

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 28 September 2009

Public Authority: London Borough of Barnet Council
Address: North London Business Park
Oakleigh Road South
London
N11 1NP

Summary

The complainant requested copies of the instructions to counsel and the corresponding legal opinion obtained by the London Borough of Barnet Council ('the Council') in regards to its decision to rescind a deed of agreement and the associated restrictive covenant. The Council refused the request pursuant to section 42(1) of the Freedom of Information Act ('the Act'), claiming that the public interest favoured maintaining the legal professional privilege exemption. However, the Commissioner has found that the withheld information should have been considered under the Environmental Information Regulations 2004 ('EIR'). As a result, the Commissioner considers that the Council breached regulation 14(3) in failing to provide a refusal notice in accordance with the EIR. Nevertheless, in transferring the relevant arguments over to the EIR, the Commissioner has determined that the information does attract legal professional privilege and that the public interest favours maintaining the exception provided by regulation 12(5)(b).

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.

Background

2. The requested counsel's opinion relates to approximately 35 acres of land located in Cricklewood, with part of the site taken up by Hendon Football Club. This space was originally burdened with a 1925 and 1927 restrictive covenant, the former being the subject of a case put before the land tribunal that resulted in the covenant being released. However, it is the later covenant contained in an agreement between the Hendon Urban District Council and Middlesex County Council that has served as the focus of the complainant's application.
3. The London Borough of Barnet Council ('the Council') originally sought counsel's advice in this regard during the litigation process dealing with the 1925 covenant. In May 2007, with the land tribunal case having been concluded, the Council moved to cancel the 1927 covenant entry in the Land Charges Register with a view to developing the space leased to a private company.
4. The issue, as raised by the complainant and others, revolves around the allegation that the Council erroneously and unilaterally removed the 1927 covenant.

The Request

5. On 22 August 2008, the complainant asked the Council to provide the following:
 1. "The instructions to their Counsel regarding the 1927 Deed of Agreement and the restrictive covenants contained therein."
 2. "The opinion given by your Counsel."
 3. "A copy of to [sic] the 1936 Deed between Middlesex County Council and Hendon Urban District Council which relates to the 1927 deed."
6. The complainant noted that the Council should not seek to rely on section 42(1) of the Act given that the Council itself granted planning permission from which it would gain. Therefore, all exemptions would be excluded by the Local Government Act 1972 ('LGA').
7. The Council responded to the request on 19 September 2008. In regards to parts 1 and 2 of the requests, it stated that after careful consideration the Council had reached the conclusion that the exemption provided by section 42(1) was engaged. As required by the Act, the Council then moved on to assessing the public interest in disclosure but found that maintaining the exemption held greater sway. Amongst other points, the Council also indicated that the provisions of the LGA would not have a bearing on its handling of the request.

8. The Council, however, did furnish the complainant with a copy of 1936 Deed in accordance with part 3 of the requests. This has therefore been discounted from the Commissioner's investigation.
9. On 3 October 2008, the complainant appealed the Council's decision in regards to parts 1 and 2 of the request. Although in agreement that the Act and the LGA did not overlap, the complainant maintained that the Council's actions in seeking to develop the land in question precluded it from refusing the request.
10. The Council, having completed its internal review, sought to address the complainant's points in an email dated 28 October 2008. Principally, the Council disagreed that its way of proceeding had been in anyway improper or secretive. The Council therefore upheld its original position that the requested information would be exempt under section 42(1) of the Act.
11. In light of the refusal, the complainant emailed the Council on 17 November 2008 to advise of his intention to contact the Commissioner and setting out detailed arguments explaining why he disagreed with the Council's position.

The Investigation

Scope of the case

12. On 19 November 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 consider whether the information he had requested should have been provided to him.

Chronology

13. On 9 March 2009, the Commissioner telephoned the Council to request that it provide copies of all records it had sought to withhold up this point.
14. The Council provided the requested information to the Commissioner on 17 March 2009, enclosing details of the background to the complaint and presenting its supporting arguments for the application of section 42(1) of the Act.
15. In view of the submitted information, the Commissioner wrote to the complainant to set out his preliminary findings. In his correspondence of 22 April 2009, the Commissioner indicated that section 42(1) of the Act was likely to apply and that given the evidence so far examined, the public interest would seem to favour maintaining the exemption. However, the Commissioner invited the complainant to buttress his arguments if he disagreed with his findings.
16. On 13 May 2009, the complainant presented the Commissioner with a detailed refutation of the points he had previously put forward. The complainant asserted that the Commissioner had underestimated the breadth of public interest and the

level of public funds involved. The complainant also disputed the Commissioner's interpretation of the standard of proof associated with legal professional privilege.

17. Having studied the relevant representations, the Commissioner telephoned the complainant on 15 May 2009 to ask that he elaborate on certain issues he had previously referred to, specifically:
 - the Environment Agency's criticism of the Council's plans to develop the land in question;
 - the complainant's estimation that the amount of money associated with the development would be in the quantum of £20 million.
18. The complainant responded on 14 June 2009, enclosing a copy of: a letter sent by the Environment Agency to the Council in regards to the proposed development; an agenda item of the Council's planning and environment committee of 18 October 2004; examples of the letters of objection to the development.
19. On 7 July 2009, the Commissioner wrote to the Council to confirm that he had a correct reading of the facts of the case. The Council issued a response on 21 July 2009, giving a broad summary of the reasons why counsel's advice was sought and the status of the legal advice itself.
20. The Commissioner wrote to the Council again on 5 August 2009 to ask that it reconsider the request under the EIR rather than the Act. The Commissioner also suggested that his decision recently issued under the reference FS50194691, involving Nottingham City Council, might be relevant to the issues being considered here. As the Commissioner had required disclosure in that instance, he asked that the Council provide comparative reasons that would support its position.
21. In its response of 7 September 2009, the Council accepted that the appropriate legislation was the EIR and not the Act. Given this change of access-regime, the Council stated that it would be relying on regulation 12(5)(b), the closest exception to section 42(1), to withhold the requested information. It continued by stating the reasons why its arguments differed, and ultimately held more weight, from those in the Nottingham City Council case.

Analysis

Substantive Procedural Matters

22. In its handling of the complainant's request, the Council initially sought to refuse the application under exemptions contained in the Act. However, given that the requested information relates to agreements that would effect how land was to be used, the Commissioner has found that the request should have been processed in accordance with the EIR.

23. Particularly, the Commissioner is of the view that the requested records would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This 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 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.” The full text of regulation 2(1) is included in the legal annex to this notice

24. In this instance, the legal advice concerns the application of a restrictive covenant that, when in force, would require an area to be kept for specific purposes. As a consequence, the Commissioner has deemed the advice environmental information as it is on a measure - the restrictive covenant - which affects or is likely to affect the state of the elements of the environment, in particular, land and landscape.
25. As a result of this development, the Commissioner finds that the Council's refusal notice breached the condition imposed by regulation 14(3). This requires that a public authority seeking to withhold information must specify the relevant exception it is relying on.

Exception

26. In determining this case, the Commissioner has taken into account the submissions of both the public authority and the complainant. Full extracts of the relevant law considered in this case can also be found in the Legal Annex to this Notice.

Regulation 12(5)(b)

27. The exception provided by regulation 12(5)(b) of the EIR represents the closest relative to the legal professional privilege exemption contained in section 42(1) of the Act, including the necessity to consider the public interest in disclosure.
28. Under the regulation, a public authority may refuse to release 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.” As no arguments have been put forward about any inquiry of a criminal or disciplinary nature, the Commissioner has excluded these parts and instead concentrated on ‘the course of justice’ as the relevant criterion contained in the exception.
29. Whilst regulation 12(5)(b) does not explicitly refer to legal professional privilege, previous Tribunal decisions - most notably *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] and *Rudd v ICO & The Vederers of the New Forest*

[EA/2008/0020] - have agreed that legal professional privilege is a cog in the 'course of justice' mechanism. The Commissioner has therefore generally taken the position that if it can be demonstrated that information attracts legal professional privilege, it would potentially fall under regulation 12(5)(b) of the EIR.

30. Broadly speaking, 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.”

31. The Commissioner is satisfied that the advice was sought from and provided by a qualified legal adviser, in his professional legal capacity. The Commissioner therefore accepts that the requested information attracts legal professional privilege. There is no suggestion that privilege has been waived by the Council.

Would a disclosure of the information adversely affect the course of justice?

32. To the extent that the information would attract legal privilege, the Commissioner must then adjudge whether disclosure would adversely affect the course of justice. If not, the exception would not apply.

33. In the case of *Archer v ICO & Salisbury District Council* [EA/2006/0037], the Tribunal proposed a now widely accepted approach for considering adverse effect:

“First, it is not enough that disclosure should simply affect the matters set out in [the case]; the effect must be ‘adverse.’ Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure ‘would’ have an adverse effect - not that it could or might have such effect.”

34. Legal professional privilege is a recognised principle that allows the free and frank discussion of legal matters in the knowledge that such exchanges will be retained in confidence.
35. The Commissioner acknowledges that a disclosure of information that is subject to legal professional privilege will have an adverse affect on the course of justice simply through the weakening of the doctrine. Should this occur and the privacy of discussions be routinely compromised, the Commissioner concedes that the discussions between a client and their adviser may become inhibited. However, the Commissioner must also consider the specific information caught by the request when considering any effect on the course of justice.

36. An important feature that has shaped the Commissioner's view in this respect is the knowledge that the legal advice is still live, namely that the advice had informed actions which may still be legally challenged, and that the advice is still being relied upon. Having read the advice, the Commissioner is satisfied that its disclosure would disadvantage the Council, in that it would expose the strengths and weaknesses of its position in any litigation. Consequently, the Commissioner has taken the position that to release the information would have a real and substantial effect on the course of justice and that, as a consequence, regulation 12(5)(b) is engaged.
37. Where an exception to disclosure applies, regulation 12(1)(b) requires that a public interest test be carried out. Specifically, for an authority to withhold information legitimately under the EIR, it must be established that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. In coming to his decision, the Commissioner has also been mindful of regulation 12(2), which provides that a public authority must apply a presumption in favour of disclosure.

The public interest

38. The principle of legal professional privilege is based on an established and widely accepted notion that a legal confidence should be preserved.
39. To refer back to his comments in the Nottingham City Council decision, 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...Eroding the doctrine of legal professional privilege could therefore damage the ability of parties to provide or receive legal advice on a free and frank basis..."
40. As a general steer for his assessment, the Commissioner has found it instructive to refer to the Information Tribunal's findings in *Calland v Financial Services Authority* [EA/2007/0136], which sets out a prelude to the public interest test in the context of legal professional privilege:

"The general public interest in disclosure of communications within public authorities has been referred to, usually under the headings of 'transparency' and 'informing the public debate,' in a number of decisions of this Tribunal. What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."
41. When weighing up the public interest in disclosure, the Commissioner has not treated the instructions to counsel and counsel's opinion separately, as both would seem to attract the same level of protection. This general position has been endorsed by the Information Tribunal in *Gillingham v the Crown Prosecution and the Information Commissioner* (EA/2007/0028), which remarked that the "policy

reasons which undergird legal professional privilege apply as strongly to the request for advice as to the advice itself.”

Public interest arguments in favour of disclosing the requested information

42. The central feature of this case rests on the Council's move to dismiss an agreement that had preserved an open space in an urban area of London. With growing pressures on the recreation space available in urban centres, the actions of public authorities' to develop such land has become increasingly contentious.
43. In itself, the 1927 covenant was designed to ensure that local communities could have access to a recreational area, and by so doing, to enhance the way of life of its users. In his representations, the complainant has referred to the significant number of people who have sought to utilise the recreational space, not just confined to the local residents of Cricklewood.
44. The Commissioner has also viewed submissions from various parties that state their opposition to the planned development on the land in question. These, the complainant has suggested, form part of a significant body of opposition in what the Commissioner clearly understands is an emotive subject. Amongst other points, the submissions cite the increased traffic problems associated with a development, as well as the flooding problems that building may engender.
45. Accordingly, the Commissioner considers that there is a significant interest in understanding the legal basis for overriding a covenant that had benefited people within the Council's jurisdiction and beyond. Given that a public authority should serve its population, there is a reasonable expectation that important planning decisions should be taken openly and transparently.
46. In the Nottingham City Council decision, the Commissioner acknowledged the public interest in disclosing legal advice around a planning issue, by stating:

“There is 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 [a number 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...”
47. The Commissioner also recognises the complainant's concerns about ‘how an initially community sport driven endeavour [based around Hendon Football Club] can transmute into a major property development private sector windfall at the public expense.’
48. Where a public authority seeks to develop land previously reserved as greenspace, it is normally on the premise that the redevelopment will better serve the local area. This issue has become increasingly pertinent as the pressure on authorities to house an expanding population grows.
49. Consequently, the Commissioner understands that there will not be a clear consensus between the competing interests that will try to stake their claim on the

remaining areas of greenspace - whether this is the interest promoting preservation of the space, or the interest that advocates development.

50. The Commissioner would therefore accept that, where possible, a public authority should be open about the decisions it is making. Irrespective of whether this will placate the various interests, the Commissioner believes that this will at least demonstrate the soundness of the authority's reasons for coming to a decision. In essence, transparency should equate to accountability.
51. The Commissioner has also considered further arguments that the complainant believes support the public interest in releasing the information. Of perhaps the greatest significance has been the complainant's implication that the Council had misrepresented its legal advice in some way. This issue was addressed in the Information Tribunal case of Foreign Commonwealth Office ('FCO') v the Information Commissioner (EA/2007/0092).
52. In its ruling, the Information Tribunal considered occasions where the public interest would be likely to 'trump' the preservation of legal professional privilege, with the Tribunal commenting that:

"The most obvious cases would be those that 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 lawful or where there are clear indications that it has ignored unequivocal advice which it obtained."
53. The Commissioner has not seen any evidence that would give him reason to believe the complainant's suspicions, nor that the Council has acted in such a way that would imply that it has forfeited its right to claim legal professional privilege - for example, that its actions have been shown to be unlawful.
54. The Commissioner has also considered the submissions put forward by the complainant relating to the Environment Agency ('EA')'s criticisms of the development.
55. The Commissioner, though, is not convinced that this element would have a substantial bearing on his assessment. Concerning the Environment Agency's views on the Council's plans, the Commissioner has been provided with a copy of correspondence that dates back to 28 June 2004. This states EA's objection to the proposals on the grounds that the developer had not undertaken a Flood Risk Assessment ('FRA').
56. The complainant has conceded that such an objection would only seem to be based on a technicality, but has argued that any FRA would be unlikely to satisfy the EA given the numerous objections to the development. Yet, the Commissioner is not in a position to make such an inference and therefore believes that the document by itself would not serve to bolster the case for disclosure. Besides, the Commissioner would only see the issue of flooding to have an indirect influence on his considerations, given that the legal advice being requested only addresses issues around a restrictive covenant.

57. Finally, the complainant has argued that if development is crucial for the Council's housing strategy, the Council should have commissioned the property development itself, rather than leave the development in the hands of the private company that currently leases the land. By not doing so, the complainant has estimated that the Council, and therefore the public purse, has lost out on £20 million at a conservative estimate.
58. The Commissioner is conscious that the amount of money involved can be a factor when considering the public interest, with £20 million representing a significant figure. Yet, irrespective of the accuracy of the estimate, the Commissioner is aware that the subject of whether the Council should have taken control of the development, and whether it had the legal authority to do so, does not relate to the legal advice in question. This, in the Commissioner's opinion, would seem to lessen its weight as an issue in support of disclosure.
59. Tellingly, the Tribunal in Calland similarly noted that a distinction should be drawn between the public interest in ensuring that an authority is properly discharging its responsibilities and the "more limited interest in disclosure of...communications subject to" legal professional privilege.

Public interest arguments in favour of maintaining the exemption

60. The Commissioner considers that there will always be an initial weighting in favour of maintaining legal professional privilege due to its importance as a concept, namely safeguarding the right of any person to obtain free and frank legal advice that goes to serve the wider administration of justice.
61. This position was endorsed by Justice Williams in the High Court case of Department for Business, Enterprise and Regulatory Reform v Dermod O'Brien (EWHC 164), who said:
"[legal professional privilege] 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..."

The in-built interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight."

62. In this regard, the Commissioner believes that a public authority should have the right to seek advice about challenging restrictions that it considers inhibit its ability to meet the needs of the community. A critical part of this process will involve that authority weighing up the strength and weaknesses in its position and then taking a firm line, free from the fear that its opponents could exploit the advice to its own purposes. As the Tribunal in the FCO case remarks:

"Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned."

63. This point was similarly raised by the Information Tribunal in *Creekside Forum v Department for Culture, Media and Sport (EA/2008/0065)* as supporting grounds for maintaining an exemption or exception based on legal professional privilege:

“Disclosure under [the Act or the Regulations] puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis.”

64. To compound the more general arguments in favour of maintaining the exception, the Commissioner is also mindful that the counsel's advice is live. That is, the advice is still being relied upon by the Council and therefore may give rise to legal challenges by those unhappy with the course of action adopted based on that advice. To release the information at this stage then, would likely weaken the Council's position in a legal, adversarial system. In such circumstances, the Commissioner has normally been persuaded of the strong weight that this factor would carry.

Balance of the public interest arguments

65. The Commissioner acknowledges similarities between the circumstances presented here and those in the Nottingham City Council case. However, the Commissioner considers each case on its own merits, with reference to the particular information in question. Although he believes that the public interest was finely balanced, the Commissioner has concluded that in this case it would favour maintaining the exception.
66. The Commissioner understands that the issues at the heart of the case are important, not least because it reflects an increasingly common situation in many urban areas.
67. In respect of Cricklewood's recreational space, the Commissioner recognises that there are a significant number of individuals interested in preserving the area for future generations. The Commissioner has therefore carefully considered the arguments in favour of disclosure, and acknowledges the cogent argument that proposes that transparency in the Council's decision-making process could serve to benefit the people affected by the planned development.
68. However, the Commissioner is conscious of the weight invested in legal professional privilege, particularly the breaching of a trust between a legal adviser and their client that may go on to undermine the possibility of a frank discussion between the parties. When taking this into account, the Commissioner feels that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
69. To return then to the prelude set out by the Tribunal in *Calland*, the Commissioner has concluded that there is an absence of clear, compelling and specific justification for disclosure in the submissions.

The Decision

70. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- Withholding the requested information pursuant to regulation 12(5)(b)

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

- The Council incorrectly considered the information under the provisions of the Freedom of Information Act 2000 rather than the Environmental Information Regulations 2004.
- In providing a refusal notice that referred to exemptions under the Act rather than exceptions under the EIR, the Council breached regulation 14(3), in that it did not cite the relevant exception it was relying on in its refusal notice.

Steps Required

71. The Commissioner requires no steps to be taken.

Right of Appeal

72. 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

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.

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 28th day of September 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

Freedom of Information Act 2000

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Environmental Information Regulations 2004

Interpretation

Regulation 2(1) In these Regulations –

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

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

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 the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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) 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;