

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 May 2007

Public Authority: Department of the Environment for Northern Ireland
Address: Room 6-20
Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Summary

The complainant on 1 January 2005 made a request to the Department of the Environment for Northern Ireland (the Department) for a copy of a planning enforcement file relating to his planning application. The Department allowed the complainant to view the file but withheld some information contained in the file. In responding to his request, the Department subsequently applied the exemptions under sections 40, 42 and 30 (1) of the Freedom of Information Act 2000 to parts of the file, some of which he had already viewed. Following correspondence with the Information Commissioner, the Department dealt with the request under the Environmental Information Regulations 2004 (EIR), relying on regulations 12(5)(b) and 13(1) to withhold the information sought. As a result of the intervention of the Commissioner, the Department undertook to disclose a redacted copy of correspondence with its in-house solicitors to the complainant and withheld the remaining information. The Commissioner is satisfied that the remaining redactions contained in the legal correspondence are exempt by virtue of regulation 12(5) (b) of the EIR. The Commissioner is satisfied that to disclose the outstanding third party personal information contained in the enforcement file would be unfair to the individuals involved and is therefore exempt under Regulation 13 of the EIR. The Commissioner is of the view that in relation to that correspondence between the Department and its external legal advisors exception 12 (5) (b) is not engaged and in any event the privilege in this information has been waived due to the complainant being privy to its content. The Commissioner orders the Department to release that information to the complainant.

The Commissioner's Role

- 1 The Environmental Information Regulations 2004 (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 IV of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On the 1 January 2005, the complainant requested from the Department a full copy of the enforcement file relating to his planning application, reference no. X/2000/1311/F.
3. On 26 January 2005 the Department contacted the complainant to state that they had written to all third parties concerned in this case to request their permission to release the information which relates to them.
4. On 27 of January 2005, the Department allowed the complainant to view the file but withheld some information as follows:-
 - a) *The personal data of individuals who provided the Department with information relevant to its enforcement action*
 - b) *Correspondence between the Department and its in house solicitors (the Departmental Solicitors office – 'the DSO') relating to their request for advice*
 - c) *Correspondence between the Department and the external solicitors whose services retained in relation to the ongoing enforcement action*
5. On 21 April 2005 the Department wrote to the complainant refusing to release the above information applying sections 40(2), 42 and section 30(1) (b) of the Act.
6. On 23 April 2005 the complainant requested an internal review from the Department and on 31 May 2005 the Department upon completing its internal review upheld its reliance on section 40, 42 and 30(1) (b) of the Act.
7. On 4 July 2005 the complainant wrote to the Commissioner seeking a request a review of the Department's decision to withhold information. This request was received by the Commissioner on 6 July 2005.
8. As a result of the intervention of the Commissioner in this case, the Department subsequently treated the complainant's request as a request for environmental information withholding, the information referred to at paragraph 4 above, in reliance on regulations 12 (5) (b) and 13 (1) of the EIR .

The Investigation

Scope of the case

9. On 4 July 2005, the complainant contacted the Commissioner to complain about the manner in which his request for information had been handled by the Department. The complainant specifically asked the Commissioner to investigate the decision of the Planning Service to withhold information supplied to it in connection with his planning application for his home (address supplied). The complainant raised other issues with the Commissioner in relation to his planning application. The Commissioner did not investigate those matters because they do not relate to the Department's handling of his request.
10. The Department in responding to the complainant's request allowed him to view his enforcement file but withheld some the information referred to at paragraph 4 from that file. In responding to his request, the Department subsequently applied the exemptions under sections 40, 42 and 30 (1) of the Act to parts of the file, some of which he had already viewed. Following correspondence with the Information Commissioner, the Department dealt with the request under the EIR, relying on regulations 12(5) (b) and 13(1) to withhold the information sought.
11. Subsequently, as a result of the intervention of the Commissioner, the Department disclosed a redacted copy of the correspondence with its in-house solicitors to the complainant and withheld the remaining information (the *withheld information*). This decision notice deals solely with the application of the EIR by the Department to the withheld information at the time of the request.

Chronology

12. On the 29 November 2005, the Commissioner informed the Department that it was commencing an investigation of the complaint received on the 06 July 2006 from the complainant. The Commissioner sought to clarify all that correspondence in relation to this complainant both with the Department and the complainant as there appeared to be some overlap in the correspondence presented to the Commissioner.
13. Having clarified those documents which relate solely to this specific request for information the Commissioner contacted the Department to discuss the complaint. Having ascertained the nature of the withheld information, the Department agreed with the Commissioner that the request was covered by the EIR and they would issue a fresh decision under the EIR
14. After having received the Department's representations on the application of the EIR as well as a copy of the withheld information the Commissioner wrote to the Department on the 28 July 2006 regarding their application of the exceptions to this information.
15. Having received the Department's response on the 18 September 2006 the Commissioner then discussed with the Department the possibility of informal

- resolution of this case. On the 08 November 2006 the Department requested some time to review the withheld information with a view to possible informal resolution. It was not until the 21 December 2006 however that the Department provided an interim response to the Commissioner indicating a further response would be made to the Commissioner no later than mid January 2007. Despite assurances from the Department no such response has been received by the Commissioner to date.
16. Having not received a completed response from the Department, the Commissioner wrote to the Department to set out his views regarding informal resolution of this case. The Commissioner indicated to the Department that if informal resolution was not pursued in this case, he would issue a decision notice in the matter.
 17. The Commissioner on the 05 February 2007 wrote to the complainant to ascertain whether he would have any objections to the information caught by his request being publicly available should the Commissioner order full or partial release of this information. The Commissioner explained to the complainant the implications of information being released under EIR to the public at large.
 18. On the 22 February 2007 the Commissioner telephoned the Department to discuss the possibility of release of a piece of correspondence from the Department and the DSO. The Department subsequently undertook to release a part of this information to the complainant.

Findings of fact

19. The complainant had submitted to the Department an application to construct a private dwelling. The Department failed to 'determine' (make a decision on) the application within the required time period and the complainant submitted a Non-Determination Appeal to the Planning Appeals Commission ("PAC") The complaint was granted permission by the PAC subject to certain conditions being met. As soon as the complainant started building works the Department received complaints from members of the public that the construction was not in compliance with the PAC ruling. Enforcement proceedings were commenced by the Department. Following this action, the complainant submitted a further planning application for the construction of his dwelling as well as a fresh appeal to the PAC. The PAC refused the application.
20. The complainant then made an application to the High Court for judicial review of the PAC's decision to refuse his application for planning permission. This resulted in its decision being quashed by consent and a fresh determination being undertaken. This new determination was made some time after the complainant's request for information to the Department. Throughout the period up until the fresh determination the Department stayed its enforcement action.

Analysis

Which Information Access Regime Applies?

21. The Department first dealt with the complainant's request under the provisions of the Act. However as a result of the intervention of the Commissioner, the Department reconsidered its decision and then dealt with the request under the EIR.
22. The definition of environmental information is to be found at regulation 2(1) of the EIR as follows;
- “...environmental information has the same meaning as in Article 2(1) of the Directive, namely ‘any information in written, visual, aural, electronic or any 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;*
- (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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).’*
23. The Commissioner is satisfied that the withheld information falls within paragraph 2(1)(c) of EIR because it is information on planning enforcement action. Such enforcement action is in the Commissioner's view a measure which affects or is likely to affect the elements and factors referred to at regulation 2(1)(a) and (b) above. In this case, the elements and factors likely to be affected include the landscape, waste and possibly noise because the measure concerns the construction of a private dwelling house. The Commissioner is also satisfied that the withheld information falls within regulation 2(1)(c) of the EIR as an administrative measure designed to protect these elements. Accordingly the Commissioner finds that the complainant's request is a request for environmental information and ought to have been dealt with such by the Department. He is

satisfied therefore that the information is exempt under s39 of the Act. The effect of the exemption provided for at 39 of the Act is to divert the complainant's request to a different information access regime, in this case, the EIR.

24. The Commissioner, in considering the withheld information between the Department and its legal advisors (both internal and external) is mindful of Information Tribunal's decision in the case of Malcolm Kirkaldie v Information Commissioner and Thanet District Council. (Appeal No EA/2006/001) ("the Kirkaldie case "). At paragraph 44 of that decision, the Tribunal referred to this issue in the context of such information and dealt with the transfer of exemptions/exceptions as between differing access regimes. The Tribunal states:

"We would be reluctant to find that a public authority could not argue that a similar exemption or exception could not be applied under the correct legal instrument. However we would not necessarily extend this finding to other exemptions or exceptions which had no relationship to original exemption or exception claimed."

Procedural matters

25. The Department had originally dealt with the complainant's request under the Act and had informed the complainant on 26 January 2005 that it was writing to all third parties to request their permission to release their information. The Department advised the complainant in that letter, as required by section 17 (2)(b) of the Act, that it would respond to him within 7 days.

26. However, the Department did not respond to the complainant until 21 April 2005 some 16 weeks after his initial request. The Commissioner did draw this to the Department's attention in his letter of 28 July 2006 and reminded the Department of their obligations under section 10(1) of that Act as well as their obligations under section 17(2) of the Act. Section 17 (2)(b) states:

"at the time when the notice under subsection (1) is given the applicant, the public authority (or in the case falling within section 66 (3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1) (b) or (2) (b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

27. Subsequently the Department dealt with the request under the EIR. The provisions in those regulations for the timing of responses to information requests differ slightly from the above. Under regulation 5 (2) of the EIR *"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"*

28. In the context of it's obligations under the EIR, the Commissioner also highlighted to the Department their duty under regulation 7 of the EIR which allows a public authority a period of 20 working days to 40 working days if it *'reasonably believes that the complexity and volume of the information requested means that it is*

impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.'

29. The Commissioner notes that the Department have by way of explanation, advised that the reason for this substantial delay was because this was one of the earliest cases they had dealt with under the Act/EIR. However, the Commissioner will continue to monitor the Department's timeliness in response to request for information.

Exceptions

Personal Information of Third Parties – Regulation 13 of the EIR

30. Some of the requested information includes personal information of living individuals who provided the Department with details relevant to its enforcement action against the complainant. The information comprises correspondence containing information identifying those individuals (their names and addresses) as well as their opinions and views in relation to the actions of the complainant. The Commissioner is satisfied that this information is personal data within the meaning of section 1(1) of the Data Protection Act 1998 ("the DPA"). The Commissioner is satisfied that the opinions of those third parties concerning the actions of the complainant are also his personal data. The Department refused to disclose this information to the complainant.
31. The Department has subsequently advised the Commissioner that it is currently considering its policy in relation to requests made by individuals who are the subject of enforcement action in light of its obligations under section 7 of the DPA (the subject access provisions). Although not part of the Commissioner's decision in this case, in ease of the complainant, the Commissioner has considered whether or not the Department met its obligations under the subject access provisions in withholding the third parties views and opinions. The Commissioner is mindful of the provisions of section 7(4) of the DPA which states that:
- "(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless-*
- (a) the other individual has consented to the disclosure of the information to the person making the request, or*
 - (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual."*
32. The Department has advised the Commissioner that in this case, it did seek the consent of the individuals to release of their information to the complainant and that this was refused. The Commissioner has considered whether the Department was wrong in considering that the release of this personal information to the complainant was not reasonable in the circumstances.
33. The Commissioner is mindful of the provisions of section 7(6) of the DPA as follows:

“(6) In determining for the purposes of subsection (4) (b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to –

- a. any duty of confidentiality owed to the other individual,*
- b. any steps taken by the data controller with a view to seeking the consent of the other individual,*
- c. whether the other individual is capable of giving consent, and*
- d. any express refusal of consent by the other individual.”*

The Commissioner has noted that the opinions and views of third parties in relation to the conduct of the complainant were provided in circumstances giving rise to an obligation of confidence and that the information, at the time of the request, was not accessible to the public at large. The Commissioner accepts the Department's view in this case that a duty of confidentiality was owed to the third parties involved and that it was not reasonable in all the circumstances to disclose this information to the complainant. Therefore the Department has met its obligations under the subject access provisions of the DPA.

34. Some of the withheld information relates solely to the other individuals. Regulation 13 of the EIR makes provision for exceptions to the disclosure of environmental information. Regulation 13 of the EIR makes provision for exceptions to the disclosure of environmental information and this includes personal data of which the person requesting the information is not the data subject (third party data). It provides that such information must not be disclosed where its disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act as set out in the annex accompanying this decision notice.

35. The first Data Protection Principle states:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
at least one of the conditions in schedule 2 is met...”*

This principle introduces the requirement that as a requisite of fair and lawful processing, personal data shall not be processed unless at least one of the conditions in Schedule 2 of the DPA (“the conditions for processing”) is met and, in the case of the processing of sensitive personal data at least one of the conditions in schedule 3 of the DPA (“the conditions for processing sensitive data”) is also met. In this case, the withheld information contains no sensitive personal data and therefore only the schedule 2 conditions need be considered. A list of these is available at annex 1 to this decision notice. The Commissioner is mindful that meeting a schedule 2 condition will not, on its own, guarantee that processing is fair and lawful. The general requirement that data be processed fairly and lawfully must be satisfied in addition to meeting a schedule 2 condition.

36. The Commissioner notes that generally objectors to any proposed planning application(s) can have their details made available for public viewing. However this has not been the case for those complainants in enforcement proceedings who alert the Department to possible breaches of planning approval and planning

law. Many of those individuals will often be neighbours and individuals living in close proximity to the alleged respondent. The Department has advised the Commissioner that there is a long standing expectation that such individuals expect that their identity will be kept confidential. The Commissioner specifically has considered whether disclosure of the identity of such persons would breach the first data protection principle.

37. In this case the Commissioner considers that to disclose this third party information would contravene the 'fairness' requirement of the first principle of the DPA. In arriving at this conclusion he is mindful of the reasoning in his decision of 19 July 2006 in the case of Mid Devon District Council (ref: FER0070849, available at www.ico.gov.uk). The Commissioner considers that as in the Mid Devon case, release of this information would be unfair and against the reasonable expectations of the individuals in that personal details/identities of their complaints would be disclosed.
38. The Commissioner is satisfied therefore that the exception under regulation 13(1) is engaged in respect of that personal information detailed at paragraph 4(a) above. Since that exception is an absolute one, the Commissioner is not required to consider whether the public interest in maintaining this exception outweighs the public interest in disclosing this category of withheld information.

Legal Advice to the Department from its in-house advisors.

38. In relation to this category of information, which comprises of a correspondence between the Department and its in house solicitors in regard to the enforcement action against the complainant, the Department informed the Commissioner that the complainant was not shown this information at the time when he inspected his enforcement file, nor was it subsequently disclosed by the Department. The Department on the intervention of the Commissioner undertook to release some of this correspondence to the complainant, this decision notice deals with that remaining redacted information.

Regulation 12(5) (b) states:

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."

The Commissioner is aware that an important aspect of a 'fair trial' is the ability to receive legal advice free from premature disclosure. The Information Tribunal in the case of Mr Trevor Kitchener and the Information Commissioner and Derby City Council (Appeal no. EA/2006/0044 Promulgation Date 20 December 2006). ("Kitchener case") recognises this vital part of the administration of our justice system:

"Legal systems which recognise the importance of a fair trial recognise that an inherent part of a fair trial is access to legal advice and representation for those

involves in litigation. If either the lawyer or the client could be forced to disclose what either said to the other (whether orally or in writing) as part of that process it would undermine the very point of the process."

40. In relation to this category of withheld information, the Commissioner is satisfied that it comprises legal advice relating to the enforcement action against the complainant which was not disclosed to him. He accepts the Department's representations that this category of the withheld information was brought together for the dominant purpose of seeking legal advice. Therefore the Commissioner is satisfied that this information is subject to legal advice privilege. Further there is no evidence in this case that this privilege has been waived by the Department.
41. The Commissioner is satisfied that the information includes advice as to what should prudently be done in the relevant legal context of this particular case. The Commissioner considers that to release this particular information into the public domain at the time of the complainant's request would have adversely affected the course of justice. That is because it would involve public access to privileged information when enforcement action by the Department was still pending. In these circumstances, the Commissioner is satisfied that the exception under regulation 12 (5) (b) applies. Having concluded that an exception applies to this part of the withheld information, the Commissioner has considered the Department's arguments in relation to the balancing of the public interest in this case. A public authority must also apply a presumption in favour of disclosure as at regulation 12(2) of the EIRs when applying an exception. This means that if the arguments are evenly balanced for withholding and disclosing information, the information must be disclosed.
42. In regard to those factors in favour of openness and transparency the Commissioner has taken account of the clear public interest in favour of individuals being informed of the reasons behind decision making in terms of legal action which engages the public authority as well as increasing public confidence and trust in this being carried out in an equitable and cost effective manner. The Commissioner in weighing those factors favouring non-disclosure considered those arguments relating to a fair hearing in that everyone who is party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent. The Commissioner considered the maintenance of privilege as important in striking a 'fair balance' between the parties. In his decision regarding the Attorney General's advice on the legality of Iraq war the Commissioner considered the public interest test in terms of withholding and disclosing legal advice sought by the Government, he concluded '*arguments for maintaining the exemptions are sufficiently powerful that the balance of competing public interest does not require the disclosure of those parts of the recorded information which were of a preliminary, provisional or tentative nature or which may reveal legal risks, reservations, or possible counter-argument.*' (Enforcement Notice issued by the Commissioner on the 22 May 2006 to the Legal Secretariat to the Law Officers" Part D paragraph 10)

43. The Commissioner is satisfied that the arguments in favour of disclosure in this case such as transparency of advice sought by Government Department's in relation to how they carry out enforcement proceedings and the public interest in calling a public authority to account is sufficiently outweighed by the public interest in maintaining the confidentiality of information subject to legal professional privilege. The Commissioner is therefore satisfied that in relation to that information relating to advice from the Department's in-house solicitors that the exception at 12 (5) (b) is engaged and the public interest in this case favours maintaining the exception.

The Legal Advice from External Solicitors

44. The Department in its refusal notice of the 21 April 2005, refused to disclose to the complainant the information in relation to the legal advice from external solicitors retained by the Department stating it was subject to legal professional privilege under section 42 of the Act. The Commissioner noted that the Department allowed the complainant to view this information at an inspection of the file on the 27th January 2005.
45. The information within this category which was made available to the complainant upon his inspection of the enforcement file but later refused to him in the Department's notice to the complainant of the 21 April 2005 includes:
- a. Information between the Department and its external solicitors in relation to the proceedings in respect of the enforcement action, venues, adjournments etc...
 - b. Advice on the procedure, conduct and the running of this case.

The Department also sought to rely on section 30(1)(b) of the Act to withhold this information. Section 30 is a qualified exemption relating to investigations conducted by the authority which may lead to a decision by that authority to institute criminal proceedings. Having further reviewed the complainants request as a result of discussions with the Commissioner's staff, the Department sought to rely on regulation 12 (5) (b) of the EIR in the place of s.42 and s.30 (1) (b).

46. In this case the Commissioner has considered representations from the Department stating that the advice from the Department's external solicitors in this case is privileged and attracts the doctrine of legal professional privilege as it was created for the dominant purpose of seeking legal advice. The Department argued that to disclose this privileged information would inhibit the candour and frankness of the advice provided to the Department by its legal advisors. The Department further contend that although the legal advice is provided with respect to an individual case, the legal implications will be analogous to other cases that the Department will be engaged in, both now and in the future, as the Department is continually involved in enforcement proceedings. This would the Department claimed; adversely affect the course of justice by disadvantaging it in current and future actions. The Department submitted to the Commissioner that the disclosure of the advice would reveal elements of the Department's investigations and procedures and that this would prejudice ongoing actions. This

would in the Departments view adversely affect its ability to conduct an inquiry of a criminal nature in relation to enforcement action.

47. Exception at 12 (5) (b)

The Commissioner is mindful of the decision of the Information Tribunal in the Kirkaldie case in relation to the purpose of this exception (Case ref: Malcolm Kirkaldie v The Information Commissioner et al Appeal No EA/2006/001, 04 July 2006 para21) which states:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.”

48. The Commissioner in considering the facts of this case in relation to applicability of the exception at 12 (5) (b) believes that disclosing that information comprising of correspondence between the Department and its external legal advisors, which the complainant has already seen would not in relation to any retrospective or prospective enforcement action taken by the Department adversely affect the course of justice in this particular case. The Commissioner is mindful that the right to a fair hearing requires that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial advantage or disadvantage vis-à-vis his opponent. In terms of striking a 'fair balance' between the parties in this case the Commissioner is satisfied that the information in relation to the correspondence between the Department and its external legal advisors is sufficiently innocuous so as not to adversely affect any purported action which the Department may take against the complainant. The position of the complainant in terms of defending any prospective enforcement action would not be benefited to any degree by the disclosure of this information nor would the Department be disadvantaged to any degree. In any event the Commissioner is satisfied that the Department has waived any claim to legal privilege in this information by showing it to the complainant and has noted the Department did not seek to restrain or imply any restraint on the part of the complainant to his viewing of that information.

Waiver of privilege

49. In its correspondence of the 18 September 2006 the Department confirmed to the Commissioner that the complainant had viewed that information relating to the correspondence between the Department and its external solicitors upon which the Department had marked with purple tabs when it supplied this part of the withheld information to the Commissioner. The Department had claimed this information to be to be exempt under Regulation 12 (5) (b). The Department stated to the Commissioner in its letter of the 18 September 2006, the complainant, either as the direct interlocutor or through his legal advisors would have been fully aware of the content of the information concerned. The Commissioner notes that at the time of inspection by the individual the

information was not withheld but was subsequently by the Department in response to his request.

50. The Commissioner relying upon the dicta of Lord Hailsham LC in *Banning v Right* [1972] 1 WLR 972, 978-9 who pointed out that 'waiver' is derived from the same root as 'waif', namely a person or thing abandoned. The Commissioner is of the view that 'waiver' does not necessarily connote an intentional or indeed a deliberate conscious abandonment of a right of the part of the waiving party but that once the substance of privileged material is divulged to one's opponent, even by accident, even when there is no intention to waive privilege it may be *prima facie* lost.¹
51. The Commissioner is satisfied that since the Department had allowed the complainant to view this 'privileged' information that it could no longer assert privilege against him as an opposing party. The Commissioner looked further to the authority of *Derby v Weldon (no 10)* [1991] 1 WLR 660, 670 where a company had passed a copy of confidential legal advice to a director before litigation against the director was contemplated, it was held no longer able to claim privilege in those documents in the subsequent proceedings. The Commissioner also considered the judgement of the Information Tribunal in the *Kirkaldie* case which looked at the issue of waiver of privilege within the EIR context. In that case it was deemed by the tribunal that legal privilege had been waived by the Council solicitor providing a summary of legal advice during a council meeting. The Commissioner is aware that on the facts of that case the waiver occurred in front of a large number of people and the legal advice concerned an issue which affected or had an impact on a potentially substantial group of people.
52. In this particular case the Commissioner is of the view that the adverse affect would be minimal in relation to the administration of justice or to the rights of the individual concerned or to the Department in this case. The Commissioner is satisfied the Department made the information available to the complainant on the basis that he was privy to much of the content of the information by virtue of his court attendance; they did not seek to restrain nor in any way imply restraint as to that use of any privileged material that the complainant viewed. The complainant confirmed to the Commissioner that he had no objections to any of the information in relation to this file being released to the world at large. As the Department allowed the complainant to view the information without restraint, the contents of which relate to that individual and his enforcement proceedings, release of this information would not place either party to the proceedings in relation to this request at a disadvantage. Unlike the *Kirkaldie* case this information does not potentially impact upon a large number of people and therefore the Commissioner is satisfied that in the circumstances of this case the exception is not engaged as there would be no adverse affect on the course of justice arising from the disclosure of non-privileged legal advice in this particular case to this individual. Since that exception is not engaged the Commissioner did not consider the public interest under Regulation 12 (1) (b).

¹ See *Re Briamore* [1986] 1 WLR 1429, 1431.

The Decision

53. The Commissioner's decision in this case is that the Department dealt correctly with the information referred to at paragraphs 4 in relation to that information relating to third parties as well as that legal advice between the Department and its in-house solicitors in accordance with the requirements of the EIR.
54. However, the Commissioner is not satisfied that the Department dealt correctly with the remaining information as it did not make available that information referred to paragraph 4 relating to the advice between the Department and its external solicitors to the complainant in accordance with regulation 5(1) of the EIR.

Steps Required

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

To make available that information relating to correspondence with the Department and its external solicitors to the complainant.

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

Other matters

57. The Commissioner reminded the Department of their duties under Section 10 and section 17 of the Act as well as regulations 5 and 7 of the EIR in his letter of the 28 July 2006. The Commissioner has not specified any remedial steps as regards other matters arising from this investigation, but will continue to monitor the timeliness element of the Department's handling of requests brought to his attention under both regimes.

Failure to comply

58. 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

59. 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 21st May 2007

Signed

**Marie Anderson
Assistant Commissioner
Northern Ireland.**

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

Annex 1: Legislation in relation to this decision notice

Environmental Information Regulations 2004 Legal Annex Sections

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 2(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and
- (d) “personal data”.

Regulation 5 - Duty to make available environmental information on request

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 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 7 - Extension of time

Regulation 7(1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

Regulation 12 - Exceptions to the duty to disclose environmental information

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

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

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 –

- (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.

Regulation 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

Regulation 13 - Personal data

Regulation 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.

Regulation 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 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

Regulation 14 - Refusal to disclose information

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(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.

Regulation 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).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11;
and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Relevant Statutory Obligations under the Act

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.”

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.”

Section 17 (2) provides that:

“Where-

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) (b) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1) (b) or (2) (b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.ffff

Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct

Personal Information

Section 40 provides that:

- “(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
 - (a) it constitutes personal data which do not fall within subsection(1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
 - (a) in a case where the information falls within any of 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 this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)

Schedule 2: Conditions relevant for the purposes of the 1st principle : processing of personal data.

1. The data subject has given his consent to the processing.
2. The processing is necessary
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary-
 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, to be taken to be satisfied.

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.”

Section 42(2) provides that –

“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.”

