

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 8 January 2008**

**Public Authority:** Borough Council of Kings Lynn & West Norfolk  
**Address:** Kings Court  
Chapel Street  
Kings Lynn  
Norfolk  
PE301EX

### Summary

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The complainant requested information from the Council in connection with a planning application and disposal of open space relating to the Hunstanton Green / Pier Project. The request was declined by the Council on the basis that the information was subject to legal professional privilege and was therefore exempted under section 42 of the Act. After requesting a copy of the withheld information and further information about the refusal, the Commissioner concluded that although the requests should have been dealt with under the Environmental Information Regulations 2004, the claim that the legal advice it obtained dated 24 January 2006 was subject to legal professional privilege nevertheless applied and that this information was exempt from disclosure by virtue of Regulation 12(5)(b). However, in relation to other information, concerning the instructions to the external legal adviser (and the clarification of these instructions), the Commissioner found that the Council had waived its right to claim legal professional privilege. As a result the Commissioner concluded that this information was not exempt from disclosure under regulation 12(5)(b) and that it should be released to the complainant within 35 days of this Notice.

### The Commissioner's Role

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

## The Request

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2. The complainant made the following requests for information:

a) Original request on 22 February 2006 (Request 1):

“In the past you have supplied me with legal opinions on Hunstanton Green / Pier...two opinions were supplied by Graham Sinclair and one by Guy Featherstonhaugh.

Unfortunately, I have not seen the instructions given to these gentlemen...I assume this is something you have on file and available by email under the FOI Act?”

b) Subsequent extended request on 3 April 2006 (Request 2)

“It has become even more important that I obtain access to the evidence and instructions provided to Graham Sinclair (on two separate occasions), Guy Featherstonhaugh, Phillip Kratz and the latest external barrister”.

3. On 21 March 2006 the Council refused request 1 citing the exemption under section 42 of the Act (legal professional privilege) and stating “the Council’s position in this case is that it is in the public interest to maintain the exemption, in order that frank and candid legal advice may be obtained safely and sufficiently.”
4. The complainant asked the Council for an internal review of the decision on 31 March 2006.
5. Having completed the review, the Council confirmed its decision not to release the information on 27 April 2006. It stated that the public interest in withholding the information outweighed that in disclosure, providing reasons for this. It acknowledged that the resultant advice had been made public and felt that this meets the needs and rights of the public to know what is happening.
6. In relation to request 2, this was dealt with by the Council as a separate request and given a different reference number. On 29 September 2006, this request was refused using the exemption under section 42 of the Act.
7. An internal review was requested on 5 October 2006 and the review decision dated 19 January 2007 was sent to the complainant. This upheld the original decision not to disclose the information citing section 42 of the Act and reaffirmed the public interest arguments previously addressed. The Council informed the complainant of his right to complain to the Information Commissioner.

## The Investigation

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### Scope of the case

8. On 19 May 2006 and subsequently on 22 January 2007, the complainant contacted the Commissioner to complain about the way his initial and subsequent request for information had been handled. The complainant asked the Commissioner to determine whether he was entitled to see the instructions and evidence given to the external consultants.
9. The complainant also raised other issues that are not addressed in this Notice because they are not relevant to the requirements of the EIR and therefore fall outside the Commissioner's powers.
10. In investigating this case, the Commissioner has identified that the advice provided by Counsel relates to a planning application and disposal of open space at Hunstanton Green / Pier which is an ongoing live debate of public importance. He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)–(f), and he has concluded that it can for the reasons given below.
11. In this case the subject matter of the advice relates to land/landscape and any advice could determine or affect, directly or indirectly, policies or administrative decisions taken by the council. This means the Commissioner considers that the information falls within the category of information covered by regulation 2(1)(c), that is the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)* ("Kirkaldie"). In view of this, the Commissioner has identified that the complainant's request has been incorrectly treated by the Council having been dealt with under the Act. The Commissioner has therefore considered whether the Council handled the request in accordance with the EIR.

### Chronology

12. The Commissioner contacted the Council on 14 November 2006 and asked for copies of the withheld information in relation to request 1.
13. The Council responded on 20 November 2006 enclosing a copy of the withheld information in relation to request 1. It explained that it had received two requests from the complainant, and request 2 had also been refused using the exemption under section 42 of the Act. The Council confirmed that it was in the process of carrying out an internal review of the complainant's second request.
14. The Commissioner wrote to the Council on 9 January 2007 to clarify exactly what information attached to its previous response dated 20 November 2006 had already been disclosed. He also requested a timeframe for the outcome of the internal review that remained outstanding in respect of request 2.

15. The Council replied on 10 January 2007 providing a list of the information that had already been disclosed to the complainant. It also confirmed that the internal review in relation to request 2 would be completed within the next 7 days.
16. The Council wrote directly to the complainant on 19 January 2007 informing him of the outcome of the internal review. It stated that it remained of the view that the information requested in relation to request 2 was exempt from disclosure under section 42 of the Act. A copy of this response was forwarded to the Commissioner on 22 January 2007.
17. On 24 January 2007 the Commissioner wrote to the Council to request a copy of the withheld information in relation to request 2, a further explanation as to why it considered this information was exempt and to ask it to reconsider its application of section 42 to the information requested in request 1.
18. The Council responded further on 29 January 2007 providing a copy of the majority of information relevant to the complainant's second information request. Concerning the instructions provided to Phillip Kratz, it advised that it was at this stage unable to locate the necessary information. Concerning the complainant's first information request, it confirmed that on reflection it was now willing to disclose the withheld information.
19. The Commissioner wrote to the Council again on 6 February 2007 to request that it contact the complainant directly to release the further information. The Commissioner outlined his view that the instructions to Phillip Kratz should also be disclosed once the information was located and requested that further work was undertaken to trace these instructions.
20. The Council replied on 16 March 2007 and confirmed that copies of the instructions given to Graham Sinclair and Guy Featherstonhaugh had now been forwarded to the complainant. Concerning the instructions to Phillip Kratz, it advised that it was still in the process of carrying out further checks for this information.
21. The Council confirmed on 1 June 2007 that it had now located a copy of the instructions to Phillip Kratz and agreed that this information should be supplied to the complainant (information requested in request 1). This therefore meant that all information in relation to requests 1 and 2 had now been disclosed, except the instructions to the latest barrister and the opinion that followed.

## Analysis

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22. The full text of the relevant regulations can be found in the Legal Annex, however the salient points are summarised below.

## Procedural issues

23. The Commissioner notes that the Council took over five months to respond to the complainant's second information request. Regulation 14(2) of the EIR states that if a request for environmental information is refused by a public authority, the refusal should be made as soon as possible and no later than 20 working days after the date of receipt of the request. As the complainant's second information request was made on 3 April 2006 and the Council did not issue its Refusal Notice until 29 September 2006, the Commissioner has concluded that the Council was in breach of regulation 14(2) of the EIR.
24. As the Council failed to identify that the requested information was environmental information it dealt with the complainant's information requests under the Act. As a result the Council issued a Refusal Notice citing exemptions under the Act for its reasons of non disclosure. Regulation 14(3) of the EIR states that if a request for environmental information is refused by a public authority it should issue a Refusal Notice which specifies the exception(s) being relied on and the matters the public authority considered in reaching its decision with respect to the public interest test. As the complainant's information requests were dealt with under the incorrect regime, the Refusal Notices did not specify the exception being relied on under the EIR and the public interest arguments considered by the Council. The Commissioner has therefore concluded that the Council was in breach of regulation 14(3) of the EIR in this case.
25. The Commissioner also notes that although the complainant requested an internal review for his second information request on 5 October 2006, the Council did not respond until 19 January 2007. As regulation 11(4) stipulates that a public authority should notify the complainant of the outcome of the internal review as soon as possible and no later than 40 working days after the date of receipt of the request for internal review, the Commissioner has concluded that the Council was in breach of regulation 11(4) of the EIR in this case.

## Scope of the Decision

26. As a result of the action taken by the Council in paragraphs 20 and 21, the Commissioner has only focussed his decision in this case on the remaining withheld information, namely the latest external Counsel's instructions and Counsel's opinion dated 24 January 2006.

## Exception

27. In considering whether the exception is valid, the Commissioner has to take into account that the EIR are designed to be applicant blind and that disclosure should be considered in the widest sense; that is, to the public at large. In view of this, the Commissioner has proceeded with the investigation on the basis that if the information were to be disclosed, it should be available to any member of the public. Further, when examining arguments in favour of disclosure of the information requested and the maintenance of the exception, the Commissioner has taken into account evidence gathered from the complainant and the Council.

28. The Council has argued that the information requested is subject to legal professional privilege and is exempt under section 42 of the Act. However, the Commissioner considers that the information falls within the scope of the EIR for the reasons explained in paragraph 11. The EIR contain no direct equivalent of section 42 of the Freedom of Information Act 2000 (where an exemption exists for legal professional privilege) however, in the case of Kirkaldie (para 22), the Information Tribunal decided that regulation 12(5)(b) is similar in purpose to section 42. The Commissioner accepts this view.

#### Regulation 12(5)(b)

29. Under this regulation a public authority can refuse to disclose information to the extent that its disclosure would adversely affect “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”. In the case of Kirkaldie the Information Tribunal stated that the purpose of this exception was reasonably clear and that:

“It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of 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”.

It is the tribunal’s view that legal professional privilege is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase course of justice.

30. The Commissioner has considered whether the Council was correct to apply the exception at regulation 12(5)(b) of the EIR. Firstly, the Commissioner has considered whether the information is subject to legal professional privilege and secondly, whether there would be an ‘adverse effect’ through disclosure of the information. The Commissioner has considered the application of Regulation 12(5)(b) taking into account the presumption in favour of disclosure as set out in Regulation 12(2) in accordance with the decision of the Information Tribunal in *Mr R P Burgess v The Information Commissioner and Stafford Borough Council* (EA/2006/0091) (“Burgess”).

#### Legal professional privilege

31. The Commissioner has considered the barrister’s advice and is satisfied that the information contained within it constitutes legal advice to the Council. The advice discusses points of law and case law and was supplied to the Council in confidence.
32. The Commissioner is satisfied that the information was supplied by legal Counsel. The document itself is in the standard format used to provide Counsel’s opinion and includes the name of the barrister who provided the advice and the name of the chambers where he practices from. The Commissioner is therefore satisfied that the legal adviser was competent to provide the opinion.



### Whether privilege has been waived

33. An issue has arisen as to whether the Council had waived legal professional privilege regarding the instructions to and opinion of the latest external barrister.
34. The Commissioner was informed that a “summary” of the legal advice had been sent to the Hunstanton Civic Society. This matter has been investigated and the Commissioner is satisfied that the summary was in fact a list of questions the Council had posed to Counsel in order to obtain legal advice. The Commissioner believes the statement did contain wording of the instructions to Counsel and therefore he has decided that legal professional privilege has been waived in relation to the instructions to the latest external barrister.
35. The Commissioner also investigated whether the summary contained wording or a reflection of the substance of the actual advice provided in Counsel’s opinion. It has been considered whether the council’s use of Counsel’s summary of the instructions could constitute waiver, as the document which contains Counsel’s summary of the instructions and the opinion itself is a single communication between lawyer and client. Effectively, this communication improved the clarity and conciseness of the ‘questions’ and then provided the answers to those improved questions.
36. However, the Commissioner considers that the communication contains two distinct elements, the first being the instructions and Counsel’s introduction to the advice, the second being the advice itself. By clarifying the instructions and pinpointing precisely the area upon which Counsel needed to advise, Counsel simply did what he could have done in a separate communication, either in writing or perhaps by telephone, and ensuring that the advice that he was to provide would be useful. Importantly, the summarised instructions themselves do not give away the substance of the advice provided.
37. In view of the above, the Commissioner has decided that legal professional privilege has not been waived in relation to the opinion of the latest external barrister, but that it has in relation to the instructions.

### Adverse effect

38. In the decision of Benjamin Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Tribunal also highlighted the requirements needed for this exception to be engaged. It explained that it is not enough that the information requested is subject to legal professional privilege; the effect of disclosure must be “adverse” and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure “would” have an adverse effect and that any statement that it could or might have such an effect was insufficient.
39. In reaching his decision on whether disclosure would have an adverse effect, the Commissioner has considered the interpretation of the word “would”. It is the Commissioner’s view that the Information Tribunal’s comments in the case of

Hogan v Oxford City Council and the Information Commissioner (EA/2005/0026 and EA/2005/0030) 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” 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. Legal professional privilege is a key element in the administration of justice and advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.
41. The Commissioner has confirmed that the Council needed advice on the planning application and disposal of land issues affecting the Hunstanton Green/ Pier Project and the effect this would have on residents. The Council explained that if disclosure were ordered, this would adversely affect its ability to obtain legal advice in respect of other decisions it may make in the course of its duties in the future. It confirmed that disclosure of information covered by legal professional privilege would undermine the relationship between a client and lawyer and that it should be allowed to conduct a free exchange of views as to its rights and obligations with those advising them without the fear of intrusion or potential disclosure.
42. In the circumstances of this decision the Commissioner is satisfied that it is more likely than not that disclosure of the legal advice would adversely affect the course of justice, but that disclosure of the instructions would not.

### **Public interest test**

43. Under regulation 12(1)(b) all the exceptions provided by the EIR are subject to a public interest test. So, it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exception in relation to the opinion provided by Counsel outweighs the public interest in disclosing the information. Again, the Commissioner took into account the presumption in favour of disclosure contained in the EIR at regulation 12(2).

### **Public interest – in favour of maintaining the exemption**

44. The Commissioner acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In the case of Bellamy v the Information Commissioner and the DTI (EA/2005/0023) (para. 35) (“Bellamy”), the Tribunal stated that:

“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.

45. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined



and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. This reflects the decision in Bellamy (para 35) where the Tribunal observed:

“it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...”

46. In Burgess, the Tribunal reaffirmed this decision, stating that:

“there is a strong public interest in maintaining legal professional privilege, for the reasons set out in Bellamy and other cases. Public authorities should be able to obtain free and frank advice and to be able to give full information to its legal advisors, including matters that would adversely affect public authorities opinion (for the avoidance of doubt we make no comment one way or the other as to whether there is in fact any such issue within the legal advice, we are merely using it by way of an example).”

47. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. English law considers:

“privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned” (Bellamy, para 8).

Therefore, there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.

#### Public interest – in favour of disclosure

48. The Commissioner recognises that there is significant public interest in public authorities being transparent in the decisions they take in relation to the Hunstanton Green / Pier Project, in order to promote accountability. If reasons for decisions are made public, there is a strong argument that this should improve the quality of future decisions.

49. The Commissioner accepts there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them were taken by public authorities and in them having the ability to challenge those decisions. In *Shipton v The Information Commissioner and the National Assembly for Wales EA/2006/0028*, the Commissioner accepts there is a public interest in individuals having access to the information. The Tribunal advised that:

“if the qualified nature of the exemption is to have any meaning, there will be occasions when the public interest in disclosure will outweigh the public interest in maintaining privilege.”

50. The Commissioner accepts that there is a public interest in disclosing information which will help determine whether public authorities are acting appropriately. So, it is in the public interest that as much information as possible relating to the Hunstanton Green/ Pier Project, be available for public scrutiny, so as not to undermine public confidence in the Council.
51. The Commissioner has taken into account the aims of the European Directive 2003/4/EC(d) and the Aarhus Convention 2005/370/EC. These aims include ensuring public awareness on environmental issues and to provide the public with more information about issues which may affect them. The Commissioner has therefore considered this information in the context of the information being environmental in nature and the impact that the Hunstanton Green / Pier Project could have on people living in the area.

### Balancing the competing considerations

52. In the circumstances of this case the Commissioner is satisfied that there is a significant public interest in favour of 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.

### **The Decision**

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53. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the EIR in that it correctly applied the exception under section 12(5)(b) of the EIR to withhold the latest opinion of the external barrister dated 24 January 2006.
54. However, the Commissioner has also decided that the Council did not deal with the request for the instructions in accordance with the EIR in that it incorrectly applied the exception under section 12(5)(b) to withhold the instructions (and the clarification of these instructions) to the external barrister.

### **Steps Required**

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

Disclose the latest instructions to Counsel 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.

## Failure to comply

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57. 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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58. 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 8<sup>th</sup> day of January 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## **Legal Annex**

### **Freedom of Information Act (2000)**

#### **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.”

### **Environmental Information Regulation 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 11(4) provides that -**

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

**Regulation 12(2) provides that -**

A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(5) provides that -**

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(2) provides that-**

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) provides that -**

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).

