

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

Decision Notice

Date: 9 September 2010

Public Authority: North Somerset Council
Address: Town Hall
Walliscote Grove Road
Weston-super-Mare
BS23 1UJ

Summary

The complainant requested a copy of legal advice the public authority obtained in relation to a complaint he made to it about an alleged breach of planning control at a residential property neighbouring his own. The public authority applied sections 31 (law enforcement) and section 42 (legal professional privilege) of the Act and stated that the information was exempt from disclosure. During the Commissioner's investigation the public authority also sought to rely on regulation 12(5)(b) of the EIR. The Commissioner considers the withheld information to constitute environmental information and the relevant legislation under which the request should have been considered to be the EIR. The Commissioner considers that the withheld information is subject to legal professional privilege and that it is exempt by virtue of regulation 12(5)(b) of the EIR. He found procedural breaches in the way the public authority handled the request but requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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

3. In June 2009, the complainant contacted North Somerset Council (the "Council") with a complaint about an alleged breach of planning control at a property neighbouring his own. In July 2009, the Council wrote to the complainant with its view that there had been no breach of planning control. The Council stated that it would not be taking any further action in relation to the complaint and that it considered the matter closed.

The Request

4. On 22 October 2009 the complainant made the following request to the Council under the provisions of the Act:

"I am writing to you to request information held by the Council on myself, my property and the property directly adjacent to me at [property address]."
5. The Council responded on 7 December 2009 by disclosing some information but withholding other information under the provisions of regulations 13 (personal data) and 12(5)(f) (interest of the person who provided the information) of the EIR.
6. Following further correspondence and the completion of an internal review into its handling of the request by the Council, on 22 January 2010 the complainant emailed the Council's Chief Executive asking for a list of information that had been withheld. The complaint also specifically asked for disclosure of "the legal advice provided by the Council's solicitors" that he understood formed the basis of the Council's action not to take enforcement action.
7. The Council responded on 12 February 2010 and stated that it held legal opinion that related to the alleged breach of planning control raised by the complainant but that it considered it to be exempt by virtue of sections 31 and 42 of the Act.

8. The complaint expressed dissatisfaction with the Council's decision on 15 February 2010 and on 22 February 2010 the Council informed him that it would be willing to hold further discussions with his solicitor. The Council also informed the complainant that it had appointed a single point of contact to liaise with him regarding his complaint to the Council.
9. It does not appear that the Council conducted an internal review of its decision to withhold the legal advice requested on 22 January 2010.

The Investigation

Scope of the case

10. On 12 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The complaint that he raised with the Council related to a planning matter and "in the interest of openness and transparency local authorities should be clear in their dealings and provide clear, unambiguous explanations with legal advice, if taken, to explain how a decision was made".
 - He therefore asked the Commissioner to secure disclosure of the "legal advice on this planning matter which they [the Council] obtained from their solicitors on 3th [sic] October 2009".
11. Although the complainant's original request of 22 October 2009 was for information that would have included his own personal data and the data of the owners of a neighbouring property, the complainant has made it clear that he is only now concerned with the legal advice referred to above. Although the Commissioner has seen no evidence that the Council conducted an internal review to examine its decision not to disclose the legal advice in question, he considers that, given the amount of time that this issue has been ongoing, it would be unreasonable to expect the complainant to wait for the outcome of an internal review before setting out his opinion on this matter. This Notice therefore focuses on the Council's decision to withhold the legal advice in question.

Chronology

12. On 24 May 2010, the Council provided the Commissioner with a copy of the withheld legal advice and clarification of its position in this matter.

Analysis

The relevant legislation

13. In its refusal of the complainant's request for a copy of the legal advice of 12 February 2010, the Council stated that the information was exempt by virtue of sections 31 and 42 of the Act. However, in its letter to the Commissioner of 24 May 2010 the Council stated that it was also relying on regulation 12(5)(b) of the EIR.

14. The Commissioner therefore considered whether the EIR was the correct legislation under which to consider this request.

15. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. Regulation 2(1)(c) of the EIR states that information on the following can be environmental information;

"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 order for information on any of the above measures to be considered environmental it must be possible to link it to the elements and factors referred to in regulation 2(1)(a) and (b).

16. The complaint that the complainant made to the Council about an alleged breach of planning control related to an external structure on property owned by one of his neighbours. The legal advice in question relates to the interpretation of planning legislation that influenced the Council's decision on whether there had been a breach of planning control and therefore whether it needed to consider enforcement action against the owner of the property in question.

17. The Commissioner considers that advice on the interpretation of planning legislation that influenced a decision on whether to take enforcement action in relation to an external development is, in this case, information on a measure that would impact on the landscape - an element referred to in regulation 2(1)(a). As such, the Commissioner considers the EIR to be the relevant legislation under which the request for legal advice should have been considered.

Exceptions

Regulation 12(5)(b)

18. As stated above, the Commissioner is satisfied that the legal advice in this case falls within the definition of environmental information as provided in regulation 2(1)(c).
19. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the 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 communications or exchanges come into being for the purpose of preparing for litigation." (paragraph 9). * The Commissioner assumes this should read [third parties].
20. 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.
21. 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.
22. The Council has not specified which type of legal professional privilege it considers to apply in this case. The Commissioner has seen no evidence that litigation was proposed or had been contemplated in this case; although he is aware that the complainant has stated that he will

challenge the Council's decision, it is not clear whether he intends to bring proceedings against the Council. The purpose of requesting legal advice in this case was to obtain a legal interpretation of relevant planning legislation. The Council used this opinion to assist it in determining whether there had been a breach of planning control in the case highlighted by the complainant. The withheld information is legal opinion in the form of an internal memorandum and an email, provided to the Council's Development Control Department by a solicitor employed by the Council.

23. On the basis of the above, and having reviewed the withheld information, the Commissioner is satisfied that legal advice privilege applies in this case. Having assessed the information, the Commissioner has concluded that the Council is the party entitled to legal professional privilege and that this privilege has not been waived in this case.
24. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice, with particular reference to legal professional privilege.
25. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice. This is because the principle of legal privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. The confidence that discussions between clients and their advisers will remain private would become weaker and their discussions may therefore become inhibited. He considers the likelihood of this happening to be more probable than not and therefore finds that the exception at regulation 12(5)(b) is engaged. He is satisfied that 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.
26. Regulation 12(5)(b) of the EIR is subject to the public interest test. The public interest test favours disclosure unless, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the information. The Commissioner has gone on to consider the public interest arguments in favour of disclosure and those in favour of maintaining the exception.

Public interest test

Factors in favour of maintaining the exception

27. Having viewed the withheld information, and taken into account the circumstances of this case and the submissions from the Council and the complainant, the Commissioner has determined that the following factors in favour of maintaining the exemption are relevant:
- a. Protecting the ability of the Council to communicate freely with internal and external legal advisors in order to obtain advice in confidence regarding the interpretation of planning legislation.
 - b. Preserving the Council's general ability to seek and obtain informed legal advice about matters related to its general functions, duties and responsibilities. The Council argued guidance from the Department of Constitutional Affairs (DCA)¹ makes it clear that there is a public interest in public authorities being able to consult their lawyers in confidence. The Council specifically referred to paragraphs 4.8 to 4.15 of that guidance and argued that it sets out in detail why there is a very substantial public interest in maintaining the confidentiality of material subject to legal professional privilege and states that it will "only be in exceptional circumstances that it will give way to the public interest in disclosure".
 - c. Ensuring that public authorities make decisions on the basis of fully informed and thorough legal advice.
 - d. Preserving the ability of the public authority to defend its decision in the event of legal challenge.
 - e. The relative age of the legal opinion; the matter is live in that the Council has been advised by the complainant that he intends to challenge the decision not to take enforcement action. As such, this is not a case where time has reduced the inbuilt weight of the privilege.
 - g. Preserving the general concept of legal professional privilege.

Factors in favour of disclosing the requested information

28. The Commissioner has also considered the arguments in favour of disclosing the requested information. He considers the following factors to be relevant in this particular case:
- a. Disclosure would inform public debate about the interpretation and application of planning legislation by the Council.

¹ <http://www.dca.gov.uk/foi/guidance/exguide/sec42/chap04.htm>

- b. Releasing the information would help the public to understand the legal basis for the Council's decision in relation to this specific case.
- c. Disclosure would promote accountability and transparency for decisions taken by the Council in respect of planning enforcement matters.

Balance of the public interest arguments

- 29. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.
- 30. In deciding the weight to attribute to each of the factors on either side of the scale and determining where the overall balance lies, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people and the timing of the request and the status of the advice.
- 31. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight, he has determined that in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
- 32. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would harm the candour between the Council and its legal advisors. The advice was obtained relatively recently, in October 2009, and at the time of the request it remained live, in that the public authority was still relying upon it in relation to its decision that there had been no breach of planning control in a specific case. The complainant has stated his intention to challenge the Council's decision in this matter and the Commissioner considers that this adds weight to the argument that disclosure may harm the

Council's ability to defend its position in the event of any legal challenge the complainant might bring.

33. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisors and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
34. Having viewed the advice in question, the Commissioner considers that it applies to a fairly specific set of circumstances and is not therefore likely to impact on a significant number of people on a regular basis. He is aware that the complainant has a personal interest in the matter but he does not consider this to outweigh the substantial public interest in maintaining the principle of legal professional privilege.
35. The Commissioner is also conscious that legal advice is required in relation to a wide range of issues for which the Council is responsible. This may include matters that involve a significant amount of public funds and/or which would have a substantial impact upon the public. Therefore the harm arising from a reduction in candour of exchanges between it and its legal advisors is likely to be significant.
36. Whilst the Commissioner recognises the weight of the arguments in favour of releasing the requested information he has, on balance decided that they are outweighed by the arguments in favour of maintaining the exception. As explained above, the timing of the request and the fact that the advice remains live and that the complainant has stated his intention to challenge the Council's decision have been key factors when reaching this decision. Moreover, the Commissioner has been unable to identify any public interest arguments in favour of disclosure that outweigh the significant public interest arguments in favour of maintaining the principle of legal professional privilege.
37. The Commissioner is aware that regulation 12(5)(b) has a wider application than only to protect information subject to legal professional privilege and he acknowledges that the Council also raised other arguments that might fall under this exception. However, having determined that the information is subject to legal professional privilege and having determined that the public interest weighs in favour of maintaining the exception to disclosure, the Commissioner did not consider it necessary to consider any further arguments raised by the Council.

Procedural Requirements

38. Regulation 11(1) of the EIR provides that where an applicant considers that a public authority has failed to comply with a requirement of the EIR, he or she may ask it to reconsider its decision. Regulations 11(2) to 11(5) provide that on receipt of a request for reconsideration, a public authority shall consider it, decide whether it has complied with the EIR and notify the applicant of its decision.
39. On 15 February 2010, the complainant expressed dissatisfaction with the Council's response of 12 February 2010 to his request but the Commissioner has seen no evidence that the Council reconsidered its decision not to disclose the legal advice in question. As such the Commissioner considers that the Council breached regulation 11(3) and (4).

The Decision

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

It correctly withheld the requested legal advice under the provisions of regulation 12(5)(b).

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

By failing to reconsider its decision to withhold the requested information following the complainant's email of 15 February 2010, the Council, breached regulation 11(3) and (4).

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 9th day of September 2010

Signed

**Anne Jones
Assistant Commissioner
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);

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental 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 –

- (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;