

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 July 2007

**Public Authority:** Forest Heath District Council  
**Address:** District Offices  
College Heath Road  
Mildenhall  
Suffolk IP28 7EY

### Summary

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The complainant asked the public authority for information relating to a specific planning issue. The public authority withheld it under section 42 of the Freedom of Information Act 2000 (section 42) claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner found that the requested information should have been considered under the Environmental Information Regulations 2004. Nevertheless the claim that the information was subject to legal professional privilege still applied and the information was exempt from disclosure by virtue of regulation 12(5)(b). The complaint was partially upheld.

### The Commissioner's Role

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

### The Request

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2. On 16 March 2005 the complainant requested the following:
  - *full copies of your Council's written instructions to counsel*
  - *any notes of conference with counsel*
  - *learned counsel's opinion on the matter*

- *any correspondence, file/meeting notes relating to the lawful use and planning of this site including any internal correspondence/e-mails/paper or electronic correspondence*.
3. On 23 August 2005 the public authority declined to disclose the information relying upon the section 42 exemption.
  4. On 6 September 2005 the complainant requested an internal review.
  5. On 17 October 2005 the public authority confirmed an internal review had taken place and that it was upholding the original decision on the same ground.

## The Investigation

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### Scope of the case

6. On 28 November 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - as the council had acknowledged that the legal advice was related to complainant's property and planning application, the disclosure of Counsel's opinion was clearly a matter of public interest;
  - that the council appeared to have shared the information with Members of the council;
  - in a letter from the public authority to complainant dated 19 July 2004 the public authority 'may be alluding to Counsel's advice'.
7. On 1 December 2006 the Commissioner informed the public authority that following the decision of the Information Tribunal in *Kirkaldie v the Information Commissioner and Thanet District Council EA/2006/001*, he believes that the requested information falls within the scope of the EIR under regulation 2(1) (c).
8. This is because he has looked at the requested information and is satisfied that the original planning permission would be an administrative measure under regulation 2(1)(c) that would, or would be likely to, affect the elements in (a) and (b).
9. The Commissioner has therefore considered whether the public authority handled the request in accordance with the EIR.

### Chronology

10. On 5 October 2006 the Commissioner asked the public authority to clarify which legal privilege it was relying upon. The public authority responded on 31 October 2006, identifying that specific information attracted litigation privilege and the rest of the information attracted advice privilege.

11. On 7 December 2006 the Commissioner contacted the public authority and asked for copies of the instructions to Counsel for legal advice. The public authority responded on the 21 December 2006 providing all the information including an explanation of why the information was exempt under regulation 12(5)(b) of the Regulations.
12. On 11 and 15 January 2007 the Commissioner asked the public authority for further clarification about what information it was claiming litigation privilege for. The Commissioner also identified two pieces of information and asked for clarification about claiming advice privilege with regard to them. The public authority responded on 25 January 2007 providing the clarification.

## Analysis

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13. The Commissioner will now deal with this case by considering firstly, procedural breaches and secondly, the public authority's use of the regulation 12(5)(b) exception, including its application of the public interest test. A full text of the relevant statute and regulations referred to is contained in the legal annex.

## Procedural matters

14. Regulation 5(2) of the Regulations provides that when a request for environmental information is received by a public authority, it should make the information available as soon as possible and no later than 20 working days after receipt. The request for information was made on the 16 March 2005 and the public authority did not respond to the applicant until 23 August 2005.
15. Accordingly the Commissioner finds that the public authority has failed to meet the obligation imposed upon it by regulation 5 of the Regulations.

## Exception

16. The public authority initially dealt with this request under the Freedom of Information Act 2000.
17. However it is the Commissioner's view that the requested information falls within the EIR (see para 7 above). Although there is no apparent equivalent exception under the Regulations, the Information Tribunal has decided that regulation 12(5)(b) provides the same protection. In *Kirkaldie v Information Commissioner and Thanet District Council (Appeal Number: EA/2006/001)* the Tribunal stated that the purpose of regulation 12(5)(b) was: '*reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice .... In order to achieve this it covers legal professional privilege ... Therefore this exemption is similar to the exemption under s42 FOIA*'.
18. Further the Tribunal noted that while the public authority had initially dealt with the request for information under the wrong legislation, it was reluctant to prevent a

public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime.

19. The regulation 12(5)(b) exception provides that information that would adversely affect the course of justice, the ability of person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature is exempt from disclosure if it is in the public interest to maintain the exception.
20. The Commissioner has considered whether the public authority was correct to apply the regulation 12(5)(b) exception. He firstly considered whether the information is subject to legal professional privilege.
21. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
22. There are two separate categories within this privilege known as advice privilege and litigation privilege.
23. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
24. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes communications between a professional legal adviser and her/his client, communications with third parties made for the purpose of assisting the client's case for example expert opinion and may cover a variety of documents.
25. In this case the information requested relates to a matter which has been the subject of litigation and it appears to the Commissioner from his correspondence with the complainant and the public authority that legal issues with respect to the planning status of the complainant's property remain unresolved.
26. The Commissioner has considered the requested information which consists of twenty items made up of letters and faxes. He has concluded that four items out of the twenty items submitted, attract legal professional privilege. For clarity, the four items that attracted privilege will be referred to as 'Privileged Information' and the remaining sixteen items that did not attract privilege will be referred to as 'General Information'.
27. The Privileged Information consists of:
  - a) a note dated 25 March 1998 from the Development Control Department of

the public authority to its legal department (attaching a letter dated 9 March 1998). This attracts legal advice privilege as it was from the public authority's in house lawyer to the Development Control department (the client).

- b) an internal memorandum dated 23 June 1998 from the public authority's legal department to the public authority's Development and Community Services Department. This attracts legal advice privilege as the legal department is giving legal advice to the Development and Community Services Department.
- c) the last paragraph in a note of a meeting dated 1 July 1999 in which the complainant and his lawyer were not present. This paragraph attracts legal advice privilege as the public authority's legal adviser and public authority officers were present including the Director of Development and Community Services Department and the case was discussed. The paragraph was a note of this.
- d) a file note dated 10 September 1999 of a conversation about the case between the director of Development and Community Services and the public authority's legal adviser. This attracts legal advice privilege as it was a note of a conversation between the public authority's legal adviser and the Director of Development and Community Services Department about the case.

28. The General Information consists of:

- a) a pre-existing letter dated 9 March 1998 from a third party (property consultants who were jointly selling the property with a firm of chartered surveyors), to the public authority's development control manager. This document was sent to the development control manager with another document that does attract privilege. As a general rule a document that would not be privileged will not attract privilege just because it is sent with a document that does attract privilege.
- b) a letter dated 7 April 1998 from the property consultants to the legal department of the public authority. This does not attract privilege as the property consultants were not clients of the public authority's legal adviser(s).
- c) a fax dated 22 April 1998 from the public authority's legal department to the property consultants. This does not attract any privilege as the property consultants were not clients of the public authority's legal adviser(s).
- d) a letter dated 24 April 1998 from the property consultants to the legal department of the public authority. This does not attract any privilege as the property consultants were not clients of the public authority's legal adviser(s).
- e) a letter dated 28 May 1998 from the public authority's legal department to the property consultants. This does not attract legal advice privilege as the property consultants were not clients of the public authority's legal adviser(s).
- f) a letter dated 29 May 1998 from the property consultants to the public authority's legal department. This does not attract legal advice privilege as the property consultants were not clients of the public authority's legal adviser(s).

- g) a letter dated 29 May 1998 from the property consultants to the legal department of the public authority. This does not attract privilege as the property consultants were not clients of the public authority's legal adviser(s).
- h) a fax dated 29 May 1998 from the public authority's legal department to the property consultants. This is answering a question put in the letter of the 29 May 1998 from the property consultants to the public authority's legal department. However this does not attract privilege as the consultants were not clients of the public authority's legal adviser(s).
- i) a letter dated 11 June 1998 from the second agent (chartered surveyors, jointly selling the property), to the public authority's legal department. This does not attract legal advice privilege as the surveyors were not clients of the public authority's legal adviser(s).
- j) a letter dated 15 June 1998 from the public authority's legal department to the surveyors. This does not attract legal advice privilege as the surveyors were not clients of the public authority's legal adviser(s).
- k) a file note dated 17 June 1998 from the public authority's internal solicitor's deputy to him, requesting a response to a request from the Development Control Manager. This does not attract legal advice privilege as it is not about or providing, any legal advice.
- l) a letter dated 9 November 1998 from the surveyors to the public authority. This does not attract legal advice privilege as the surveyors were not clients of the public authority's legal adviser(s).
- m) a letter dated 8 June 1999 from the solicitors acting on behalf of the applicant to the public authority. Privilege is not relevant as the applicant's solicitor is the author of this letter.
- n) a draft letter dated 1 July 1999 from the solicitors acting on behalf of the applicant to the public authority. Privilege is not relevant as the applicant's solicitor is the author of this draft.
- o) a note dated 1 July 1999 of two meetings that took place on the 30 June 1999. The complainant and his lawyer attended the first meeting therefore privilege is not relevant. However the second meeting was held between the legal adviser and other officers of the public authority. The paragraph that records this meeting does attract legal advice privilege as the case was being discussed and the public authority's legal adviser was taking part.
- p) an undated planning application submitted by the complainant. Privilege is not relevant as the planning application is the complainant's.

### **Public interest**

- 29. The public authority argued that the requested information should not be disclosed as, because it was legal advice obtained from a legal adviser, it was exempt under section 42; further it was of 'paramount importance' that Officers were able to share information fully and frankly with its legal advisers in confidence.
- 30. The Commissioner accepts that the public interest in disclosing the requested information lies in creating accountability and transparency in actions and decisions being taken by the public authority.

31. In addition the Commissioner also considers that disclosure of the legal advice may further the public's understanding of the basis on which the public authority made its decision about this planning application.
32. However the Commissioner also accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
33. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v Information Commissioner (Appeal No: EA/2005/0023, FS006313)* the Information Tribunal stated in paragraph 35 that: "... *there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest ... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case*".
34. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice highlights the strengths and weaknesses of a particular position; therefore if it was routinely disclosed public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. English law considers "*privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned*". (*Bellamy para. 8*). Therefore there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties so that they are on a level footing.
35. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of legal professional privilege in this case outweighs the factors in favour of disclosure.
36. The Commissioner also accepts that in this particular case, there remain apparently unresolved legal issues with respect to the planning status of the complainant's property as discussed in paragraph 25 above which further reinforces the public interest in legal professional privilege being maintained.

## The Decision

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37. 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 regulation 12(5)(b) exception to the Privileged Information in paragraph 28.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:

- compliance with time limits under regulation 5

## Steps Required

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38. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

- disclosure of the General Information listed in paragraph 29 apart from the last paragraph in the document referred to in 29 (o) as this specific paragraph attracts privilege.

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

## Other matters

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40. The complainant asked the Commissioner to take the following into account:

- as the council had acknowledged that the legal advice was related to complainant's property and planning application, the disclosure of Counsel's opinion was clearly a matter of public interest.
- the complainant also asserted that the council appears to have shared the information with Members of the council.
- in a letter from the public authority to the complainant dated 19 July 2004 the public authority 'may be alluding to Counsel's advice'.

41. The Commissioner has answered the first bullet point within the Decision Notice.

42. With regard to the second point the Commissioner can find no evidence that the public authority has shared the information with Members. When questioned about this, the complainant did not provide any information to support this claim.

43. With regard to the third point, the Commissioner has looked at the letter in question and can find nothing that 'may be alluding to Counsel's advice.' However, even if the public authority had alluded to Counsel's opinion, this would not have been considered as it waiving privilege. This approach is supported by the Information Tribunal. In *Kirkcaldie v the Information Commissioner and Thanet District Council (Appeal No: EA/2006/001)* the Tribunal held that "the test for waiver is whether the *contents* of the document in question are being relied upon." Although reference alone to a privileged document is not sufficient, privilege will be waived if the contents are quoted or summarised (para.26).

### **Failure to comply**

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44. 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

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45. 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](mailto: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 10<sup>th</sup> day of July 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### FOIA

#### Section 42 provides -

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

### EIR

#### Regulation 5 provides-

- (1) Subject to paragraph (3) and in accordance with paragraph (2), (4), (5) and
- (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 12(1) provides –

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(5) provides -

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 14(3)** provides-

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).