

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 June 2009

Public Authority: Nottingham City Council
Address: Severns House
20 Middle Pavement
Nottingham
Nottinghamshire
NG1 7DW

Summary

The complainant requested legal advice which the council obtained in respect of a piece of land called the Arboretum in Nottingham. The council initially claimed that the exemptions in sections 42 and 43 of the Freedom of Information Act applied. The Commissioner told the council that the information should have been considered under the Environmental Information Regulations 2004 (the 'Regulations') and the council therefore reconsidered the information and applied Regulation 12(5)(b) and Regulation 12(5)(e).

The Commissioner has considered the application of these exceptions. His decision is that Regulation 12(5)(e) was not engaged by the information, and that Regulation 12(5)(b) was engaged, however the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information.

The Commissioner's Role

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

2. After a long running dispute pertaining to a piece of land called the Arboretum in Nottingham, the complainant requested a copy of the legal advice obtained by the council regarding the legal status of the land.

3. The Commissioner notes that requests for this information dates initially back a number of years (to at least 2006), and would normally fall out of time for him to consider for investigation. However the complainant made a more recent request which was refused by the council and therefore the case is eligible to be investigated under section 50 of the Act.
4. The Commissioner does not have a copy of the original request for the information. However he was provided with a copy of a letter to the council dated 15 January 2008 referring to the previous request, and asking the council to respond it. That letter also makes clear that this was an ongoing issue between the parties and that the complainant believed that she had only recently been told, verbally, that her request was to be refused.
5. The complainant did not receive a response to that letter, and so on 7 February 2008 she requested that the council review its decision to withhold the information from her.
6. The council responded on the 18 February 2008 stating that it was refusing the request on the basis that section 42 (legal professional privilege) and section 43 (2) (Commercial interests) of the Freedom of Information Act 2000 applied.

The Investigation

Scope of the case

7. On 28 February 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she requested should have been provided to her.

Chronology

8. The Commissioner wrote to the council on the 20th January 2009. In that letter he stated to the council that in his view the information should have been considered under the Regulations rather than under the Act. He therefore asked the council to reconsider the request under this regime.
9. He also provided preliminary arguments to the council relating to the application of section 42 and of Regulation 12(5)(b). He provided a preliminary view that the information was unlikely to be exempt, and asked the council to take his arguments into consideration and consider disclosing the information to the complainant without the Commissioner issuing a Decision Notice.
10. The council acknowledged the Commissioners letter on 28 January 2009 and stated that it would respond fully in due course.

11. On 17 February 2009 the Commissioner emailed the council and asked when he would receive a response to his letter.
12. On 26 February 2009 the council provided its response to the Commissioner. It had reconsidered the request under the Regulations and had applied Regulation 12(5)(b) for the same reason - that the information was subject to legal professional privilege.
13. It did not however specify whether it wished to rely upon any other exception, for instance relating to the commercial interests arguments it had identified in its initial refusal notice and in its response to the internal review under the Act. The Commissioner therefore wrote back to the council on 13 March 2009 asking if the council wished to rely upon a similar exception to section 43 under the Regulations. He identified regulation 12(5)(e) as being the closest exception to section 43 but provided a preliminary view that it would be unlikely to apply. The council responded on 8 April 2009 stating that it wished also to apply Regulation 12(5)(e) and provided arguments for the exception applying.

Procedural matters

14. The Commissioner notes that the council initially refused the request for the information because it considered it exempt under sections 43 and 42 of the Act. However the Commissioner considered that the information was environmental information which falls under the scope of the Regulations.
15. The Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR.
 34. Regulation 2(1)(c) provides that –

“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 -

(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’
16. The factors referred to in (a) include -

‘ 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’
17. The Commissioner is satisfied that the legal advice falls within the definition of environmental information as provided in Regulation 2(1)(c). The information is legal advice which relates to legal restrictions placed on land to prevent its sale, lease or development other than for specified purposes. The legal restrictions are

a measure as defined in Regulations 2(1)(c) and the information in question is on that measure.

18. Given this, the refusal notice which the council issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.

Exceptions

Regulation 12(5)(b)

19. The council claims that the information is legal advice which is subject to legal professional privilege and that it is therefore exempt from disclosure under Regulation 12(5)(b) of the Regulations. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on:

“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”

20. The information is legal advice concerning the Arboretum. The Commissioner understands that the council has previously allowed the development of parts of the Arboretum and planned to allow other parts of it to be used for the purposes of a local school. The complainant wrote to the council providing arguments that the land was designated to the council by statute in the Nottingham Inclosures Act 1845 and that allowing any further development would be a breach of the restrictions in that Act which limits the use of the land in question to specific purposes, namely that of public walks and/or “public baths and outbuildings and gardens connected therewith”.
21. Legal professional privilege protects the confidentiality of communications between a lawyer and client. There is no specific exception within the Regulations referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that Regulation 12(5)(b) encompasses such information.
22. In the case of *Kirkaldie v the Information Commissioner and Thanet District Council*, (Appeal Number: EA/2006/001), The Tribunal expressed the view that the purpose of section 12(5)(b) was reasonably clear. It said that 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 rights of individuals or organisations to a fair trial.” It therefore accepted that this Regulation “covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation” (para. 21). The Commissioner therefore considers that the arguments put forward by the council are relevant to whether Regulation 12(5)(b) is engaged or not.
23. Regulation 12(5)(b) provides a number of different criteria in order for it to be engaged. The council has not submitted arguments about any inquiry of a

criminal or disciplinary nature being involved in this case, and therefore the Commissioner has excluded these criteria from his considerations. The Commissioner notes that the test is whether disclosure “would” have an adverse effect rather than “could” and so the council needs to show a clear argument as to how justice would be affected by its disclosure.

24. The Commissioner must therefore firstly assess whether the information is subject to legal professional privilege. He must also decide whether a disclosure of that information would have an adverse effect on the course of justice or the ability of a person to receive a fair trial. If the information is subject to legal professional privilege then it is more likely that its disclosure would have an adverse effect on the course of justice, however this is not a necessity in order for the exception to apply.

Is the information subject to legal professional privilege?

25. The Commissioner is satisfied that the advice was sought from and provided by a qualified legal adviser, in this case a barrister, in his professional legal capacity. The advice is legal advice referring to matters relating to the Arboretum. The Commissioner therefore accepts that the advice attracts legal professional privilege. There is no suggestion that privilege has been waived in this instance.

Would a disclosure of the information have an adverse effect on the course of justice?

26. Legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
27. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the Act or the Regulations. Clients and their adviser's confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
28. The Commissioner accepts this, and has therefore borne mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege which he is ordering disclosed. However the Commissioner must also consider the specific information caught by this request when making his decision on this complaint.
29. His first consideration is whether the advice was still in use at the time of the request or whether there was any likelihood that it would become relevant to litigation in the future. If that is not the case then disclosure would be less likely to have an adverse effect and the council would need to provide further reasons to show how it might.
30. The Commissioner firstly asked the council to consider whether the advice was still “live” - whether the advice had informed public policy which was still in place

which might be legally challenged, or whether there was any likelihood that the advice might become relevant in any future litigation. That litigation need not necessarily be specifically concerned with the land at the Arboretum but could be concerned with other areas of land where the advice was also relevant or informed the council's decision making.

31. The council stated that legal issues concerning inclosure land remain a generally live concern, and that it is frequently under scrutiny in relation to its uses and proposed uses of inclosure land. The council therefore argues that the legal advice remains of current relevance and has application beyond the local issues of the Arboretum. Inclosure land was awarded under statute to the council (in the form of awards to "the Mayor, Alderman and Burgesses"), but, in the case of the Arboretum and other portions of inclosure land, those awards limited the use of that land to specified purposes. It is legal advice regarding the current legal standing of these limitations which has been requested in this case.
32. The Commissioner also notes that the complainant stated to the council that she has an interest in the advice because it may be relevant to her interest in other inclosure land. The Commissioner therefore accepts that the advice is still live and may therefore be of relevance to legal matters beyond the Arboretum.
33. The Commissioner has read the advice and is satisfied that its disclosure could have an effect on the course of justice. A disclosure of the advice would provide a clear indication of the arguments, strengths or weaknesses which the council might have in any litigation which took place over inclosure land, placing it at a disadvantage between the parties in any litigation. In the Commissioner's view, disclosure would unbalance the level playing field under which adversarial proceedings are meant to be carried out.
34. The Commissioner therefore accepts the argument that a disclosure of the legal advice would have an adverse effect upon the course of justice, and that Regulation 12(5)(b) is therefore engaged.
35. Regulation 12(1)(b) requires that where the exception in Regulation 12(5)(b) is engaged then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test the Commissioner has applied the requirement in Regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

The Public Interest

36. The Commissioner recognises that there is a strong and inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the doctrine of legal professional privilege could therefore damage the ability of parties to provide or receive legal advice on a full and frank basis,

- thereby damaging the parties' ability to effectively determine their legal options, or to defend, or seek legal restitution against other parties in accordance with their rights.
37. In the case of Christopher Bellamy and The Information Commissioner and the Secretary of State for Trade and Industry, (EA/2005/0023), the Information Tribunal stated that the public interest in disclosing the information must, at the least, match the public interest in maintaining the exception before privilege will be overturned, and it is recognised by the Tribunal that the public interest in protecting the doctrine of legal professional privilege is strong.
 38. In the case of Pugh v Ministry of Defence and the Information Commissioner, (EA/2007/0055) the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "*where the privilege holder no longer has a recognised interest to protect*" or where the subject matter of the requested information would affect "*a significant group of people*". In that case section 42 of the FOI Act was being considered however the arguments are equally applicable to the consideration of legal professional privilege under the Regulations.
 39. Similarly in the case of Shipton v Information Commissioner, EA/2006/0028 the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "*when the harm likely to be suffered by the party entitled to legal professional privilege is slight, or the requirement for disclosure is overwhelming*" (para 14b).
 40. The Commissioner has therefore taken the above statements into consideration when making a decision on the application of the public interest test to this information.

The public interest in maintaining the exception

41. The Commissioner has already ascertained that the advice is relevant to the council's ongoing management of inclosure Land. Any decisions the council makes on the uses of inclosure land could be legally challenged, and therefore a public authority must be able to seek legal guidance on the options it has when making decisions on inclosure land. In this way it can assure itself that decisions it makes are both robust and legally defensible. Such guidance, although informing the final decision, should not generally be open to disclosure, as to do so could weaken or compromise the Council's legal position should its decision later be questioned in law. To reiterate the Tribunal's arguments, such advice should be free from the threat of interference, but interference will be justified in some circumstances.
42. The Commissioner also considers that authorities must have the ability to consider and address strengths and weaknesses in its position free from the fear that disclosure may be required and that its opponents could exploit its own legal advice to their own purposes when seeking to overturn a decision made by the council.

43. If the doctrine of privilege is weakened through the regular disclosure of such advice then concerns about this may result in a 'chilling effect'. Councils may become less likely to seek advice in the first instance, become inhibited in the questions they ask of their advisors (or vice versa), or the advice which is provided may become less frank. Alternatively advice may be sought verbally rather than in writing and either no, or sparse records of the advice which is given retained.
44. There are therefore strong arguments regarding the chilling effect such a disclosure may have on public authorities seeking legal advice, and there is a strong public interest in allowing a public authority to seek clarification of its legal standing in law in order to facilitate its decision making. It may then act from an informed position, with a robust legal basis or defence for its actions.

The public interest in disclosing the information

45. The relevant Inclosure Acts require the council to use the land in question for the provision of public walks and or public baths and outbuildings for the recreational purposes of the people of Nottingham. The suggestion put forward by the complainant was that the potential use of that land for the intended school extension was not in accordance with that limitation. The Commissioner notes that the plan to develop the land for parts of the school was subsequently withdrawn.
46. Since the Inclosure Acts were first passed there have been numerous changes in society which mean that the priorities under which authorities must manage land may need to be considered differently. A growing population, the increased need of housing and the associated infrastructure needed to support these is placing an ever increasing burden on greenspace surrounding cities throughout England. Such matters create competing priorities which on occasion may mean that well intentioned restrictions or limitations placed on the uses of land in the past become a potential burden to the ability of authorities to manage the land in the best interests of the community at the present time. However changing the use of the land to alternative purposes is often a highly emotive and highly controversial decision, particularly given the depletion of available greenspace in and around many cities in England.
47. Disclosure of this advice would increase the information available to the public about the Inclosure Acts and how in this case legislators sought to protect an area of greenspace for recreational use within Nottingham. This may inform public debate on such issues as the pressure on the available greenspace and how that should be responded to by authorities under pressure to provide other important services to the community. The Commissioner recognises that this is a debate which is much larger than the individual case of the Arboretum. As an example of this, The Forest is another area of inclosure Land within Nottingham which has recently been threatened by development. The Commissioner understands that part of this area has already been developed to provide parking for a park and ride service for the city. Park and ride is itself an environmentally laudable purpose, decreasing congestion within the city centre and the associated emissions which would occur otherwise. However the benefit which

was realised as a result of the creation of this service was made at a cost to the Forest area.

48. Disclosure of the information from this case would inform public debate if any contentious plans to develop areas like the Arboretum are put forward in the future. Without disclosure of this information the council's decision to allow or prevent a development would lack transparency and the public would not know whether a development fits within the council's obligations as regards its management of inclosure land.
49. It should be noted that the council's role as the manager of the land is completely separate to its role as planning authority for the area and so a decision to develop the land taken in its role as the manager of the land is not the same as a decision to allow planning approval for the development of the land.
50. Where a development is planned then interested parties would have the ability to seek a legal decision whether the intended development was within the scope of the restrictions, and consequently it is at this point that a prior disclosure of this information might affect the course of justice in that legal advice the council obtained when making its decision to allow a particular development would be in the public domain.
51. If the council makes a decision to allow a type of development on inclosure land then any interested parties would have knowledge of the advice which the council has on its legal position when making that decision. The decision would therefore be taken openly and transparently, and any question of adherence to the restrictions on the land would be better understood.
52. The council would therefore need to justify its position on legal grounds if it wished to develop an area where the limitations seemingly prevented it from being used in that way.
53. There is also a clear public interest in requiring any change of use of the land, or a weakening of the restrictions on development under which land has been managed for hundreds of years to go through the correct legal course to challenge them. Particularly, as in this case, where the restrictions placed on the land are clearly intended to benefit the community by protecting greenspace, public walks and/or areas of public recreation.
54. The Tribunal has previously found that there is a clear public interest in planning decisions being taken by public authorities in an open and transparent way. The Commissioner therefore considers that a disclosure of the information in this case would be generally in the public interest in a similar way.
55. The Commissioner does recognise however that the council should also have a right to seek advice as to the limitations of its powers in managing the land, and to know whether it has a legal case to challenge any restrictions which do not best meet the current needs of the community. Clearly the council would be falling short in its public duties if it recognised a real need for a particular development in the community and took no action to ascertain whether it has the

legal standing to allow such a development. It would also then be in a better position to defend its decision in the face of any challenges. However the Commissioner notes that a disclosure of the advice would not prevent this occurring. Although the Commissioner recognises that that a disclosure of the information would then allow the councils decision to be legally challenged from an informed point of view, he recognises however that Act should not be seen as a means of obtaining free legal advice as an alternative to legal aid. This was recognised by the Information Tribunal in the case of the Foreign and Commonwealth Office v Information Commissioner (EA/2007/0092). Any party wishing to dispute the decisions of the council has their own ability to seek legal advice on the matter.

56. However a disclosure of the advice would provide a degree of transparency and reassurance to interested parties that the council is properly managing the land and/or acting in the best interests of the community it serves in taking any actions it decides to take.

Conclusions

57. The Commissioner has placed a great deal of weight on the right of the authority to protect advice it holds which is subject to legal professional privilege. However he has also considered the right of the public to understand and know that land which, via the Inclosures Act, was given to the people of the city for specific purposes is being managed and protected appropriately, either for the purposes stipulated in the Acts or alternatively for purposes which have a greater public benefit to the community than the purposes originally stated.
58. There is a strong argument that if the council wishes to change the use of inclosure land because it has recognised a greater public benefit in a different use then it should take the appropriate legal actions to try to overturn any restrictions which detrimentally affect the community in an open and transparent way, or that it should explain the way in which it is able to do that openly. In this way land ownership and development opportunities are clearer in any future transactions which take place and objectors to this course of action will have the opportunity to know the legal advice upon which the council is considering its options.
59. The protection or development of greenspace land is a current and emotive issue which affects significant numbers of the community, both through the environment they live in and through the infrastructure that supports the community. The Commissioner is therefore satisfied that disclosure would affect a significant group of people and that developing on greenspace effectively reduces its availability, not only for this generation, but for generations to come. It will effectively remove greenspace for the foreseeable future from the community around the area.
60. On the counter side the Commissioner has not been persuaded that a disclosure of the advice would cause significant harm to the council unless it decided to take action which might on the face of it bring its adherence to the limitations on the use of the Land into question. At that point, any objectors to those plans would have access to the council's legal advice on which it based such a decision and

could analyse that advice for weaknesses to be exploited in any legal challenge. This would effectively cause an imbalance in the level playing field which should be present within the adversarial process. The Commissioner accepts that this is the case.

61. However if the council wishes to take action on inclosure land, which is potentially in contravention of limitations placed on it for the benefit of the community by its forebears, then there is very strong public interest in that being done openly and transparently in order that the public may debate the use which is planned.
62. If the council has legal advice which states that the restrictions no longer apply, that they apply only in part, or that specific plans are in line with the restrictions then explaining how that is the case would also not on the face of it be harmful to the council unless actions it took brought its adherence of the restrictions into question.
63. The council must carry out its functions for the benefit of the local community. Its function in this case is to manage the land appropriately and in the best interests of the community it serves, with the presumption being that this will be for the purposes highlighted in the relevant Inclosure Acts. Any decision which contravenes one of the restrictions may on the face of it be against the public interest and there is therefore an onus on the council to explain what countering interest outweighs maintaining the restrictions for the benefit of the community.
64. If the restrictions do not retain their legal standing then there is also a strong public interest in the people of Nottingham being made aware that that is the case in order that they may either lobby the council to take steps to further protect the land or debate what further purposes the community might wish the land to be put to. These are strong public interest arguments in favour of disclosure, particularly taking into account the aims of EU Directive the EIR are derived from and the Aarhus Convention that the Directive stems from. Both stress the importance of access to information to support public participation in environmental decision making.
65. The Commissioner therefore finds that withholding the information in this instance does not protect the public interest. Rather it creates ambiguity both as regards the current status of the land, but also as regards the actions and decisions of the council in the use of the land.
66. The Commissioner places a strong weight on the right of the council to seek and hold the legal advice in confidence. He also clearly accepts the strong public interest in legal professional privileged being maintained. The Commissioner has further accepted that it is possible that litigation may ensue should a decision be made by the council to develop, sell or lease any area of land subject to restrictions under the Inclosure Acts other than for purposes specified in the Inclosure Acts. Conversely however it is unlikely that that would be the case if the council does not sell, lease or agree to development upon inclosure land other than for the purposes under which it was awarded to the council in the Inclosure Acts.

67. The Commissioner's view is that leaving the status of restrictions placed on land for the benefit of the public ambiguous, or leaving potential uncertainty as to the title or ownership of the land is harmful to the community. The land has very clearly been given into the care of the council to be managed for very specific purposes under the Inclosure Act. The complainant has requested that the land be removed from the Crown Estates list to further protect it for the community however the suggestion is that this has not been agreed by the council. It is also clear, given the development of the park and ride system in the Forest, and also given the intended or actual encroachments into the Arboretum that the council has previously agreed to small scale development or larger projects on inclosure land in the past. He notes for instance that a small area of the Arboretum has previously been leased to a public house in the past.
68. In balancing these two competing interest the Commissioner has come to the conclusion that the balance between the competing interests is very fine in this particular instance. The Commissioner does not lightly consider that the public interest in the disclosure of information outweighs the very strong public interest in maintaining legal professional privilege. However the Commissioner is also mindful of the purposes of the Regulations and of the specific presumption of disclosure in Regulation 12(2) of the Act. Given that there are clear examples of inclosure land which have been leased and developed upon in the past; areas which are then effectively lost to the community for the original purposes under which the council was designated to manage the land, the Commissioner considers that the public interest in disclosing the advice outweighs the public interest in maintaining the exception in this instance.

Regulation 12(5)(e)

69. The council also applied Regulation 12(5)(e) to the information. This exception provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. This exception is also qualified by the public interest test where the exception is engaged.
70. The Commissioner believes that in order for this exception to be applicable, there are a number of conditions that need to be met, namely:
- The information should be commercial or industrial in nature
 - The information should be confidential where such confidentiality is provided by law
 - The confidentiality should be required to protect a legitimate economic interest
 - The confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.

The Commissioner has firstly considered whether the information is confidential where such confidentiality is provided by law. In the case of OFCOM v Information Commissioner (EA/2006/0078) the Information Tribunal confirmed

that in order for Regulation 12(5)(e) to apply the information must be protected by the common law duty of confidence.

71. The Commissioner's view is that a duty of confidence under common law is owed by one party to another. This means that the party in receipt of the confidential information cannot disclose it without the permission of the other party as doing so would breach a duty of confidence it owes to the confider of the information. In this case, the Council sought advice from counsel regarding its legal liabilities in managing the Arboretum. It therefore 'owns' the advice which it obtained and can use it for its own purposes. This is evidenced by the fact that it is the council which has the ability to waive legal professional privilege on the advice. The council does not owe a duty of confidence to the barrister who produced the advice. It has also not provided details or arguments of any other person to whom it owes a duty of confidence as regards the advice. The Commissioner's decision must therefore be that no common law duty of confidence exists between the council and any third party requiring the council to hold the information in confidence.
72. In order for the exception to be engaged there has to be an adverse effect on the confidentiality of the information. For the reasons provided above the Commissioner's view is that an adverse effect would not be possible in this case because no information was confided in it by a third party. A disclosure of the information could not therefore have an adverse effect upon a duty of confidence.
73. The Commissioner is therefore satisfied that the information does not engage the exception in Regulation 12(5)(e) as the necessary duty of confidence is not present.
74. It is not therefore necessary to carry out a public interest test as regards the application of Regulation 12(5)(e).

The Decision

75. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
 - The council incorrectly considered the information under the provisions of the Freedom of Information Act rather than the Environmental Information Regulations 2004.
 - In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the council breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information nor its reasons for relying upon that exception.
 - The council did not correctly apply Regulation 12(5)(e) to the information.

- The council did not correctly apply Regulation 12(5)(b) to the information.

Steps Required

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

To disclose the information that was requested by the complainant to her.

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

Failure to comply

78. 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

79. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

80. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

81. 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 11th day of June 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Legal Professional Privilege

42. - (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.