The public authority inappropriately withheld the requested information under

regulation 12(5)(b) of the EIR and therefore, did not satisfy its obligation to make the information available under regulation 5(1).

Steps Required

48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

That the information requested be supplied to the complainant.

49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

50. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

51. In relation to the time taken to complete the internal review the Commissioner acknowledges that there is no statutory deadline for conducting internal reviews and notes that the Council apologised to the complainant over the time taken.

52. However, the Commissioner is disappointed with the length of time taken by the Council to conduct its internal review and refers it to the Commissioner's recently published guidance on this subject, 'Freedom of Information Good Practice Guidance No 5 – Time limits on carrying out internal reviews following requests under the Freedom of Information Act 2000', which advocates that as a rule public authorities carry out such reviews within 20 working days.

Failure to comply

53. 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.

Right of Appeal

54. 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 3rd day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Environmental Information Regulations 2004

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

–

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 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.

Regulation 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);
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

(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;

Regulation 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.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

(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).

Freedom of Information Act

Section 17

(1) A public authority which, in relation to any request for information, 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 –

(b) specifies the exemption in question,

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 -

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

Legal Professional Privilege

Section 42(1) provides that –

“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.”