

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 16 July 2009

Public Authority: The Highways Agency (an executive agency of the Department for Transport)
Address: 123 Buckingham Palace Road
London
SW1W 9HA

Summary

The complainant made a request to the Highways Agency for the legal advice obtained by it in relation to a planning inquiry relating to restrictions put in place at the Orwell Crossing Lorry Park in Suffolk both before and after the Planning Inspector made his decision to allow the appeal by the lorry park owners in July 2007. The complainant also requested correspondence between the Highways Agency and a number of bodies relating to the provision of parking facilities now and in the future for lorries and heavy goods vehicles in the county. Finally the complainant requested any index or appendix attached to any of the information relevant to the requests set out above. The Highways Agency provided some of the information requested by the complainant however it refused to disclose information pertaining to the legal advice as it stated that it was exempt from disclosure under section 42(1) of the Freedom of Information Act 2000 (the "Act"). Furthermore the Highways Agency confirmed that it did not hold any index or appendix attached to the withheld legal advice. The Commissioner considers that the Highways Agency incorrectly dealt with the complainant's request under the Act and should have processed it under the Environmental Information Regulations 2004 (the "Regulations") as it was a request for environmental information. However the Commissioner has concluded that the information pertaining to the legal advice is excepted from disclosure by virtue of Regulation 12(5)(b) and therefore the Highways Agency was not obliged to comply with Regulation 5(1). Furthermore the Commissioner considers that the Highways Agency does not hold any index or appendix attached to the legal advice under Regulation 12(4)(a). Finally the Commissioner considers that the Highways Agency breached Regulation 14(1), 14(2) and 14(3)(a) as it failed to deal with the request under the correct access regime.

The Commissioner's Role

1. The Environmental Information Regulations (the Regulations) 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 Regulations 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 Regulations.

Background

2. An appeal was made by the Orwell Lorry Park owners, under section 78 of the Town and Country Planning Act 1990 (TCPA), against a refusal by Suffolk Coastal District Council to grant planning permission under section 73 of the TCPA, for the development of land without complying with conditions subject to which a previous planning permission was granted. The Council had refused to grant the planning permission at the Highways Agency's instruction. The information requested by the complainant was the legal advice obtained by the Highways Agency in order to decide whether the appeal should be opposed. Ultimately the appeal brought by Orwell Lorry Park owners was allowed by the Planning Inspector in July 2007.

The Request

3. The Commissioner notes that under the Act the Highways Agency is not a public authority in its own right, but is actually an executive agency of the Department for Transport (DfT). Therefore the public authority in this case is actually the DfT not the Highways Agency. However, for the sake of clarity, this decision notice refers to the Highways Agency as if it were the public authority.
4. In a letter dated 26 March 2008 the complainant made a request to the Highways Agency for the following information:
 - i. Legal advice received by the Highways Agency with regards to the restrictions put in place at the Orwell Crossing Lorry Park in Suffolk, relating to limiting customers and advertising its services, before and after the Planning Inspectorate made his decision to allow the appeal by the lorry park owners in July 2007.
 - ii. All correspondence held in any form between the Highways Agency and Suffolk County Council, Suffolk Coastal District Council and Ransomes Europark that relates to the provision of parking facilities now and in the future for lorries and heavy goods vehicles in the county.

- iii. In relation to 'i' and 'ii' the complainant asked that any index or appendix relating to these specific areas is also supplied.
5. On 23 April 2008 the Highways Agency responded to the complainant's request for information. It provided all information it held relevant to point "ii" of the request and also provided copies of any index or appendix relating to this point in accordance with point "iii". In relation to the information requested at point "i" above the Highways Agency explained that it was necessary for it to extend the time limit to provide a response by a further 20 working days as it was considering an exemption to which the public interest test applied. It explained that the exemption it was considering was that contained at section 42 of the Act which related to Legal Professional Privilege (LPP). It explained that it believed this exemption would be applicable as the complainant had requested information relating to legal advice received by the Highways Agency. The Highways Agency did not respond in relation to point 'iii' so far as it related to point 'i'.
6. On 22 May 2008 the Highways Agency provided a further response in relation to point "i" of the request. It explained that whilst it did hold the information requested at point "i", it was unwilling to disclose it. It explained that the information was being withheld upon reliance of the exemption contained at section 42 of the Act. It stated that this was because there was a very substantial public interest in maintaining the confidentiality of legally privileged material. The Highways Agency explained that in applying this exemption it had to balance the public interest in withholding the information against the public interest in disclosure.
7. As the complainant was dissatisfied with the response he had received, on 30 May 2008 he asked the Highways Agency to conduct an internal review of its decision.
8. On 18 July 2008 the Highways Agency wrote to the complainant with the result of the internal review it had carried out. It explained again that the information was being withheld in reliance on the exemption contained at section 42 of the Act because it stated there is a very substantial public interest in maintaining the confidentiality of legally privileged material. In reviewing the decision it stated that it had considered a number of factors.

The Investigation

Scope of the case

9. On 31 July 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate

whether the Highways Agency had correctly applied the exemption contained at section 42 of the Act.

10. The Commissioner has limited his investigation to the legal advice requested by the complainant at point 'i' of the request and point 'iii' so far as it relates to point 'i'. The Highways Agency responded in full to points 'ii' and 'iii' of the request so far as it related to 'ii'. Furthermore in making his complaint to the Commissioner the complaint focused upon the parts of his request relating to the legal advice.

Chronology

11. On 22 September 2008 the Commissioner wrote to the Highways Agency to inform it that he had received a complaint from the complainant and that the case was eligible for investigation.
12. On 14 October 2008 the Highways Agency wrote to the Commissioner. The Highways Agency provided a copy of the withheld information to the Commissioner.
13. On 27 February 2009 the Commissioner wrote to the Highways Agency. The Commissioner asked the Highways Agency to explain why it considered that the information withheld under the section 42(1) exemption was subject to a claim of legal professional privilege. Furthermore it was asked to provide any further submissions it wished to make as to why the public interest favoured the maintaining of this exemption in this case.
14. On 26 March 2009 the Highways Agency responded to the Commissioner. The Highways Agency confirmed that the withheld information solely concerned the obtaining of legal advice as to its position. It explained that the withheld information concerned legal opinion on the strength of the Highways Agency's position that conditions relating to planning consent for the Orwell Crossing Lorry Park should not be rescinded. It explained that the advice discussed the prospect of successfully resisting the appeal and explored the strengths and weaknesses of the Highways Agency's case. It explained that the advice was very detailed and went beyond merely identifying legislation it could rely upon. It explained that it made the request for the advice upon the understanding that such advice would be protected by LPP and an obligation of confidence.
15. It explained that the advice which was withheld was communicated between the Highways Agency, Treasury Solicitors and a member of Counsel from Landmark Chambers who was appointed to give advice on this matter as he is a specialist in environment, planning, property and public law. It explained that Faber Maunsell who were also appointed to act as its expert witnesses in the matter were also provided with Counsel's advice on terms that it was to be treated as confidential and was only to be used by them for the purposes of the

appeal in that case. It stated that it had not waived privilege in respect of the advice it had received. It explained that the advice was not communicated to any other party. It confirmed that the legal advice had never been made public, either by way of an extract, summary or in full.

16. It clarified that all contact between the Highways Agency, Treasury Solicitors and Landmark Chambers was conducted solely for the purpose of obtaining legal opinion as to the strength of its case at appeal.
17. Finally the Highways Agency confirmed that it had no further public interest arguments to submit and relied upon those made directly to the complainant in response to his request.
18. On 23 April 2009 the Commissioner wrote to the Highways Agency to explain that there are two categories of legal professional privilege in relation to section 42 of the Act, the categories are advice privilege where no litigation is contemplated or pending, and litigation privilege where litigation is contemplated or pending. The Commissioner explained that from the information he had been provided with so far he was of the belief that it was seeking to rely upon the former category; legal advice privilege where no litigation is contemplated or pending. However the Commissioner asked the Highways Agency to confirm this and to provide further information in support of this.
19. On 5 May 2009, the Highways Agency confirmed that it did indeed wish to rely upon advice privilege where no litigation is contemplated or pending.
20. On 8 July 2009 the Commissioner wrote to the Highways Agency to ascertain whether or not it held information relevant to point 'iii' of the request so far as it related to point 'i' of the request. On 9 July 2009 the Highways Agency wrote to the Commissioner and confirmed that it did not hold any information relevant to point 'iii' of the request so far as it related to point 'i' of the request. The Commissioner contacted the public authority to clarify that no further relevant information was held on 10 July 2009. He received a response from the public authority confirming that this was the case on 13 July 2009.

Finding of Fact

21. The Highways Agency has explained to the Commissioner that the appeal was dealt through a Public Inquiry, with the appointment of a planning inspector. The Public Inquiry was completed prior to the complainant making his request and the Planning Inspector's decision to allow the appeal was published on 26 July 2007.

Analysis

Is it environmental information?

22. Having reviewed the withheld information in detail and considered the clarification that the Highways Agency supplied on 5 May 2009, the Commissioner deemed it necessary to consider whether in fact the information sought by the complainant constituted environmental information. He therefore considered this point further and determined that the information did constitute environmental information and therefore the request should have been processed in accordance with the EIR. His basis for reaching this decision is set out below.

23. The definition of "environmental information" is set out in Regulation 2(1). This states 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—

(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 the elements of the environment referred to in (a) or, through those elements, by

any of the matters referred to in (b) and (c)..."

24. The Commissioner considers that the phrase "any information...on" should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the Regulations enact.¹
25. In this case the relevant part of the above definition is Regulation 2(1)(c). This defines environmental information as information on 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. In this instance, the information in question is legal advice on whether or not to challenge an appeal made under section 78 of the Town and Country Planning Act 1990, against Suffolk Coastal District Council's decision (on the direction of the Highways Agency) not to allow a planning permission to be varied. Given that the Town and Country Planning Act 1990 aims to balance economic development with maintaining the quality of the environment, the Commissioner considers that this is a measure which is likely to affect the factors and elements in 2(1)(a) and (b), or designed to protect those elements. In particular it is likely to impact the land and landscape, for example one of the points in dispute related to signage and external advertising as well as emissions which arise as a result of increased traffic flow and congestion and in turn affect the air and atmosphere. He is satisfied that the advice constitutes information on this measure and therefore falls under the definition of environmental information for the purposes of the Regulations.
26. The full text of Regulation 2 can be found in the Legal Annex at the end of this Notice.
27. As the Commissioner considers that the information requested is environmental information he has gone on to determine whether or not any of the exceptions contained within the Regulations would prevent disclosure. The Commissioner considers that Regulation 12(5)(b) would prevent disclosure of the requested information. As the arguments put forward by the Highways Agency in relation its application of the exemption contained in section 42 of the Act can be transferred to the Commissioner's application of Regulation 12(5)(b), he did not contact the Highway's Agency to obtain any further submissions.

Exception

¹ Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and , eventually, to a better environment.

Regulation 12(5)(b)

28. Under this regulation a public authority can refuse to disclose information if 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 v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that,

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.”²

This exception is subject to a public interest test.

29. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Vederers of the New Forest* [EA/2008/0020], which stated that,

“...the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system.”³

30. Therefore the Commissioner considers 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’.

Is the exception engaged?

31. In order to reach a view on whether the exception is engaged the Commissioner has first considered whether the requested information is subject to legal professional privilege.

² EA/2006/0001, para 21.

³ EA/2008/0020, para 29.

32. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.”⁴
33. There are two types of privilege – legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
34. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
35. In its letter to the Commissioner dated 26 March 2009 the Highways Agency stated that the withheld information attracted legal professional privilege and it clarified that all contact between the Highways Agency, Treasury Solicitors and Landmark Chambers was conducted solely for the purpose of obtaining legal opinion as to the strength of its case at appeal. On 5 May 2009, the Highways Agency confirmed that it wished to rely upon advice privilege.
36. The Commissioner has reviewed the withheld information, and is satisfied that it constitutes communications between the Highways Agency and its legal advisors for the sole or dominant purpose of obtaining legal advice. Therefore he is satisfied that the withheld information is subject to legal professional privilege and that the type of privilege is advice privilege.
37. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
38. In *Archer v ICO & Salisbury District Council* [EA/2006/0037] the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out; the effect must be “adverse” and

⁴ EA/2005/0023, para 9.

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. The information is then subject to the public interest test and the Tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.

39. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word “would”. It is the Commissioner’s view that the Tribunal’s comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & 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. The Commissioner considers, based upon the arguments put forward by the Highways Agency, that the following demonstrates that disclosure would adversely affect the course of justice:

- If the information were released into the public domain it would have a detrimental effect on the free and frank exchange of advice between the Highways Agency and its legal advisers in the future. This would mean that legal risks would not receive the analysis and mitigation they required.
- Any disclosure of instructions to Counsel would inhibit the Highways Agency from fully explaining issues of concern in relation to future legal advice. This would undermine its relationship with Counsel.

41. The Commissioner notes the views of the Tribunal in *Rudd v ICO & The Vederers of the New Forest* [EA/2008/0020], in which the Tribunal considered whether the disclosure of legal advice obtained by the public authority would have an adverse effect on the course of justice. In that case the public authority argued that:

- It was currently engaged in litigation where the subject of the legal advice had been raised. Disclosure would adversely affect its ability to defend its legal rights by disclosing advice that was the subject of current and potential future litigation.
- It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.

- It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
- Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.
- Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.

After considering these arguments the Tribunal was satisfied that these matters related to the course of justice, and that disclosure would have an adverse effect upon them.⁵ The Commissioner notes that the first point above is not relevant to this case because the withheld information is not subject to litigation privilege. However he considers it appropriate to note the remaining arguments highlighted by the Tribunal when assessing this case.

42. The legal advice that has been withheld was relied upon by the Highways Agency to determine whether or not to oppose an appeal against the Council's decision not to allow variance to a planning permission. The appeal by way of public inquiry was concluded in July 2007 and therefore was complete by the time of the request in March 2008. However as the request was made less than a year after completion of the appeal process it is possible the legal advice could be relied upon in relation to similar future cases. Given the timing of the request, the free and frank content of the withheld information and the explicit indication that legal professional privilege applied to the withheld information, as well as the comments of the Tribunal in the case above, the Commissioner considers that the likelihood of the adverse affects listed above occurring is more probable than not. Therefore he is of the view that regulation 12(5)(b) is engaged.

43. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Public Interest Test

Factors favouring maintaining the exception

44. The Commissioner considers that there will always be an initial weighting in favour of maintaining the exception due to the importance of the concept behind Legal Professional Privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed in the High Court case of *DBERR v Dermod O'Brien* (although this case relates to the application of

⁵ EA/2008/0020, para's 33 – 34.

section 42 under the Act the principal is transferable to Regulation 12(5)(b)).

“.....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (*para 41*)....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight” (*para 53*).

However it was indicated that this did not mean that s.42 should be elevated “*by the back door*” to be an absolute exemption and instead indicated that the proper approach to take was as follows:

“...acknowledge and give effect to the significant weight to be afforded to the exemption in any event, ascertain whether there were particular or further factors which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least...” (*para 53*).

45. The Commissioner is also mindful of the Tribunal’s decision in *Bellamy v ICO* (EA/2005/0023) in which it was stated:

“...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 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...”.

“The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption.”

The Commissioner has therefore considered these comments in the context of this case, and considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional.

46. The Highways Agency explained to the Commissioner that the factors it considered supported non-disclosure included the following:

- There is a substantial public interest in ensuring confidentiality between a lawyer and client is protected.

- It is in the public interest that decisions taken by government are taken in a fully informed legal context for the effective conduct of government business.
 - Legal advice will often explore counter arguments to a public authority's position and it would not be in the public interest to unfairly expose a public authority's legal position to challenge.
 - It is in the public interest that legal advice and the decision making process surrounding that legal advice is fully and accurately recorded. However disclosure may discourage full and accurate written recording of such in the future.
47. The Commissioner considers that it is in the public interest that the Highways Agency is able to continue to seek legal advice to ensure when necessary that it is making decisions that are compatible with the law. In this case the advice was sought to determine the strength of defending an appeal against the Council's decision (at the Highways Agency's instruction) to decline to vary a planning permission. The Commissioner believes that it is in the public interest for the Highways Agency to be able to seek this legal advice freely and to obtain full and frank advice to ensure that it is exercising its decision making powers in accordance with the law and its legal requirements.
48. The Commissioner also considers that if the information were released into the public domain it may have some detrimental effect on the free and frank exchange of advice between the Highways Agency and its legal advisers in the future.
49. The Commissioner has also considered whether or not the legal advice was recent. In the Tribunal case of Kessler/Ministry of Defence (EA/2007/0043) advice which was weeks old was described as "relatively recent", in Kitchner & Derby County Council (EA/2006/0044) advice which was 6 years old was described as "still relatively recent" whereas in Mersey Tunnel Users Association / Merseytravel [EA/2007/0052] advice which was over 10 years old was considered "not recent". Upon consideration of the withheld information the Commissioner believes that it is recent.
50. The Commissioner has taken into account the fact that although the appeal which the legal advice related to had concluded at the time of the request, the request was made less than a year after the appeal concluded. Therefore the Commissioner considers that whilst the legal advice was not live in the sense that it was no longer being relied upon in order to determine whether or not to oppose the appeal, it was recent and could be utilised by the Highways Agency in relation to similar cases in the future. The fact that the advice was relatively recent also increases the likelihood that at least some of the same individuals may be involved in seeking and/or providing advice

in similar cases and that they may well feel unable to provide as full and frank advice if the material had been disclosed at the time of the request.

51. The Commissioner is also mindful of the Tribunal decision of Foreign & Commonwealth Office v ICO [EA/2007/0092] in which it was stated:

“...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained...”

The Tribunal went on to state that such arguments of misrepresentation should be supported by, “cogent evidence”.

52. Upon viewing the legal advice which was the subject matter of the complainant's request the Commissioner has not found evidence that the legal advice was misrepresented by the Highways Agency.
53. Finally the Commissioner has considered the Highways Agency's argument that disclosure may discourage full and accurate written recording of such in the future. The Commissioner does not generally accept such arguments in relation to record and note keeping. In the case of *Guardian & Brooke v The Information Commissioner's Office & the BBC* (EA/2006/0011 EA/2006/0013), which was a request for a particular set of minutes which had been withheld under the exemption contained at section 36 of the Act, it was argued that keeping proper minutes was, “part of the process of carrying out proper deliberations,” and that disclosure in a particular case might discourage proper minute keeping in the future. The Tribunal did not accept this argument and stated that, “for purposes of effective administration a responsible public authority ought to keep suitable minutes of important meetings, whether or not the minutes may be disclosed to the public at a later date.” The Commissioner considers that this principle would likewise extend to the proper recording of exchanges between a public authority and its legal adviser when seeking legal advice. Therefore the Commissioner does not attribute any weight to this argument.
54. The above factors must be balanced against the public interest factors in favour of disclosing the legal advice which the complainant has requested.

Factors in favour of disclosing the information

55. The Highways Agency explained to the Commissioner that the factors it considered supported disclosure included the following:
- There is a clear public interest in the work of government being closely examined to encourage the discharging of public functions in the most efficient and effective way.
 - There is an important public interest in the work of public bodies being transparent and open to scrutiny to increase diligence and to protect the public purse.
 - There is a public interest in public authorities being accountable for their decision making. Ensuring that decisions are made on the basis of good quality legal advice.
56. The Commissioner considers that Parliament did not intend this exception to be used as an absolute exception. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel. The Tribunal placed particular weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to issues which affected a substantial number of people.
57. The Commissioner considers that there is a strong public interest in public authorities being transparent in their decision making and in people understanding the reasons behind decisions made. In this case disclosure of the legal advice may assist the public in understanding the legal basis for this particular decision. However the Commissioner does not believe that in this case the decision made affects a substantial number of people nor does he consider the impact upon the majority of those affected to be significant given that the focus is on whether or not the public can access a specific service area on the A14.
58. There may be some individuals, such as those who own the park, who are more significantly impacted by the decision by the Highways Agency to oppose the lorry park owner's appeal and how this was reached. However balanced against the need for the Highways Agency to be able to seek free and frank legal advice, as a private third party would be able to, is important so that the Highways Agency is not put at a disadvantage to private third parties. Whilst in this case the appeal had concluded at the time of the request, it may still prejudice the level of free and frank legal advice obtained in the future which may put the Highways Agency at a position of disadvantage.
59. More generally the Commissioner considers that disclosure may increase public confidence in the Highways Agency decision making,

in that it may show that decisions are well thought out and based upon professional legal advice when necessary.

Balancing the public interest arguments

60. In balancing the public interest considerations the Commissioner considers that in this case the public interest in maintaining the exception outweighs the public interest in disclosure. In favour of maintaining the exception, the Commissioner is particularly mindful that disclosure could have a detrimental effect on the Trust's free and frank exchanges with its legal advisers in the future, the advice is recent and he has found no evidence that it has been misrepresented by the Highways Agency. Furthermore the Commissioner considers that the decision made by the Highways Agency in this case was not one that affected a substantial number of people in a significant way.
61. The full text of Regulation 12(5)(b) can be found in the Legal Annex at the end of this Notice.

Regulation 14(3)(a)

62. Regulation 14(3) states 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).”
63. In this case the refusal to provide the requested information did not specify that the information was withheld by virtue of Regulation 12(5)(b). In failing to deal with the request under the correct access regime the Highways Agency breached Regulation 14(3)(a).
64. However the Commissioner considers that the issue as to whether or not the requested information was environmental information was complex in this case.

Procedural

Regulation 14(1), 14(2) and 14(3)(a)

65. As the Highways Agency failed to identify that the requested information was environmental information it dealt with the complainant's request under the Act. The Highways Agency did not issue an adequate Refusal Notice in accordance with the requirements of Regulation 14 of the EIR. Under the EIR there is a

specific exception where information is not held; 12(4)(a) and this should be cited in the refusal notice if being claimed. Section 12(4)(a) states that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

(a) it does not hold that information when an applicant's request is received...”

66. As the Highways Agency dealt with the request under the Act and failed to confirm that some of the requested information was not held prior to the Commissioner's investigation, it failed to cite the exception contained at Regulation 12(4)(a) in the refusal notice it issued. The Commissioner considers that the Highways Agency was in breach of regulation 14(1) as it failed to issue a refusal notice in relation the information within the scope of the request it has confirmed is not held, Regulation 14(2) as it failed to issue a refusal notice within the statutory time for compliance and Regulation 14(3)(a) as it failed to cite which exception was applicable.

Is further recorded information held?

67. The Commissioner will now consider whether further recorded information is held:
68. On 8 July 2009 the Commissioner asked the Highways Agency to confirm whether or not it held any index or appendix attached to any of the withheld information relevant to point 'i'. He did this having confirmed with the complainant that in seeking this information he was asking for any material that was appended to the legal advice requested in point 'i'.
69. On 9 July 2009 the Highways Agency confirmed that there were no index or appendices attached to any of the information it held relevant to point 'i' of the request. It confirmed that it had provided the Commissioner with all relevant information in relation to point 'i' of the request and that it did not hold the information requested at point 'iii' so far as it related to point 'i'.
70. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that “there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records”. It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.

71. On the balance of probabilities the Commissioner is satisfied that the Highways Agency provided him with all information it holds relevant to point 'i' of the request and does not hold the information requested at point 'iii' so far as it relates to point 'i'. The Commissioner considers that if any index or appendix were attached to the information requested at point 'i' this would have been established when compiling the information held relevant to point 'i' for the Commissioner's investigation. Furthermore the withheld information does not contain any references to suggest that there is additional material held that would fall within the scope of request iii. Finally the Commissioner has not been provided with any evidence, nor has he identified any reason such as a business need to have held material, which would suggest that information relevant to request iii is held by the public authority.
72. The Commissioner therefore considers that the information requested at point 'iii' so far as it related to point 'i' is not held in accordance with Regulation 12(4)(a).
73. On 10 July 2009 the Commissioner wrote to the Highways Agency and asked it to confirm whether or not it had obtained any legal advice after the planning decision was made in July 2007 and therefore whether it held any such legal advice.
74. On 13 July 2009 the Highways Agency confirmed that no legal advice was sought after the inquiry was completed and therefore information is not held by the Highways Agency.
75. Again bearing in mind the Tribunal's decision in Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072), the Commissioner is satisfied on the balance of probabilities, that the Highways Agency did not obtain any further legal advice after the planning decision was made in July 2007 and therefore no such legal advice is held by the Highways Agency in accordance with Regulation 12(4)(a). His reasons for reaching this conclusion are the same as those set out above in relation to request iii.
76. Regulation 12(1)(b) states that all exceptions are subject to the public interest test, however the Commissioner does not consider that it will usually be possible to consider the public interest in respect of information which is not held. He does not therefore consider that it will be possible in this case.

The Decision

77. The Commissioner's decision is that the Highways Agency incorrectly applied the exemption contained at section 42(1) of the Act.

78. However the Commissioner considers that point 'i' of the request for the legal advice is exempt by virtue of Regulation 12(5)(b) and therefore the Highways Agency was not obliged to comply with Regulation 5(1).
79. The Commissioner considers that that the information requested at point 'iii' so far as it related to point 'i' is not held in accordance with Regulation 12(4)(a). The Commissioner does not consider that the Highways Agency holds any legal advice obtained after July 2007.
80. The Commissioner considers that the Highways Agency breached Regulation 14(1)(a), 14(2) and 14(3) as it failed to deal with the request under the correct access regime and failed to confirm that some of the requested information was not held within twenty working days.

Steps Required

81. The Commissioner requires no steps to be taken.

Other Matters

82. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
83. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. Such procedures are commonly known as internal reviews.
84. In February 2007, the Commissioner issued guidance on the time limits for considering internal reviews. The guidance recommended that public authorities should aim to respond fully to all reviews in 20 working days. Although it suggested that it may be reasonable to take longer where the issues are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. The guidance also explained that the Commissioner does not expect internal review procedures to consist of more than one stage. Furthermore Regulation 11(4) states that applicants for information must be informed of the outcome of an internal review as soon as possible and no later than 40 working days after the request for a review is received.

85. The Commissioner also notes that documentation provided to him as part of his investigation suggests that the Highways Agency is operating a multiple-stage internal review procedure. If it has not already done so, he would recommend that the authority reassess this procedure and reduce the number of stages to one. Further advice on internal reviews can be obtained from the Commissioner's website via

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf

Right of Appeal

86. 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

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 16th day of July 2009

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

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

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

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

“the Commissioner” means the Information Commissioner;

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

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

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

by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

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

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

“Scottish public authority” means –

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

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

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 2(2) Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

Regulation 2(3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

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

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

Regulation 2(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant’s request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

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

- (a) international relations, defence, national security or public safety;

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12(6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.