

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

Decision Notice

Date: 15 June 2011

Public Authority: Hastings Borough Council
Address: Town Hall
Queens Road
Hastings
TN34 1QR

Summary

The complainant submitted a request to Hastings Borough Council ('the Council') for a legal opinion regarding a planning application. The public authority stated that no formal 'report' was held, and withheld an email summarising the legal advice received under section 42 of the Freedom of Information Act. During the course of the investigation, the Council reconsidered the request under the EIR and withheld the report under the exception at regulation 12(5)(b). The Commissioner has concluded that the Council does not hold any further information within the scope of the request and in particular does not hold a formal 'report' of legal advice. He has also found that the Council correctly withheld the email under regulation 12(5)(b). However, the Council has breached regulation 14(3)(a) by failing to cite the specific exceptions it relied upon in withholding information. The Commissioner does not require the Council to take any further action.

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 complainant's request relates to a planning application to construct two apartment blocks on a site in the local area, known as Robsack Meadow. The application was submitted in 2008, and has generated opposition from a group of campaigners opposed to development on the site. The planning application was submitted by the Council.
3. In June 2008, outline planning permission was granted for the application. However, in 2010, the Council confirmed that after receiving legal advice, it had referred the matter back to the planning committee.

The Request

4. On 11 July 2010, the complainant emailed the Council to make the following request for information:

"I would like to see the barrister's report that Hastings Borough Council paid for. It was sent to Hastings Borough Council and led to HS/OA/80/0022 being withdrawn....I would like to see the entire document and appendices..."

The Council responded on 26 July 2010 and stated that no legal opinion was held regarding application HS/01/80/0022, which was not withdrawn but determined in February 1980.

5. On 28 July 2010, the complainant emailed the Council and explained that he had quoted an incorrect planning application in his previous email. He asked that the Council reconsider his request with the substituted planning application reference HS/OA/08/00221. This corrected reference refers to the planning application detailed above in paragraph 2.
6. On 23 August 2010, the Council responded to the complainant. The response stated that no "formal written legal opinion" was held. However, the Council confirmed that it did receive verbal legal advice on the matter, and an email summarising this advice was held. This was withheld from disclosure under the exemption at section 42 of the Act, because the Council considered it to be covered by legal professional privilege. The Council detailed the public interest matters it had considered in concluding that the public interest favoured maintaining the exemption.

7. On 2 September 2010, the complainant requested an internal review. The complainant stated that he did not accept that no formal report was held, and that he believed the public interest favoured disclosure of the information that was held.
8. On 24 September 2010, the Council provided its internal review outcome to the complainant. This upheld the original response.

The Investigation

Scope of the case

9. On 5 October 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner has identified two issues for investigation and has confirmed these with the complainant. Firstly, the complainant does not accept that the Council does not hold a formal, written report of the legal advice. Secondly, the complainant objects to the Council withholding the information it has identified within the scope of the request. The Commissioner has considered both of these issues below.

Chronology

11. On 24 February 2011, the Commissioner wrote to the Council to outline the scope of the investigation. The Commissioner asked that the Council confirm whether it had considered whether the request was for environmental information. The Commissioner also asked that the Council provide him with a copy of the information withheld under section 42.
12. On 25 March 2011, the Council responded to the Commissioner and reiterated that it did not hold the requested information. The Council stated that "therefore no opinion could be formed as to whether the request would be better dealt with under the Environmental Information Regulations rather than the Freedom of Information regime". The Council also said that it was unable to provide the withheld information to the Commissioner as this did not exist.
13. On 28 March 2011, the Commissioner emailed the Council and again asked that it forward a copy of the information that was withheld under section 42 of the Act, or explain why this exemption had been applied if no information existed. The Commissioner also requested that the Council forward any invoices from its barrister regarding the advice to

him. The Commissioner further stated that it was his opinion that the request should have been handled under the EIR, and asked a series of questions about the request.

14. On 7 April 2011, the Council responded to the Commissioner's queries and provided copies of the withheld information, and invoices received from its barrister. The Council accepted the Commissioner's view that the information was environmental, and withheld the email under the exception at regulation 12(5)(b). In relation to a formal written report, the Council also cited regulation 12(4)(a), which applies where no information is held.
15. On 24 May and 13 June 2011, the complainant made a submission in support of his view that the information should be disclosed.

Analysis

Substantive Procedural Matters

Regulation 2

16. As outlined in paragraph 12, the Commissioner's view is that the complainant's request should have been considered under the EIR.
17. Although in its email of 7 April 2011, the Council accepted the Commissioner's view that the request was for environmental information, it has queried how this can be concluded where information is not held. The Commissioner accepts that where this is the case, it can be difficult to determine the correct access regime. However, regulation 2(1)(c) provides that "any information" on the following will be environmental:

"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".
18. In this case, the complainant requested legal advice relating to a planning application. This [application](#), which can be viewed online via the Council's website, is a proposal to build two new apartment blocks. The application is therefore a 'measure' that could affect the elements of the environment set out in regulation 2(1)(a). Legal advice relating to this would constitute "any information on" the application or measure. Therefore it is the Commissioner's view that the request was

for environmental information and should have been considered under the EIR.

Regulation 5 and regulation 12(4)(a)

Does the Council hold a 'report'?

19. The complainant's request was for "a barrister's report". The Council has identified some information that it believes falls within the scope of this request, specifically an email summarising the verbal legal advice it received at a meeting. However, the Council maintains that it does not hold any formal 'report' from the barrister that provided legal advice. It confirmed this in its response to the complainant and internal review, and during the course of the investigation has applied the exception at regulation 12(4)(a) of the EIR. This exception applies where no information is held.
20. The complainant does not accept that that Council does not hold a 'report'. The Commissioner will use the civil standard of the balance of probabilities test to reach a conclusion about whether further information within the scope of the request is held.
21. The complainant has directed the Commissioner to an article published in a local newspaper on 25 June 2010. This article states that the Council's barrister had advised it that the planning application would need to return to the planning committee. The article also states "a council spokesman said the barrister's report had cost £2,300". The complainant therefore does not accept the Council's contention that no formal report was obtained. He also argues that "...when an external barrister's opinion is sought, a report is created".
22. The Council has explained that whilst the newspaper article refers to the existence of a 'report', no such report actually exists. The Council has informed the Commissioner that it received verbal legal advice at a meeting with a barrister. The salient points of this discussion were then summarised in an email sent by the Council's barrister, which has been considered and withheld from disclosure. However, the barrister did not produce any formal 'report' of his advice.
23. The Commissioner has reviewed the email summarising the verbal advice given, and notes that whilst it mentions the history of the matter, no reference is made to the existence of a previous report, or the barrister's intention or instruction to produce any such document. He has also reviewed the invoices the Council received for its barrister's services. These invoices include detailed itemised descriptions of the services provided by the barrister, and include

advice given verbally and via email. However, the Council has not been invoiced for any written report.

24. The complainant also directs the Commissioner to an email and a letter sent to another member of the public by the Council's corporate director for 'Regeneration, Homes and Communities'. Both pieces of correspondence refer to the Council obtaining 'legal advice' regarding the application. However, neither specify the form that the advice would take and no mention is made of any formal 'report' being produced.
25. In his final submission to the Commissioner of 13 June 2011, the complainant states that the Council indicated that the advice was given over the telephone. He believes that a note would have been made of the advice given and that this should be considered for disclosure. However, the Commissioner has not seen any evidence that the Council has ever indicated that the advice was given over the telephone. He is satisfied, having reviewed the content of the email, that the barrister provided this advice following a meeting with the Council rather than a telephone call. He has consequently not gone on to investigate whether any note of a telephone conversation is held.
26. The invoices and email provided by the Council support its position that although the newspaper article referred to a 'report', this terminology was incorrect and no such 'report' was provided. The Commissioner is unconvinced by the complainant's argument that a 'report' is necessarily created when external legal advice is sought. The Council confirms that in many cases advice is sought and provided in discussion or via email. The invoices provided by the Council's barrister support this. On the balance of probabilities, the Commissioner consequently concludes that the Council does not hold a formal written report containing legal advice about the application.

Regulation 12(5)(b)

27. Although the Council has confirmed that it does not hold a 'report' of the legal advice as set out in the complainant's request, it does hold an email summarising the salient points of the advice given verbally about the application. The Council's response included this within the scope of the complainant's request. The Commissioner agrees that the Council was correct to find that this email fell within the scope of the complainant's request, because although it is not a formal report, the email does constitute legal advice received by the Council about the application.

28. Regulation 12(5)(b) provides an exception for information where 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”
29. The First Tier (Information Rights) Tribunal in the case of [*Kirkaldie v the Information Commissioner and Thanet District Council*](#) [EA/2006/0001] found that the exception “covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”. (para 21) This view was supported by the Tribunal in the case of [*Creekside Forum v Information Commissioner and DCMS*](#) [EA/2008/0065]. The Tribunal found that “...whilst regulation 12(5)(b) does not explicitly name legal professional privilege, its function and substance fall under the umbrella of ‘the course of justice’”. (para 29)
30. The Commissioner therefore considers that legal professional privilege is a concept covered by regulation 12(5)(b).

Is the exception engaged?

31. The Commissioner must assess whether the information is subject to legal professional privilege. He must also decide whether a disclosure of that information would have an adverse effect on the course of justice.
32. There is no suggestion that disclosure would impact upon 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, and so the Commissioner has not considered these factors. The Commissioner notes that the test is whether disclosure “would” have an adverse effect, and so there needs to be a clear argument why the course of justice would be affected by disclosure of the information.

Is the information subject to legal professional privilege?

33. Legal professional privilege protects the confidentiality of communications between a lawyer and client. 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, communications must be confidential, made between a client and professional legal advisor acting in their professional capacity and for the sole or dominant purpose of obtaining legal advice. Communications made between advisor and client in a relevant legal context will attract privilege.
35. The Commissioner considers that the requested information attracts legal advice privilege. This is because it is a legal opinion obtained to provide advice on whether the Council should grant planning permission for a particular application. The Commissioner is satisfied that the advice was sought from and provided by a qualified legal adviser, in this case a barrister, in his professional legal capacity. The Commissioner therefore accepts that the advice attracts legal professional privilege. There is no suggestion that the confidentiality of the information has been lost in this instance and the Commissioner is satisfied that the privilege is maintained.

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

36. Legal professional privilege is an established principle which allows parties to take advice and discuss legal interpretation freely and frankly in the knowledge that such information will be retained in confidence.
37. The Commissioner notes the view of the Tribunal in the case of [Rudd v Information Commissioner and The Verderers of the New Forest \[EA/2008/0020\]](#), which found 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” (para. 29)
38. The complainant argues that there is no detriment to the course of justice in disclosing information that attracts legal advice privilege. He points to the decision of the Tribunal in [West v Information Commissioner](#) (EA/2010/02/10), which commented at paragraph 9 that:

“...it may be arguable that regulation 12(5)(b) cannot apply in a case where there is no prospect of litigation and pure “legal advice privilege is relied upon...”

39. However, the Commissioner notes that the Tribunal merely cited this as an example of an argument that might be made to attempt to distinguish the exception at regulation 12(5)(b) from the analogous exemption under section 42 of the Freedom of Information Act. The Tribunal did not go on to consider whether the disclosure of legal advice privilege would prejudice the course of justice, because in the particular case it was considering, the information was subject to litigation privilege.

40. The Commissioner’s view is that the exception at regulation 12(5)(b) applies to legally privileged information, irrespective of whether the information attracts advice or litigation privilege. The Commissioner notes the comments of the Tribunal in [Burgess v Information Commissioner and Stafford Borough Council](#):

“...legal professional privilege is a key element in the administration of justice ... which is in our view part of the activities that will be encompassed by the phrase ‘course of justice’ and advice on the rights and liabilities of a public authority are key to that, whether or not litigation is actually in progress” (para 33).

41. The Commissioner concurs with the view that legal advice privilege is a part of ‘the course of justice’. He also notes that in this case, the planning application has not been withdrawn and is still pending. The Council therefore argues that although there does not seem to be any prospect of litigation currently, disclosure of the advice would compromise its position as the Council is the applicant for planning permission.

42. The complainant also argues that the campaign group opposed to the application has provided the Council with a copy of the legal advice it received in relation to the application. He therefore submits that in this case, there would be no adverse effect on the course of justice, as the group asking to see the information has already provided the Council with a copy of the advice it has received.

43. The Commissioner however does not accept that the fact that a campaigning group has decided to share the legal opinion it has received on the issue places the Council under a compulsion to disclose its own legal advice. The Commissioner’s view is that disclosure would

have an adverse effect on the course of justice because of the inherent public interest in protecting the principle of legal professional privilege, and the fact that disclosure would undermine the ability of a public authority to seek frank legal advice in confidence.

44. The Commissioner is therefore satisfied that the disclosure of legally privileged information would have an adverse effect on the course of justice, and consequently that the exception is engaged.

Public interest test

45. Like all exceptions under the EIR, regulation 12(5)(b) is subject to the public interest test. The Commissioner has gone on to consider the public interest test arguments submitted by the Council in its application of section 42 and has considered them in relation to regulation 12(5)(b). Regulation 12(2) of the EIR sets a presumption in favour of disclosure and the Commissioner has borne this requirement in mind in carrying out his assessment of the public interest test.

Factors in favour of maintaining the exception

46. The Council contends that although the privilege in this case relates to advice rather than litigation, the disclosure of the advice has the potential to prejudice its ability to defend itself if litigation relating to the matter arose in the future. The Council confirms that it would rely on the advice if any challenge to its position was brought. The Commissioner further notes that the advice was received relatively recently, and currently, the application is still 'live' and has not been withdrawn.
47. The Council also argues that there is no evidence of "a wider public, rather than individual interest" in disclosure. The Commissioner does not accept this point. The correspondence provided by the complainant, as well as the newspaper articles, indicates that a group of individuals has been involved in the campaign to prevent the planning application being approved. The Council's own [2008 report](#) to the planning committee details that it has received a considerable number of letters of objection and a petition relating to the proposed development.
48. The Commissioner also considers that it is important that public authorities can receive frank and considered legal advice before taking decisions. Legal advice can address all of the implications of a proposed decisions; the Commissioner considers that it is not in the public interest to inhibit the frank discussion of proposed actions, because

poorer decision making may result when decisions that are not taken on a fully informed basis.

Factors in favour of disclosing the requested information

49. The Council acknowledges that disclosure could further understanding of the issues surrounding the application, and might increase public participation in and debate about the matter. The Commissioner also accepts that there is a public interest in the advice given that it has reversed the Council's previous decision to grant planning permission to develop the site, and that disclosure might increase the transparency of the planning permission process.
50. The Council also submitted that disclosure might increase accountability and transparency about the Council's decision, and the way it spends public funds. The Commissioner notes that disclosure could also allow the public to discover the extent to which the Council followed the legal advice it received, which might contribute towards greater accountability. In this case the Commissioner notes that the Council itself is the planning applicant, which increases the public interest in there being transparency in the way that the application has been considered.

Balance of the public interest arguments

51. The Commissioner accepts that the application is of interest to a number of local residents, and that there is a public interest in ensuring that the Council is transparent and accountable for the decision making process that led to the application being referred back to the planning committee. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.
52. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exception. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain such advice in the future and have the confidence that advice is given freely without the consideration of disclosure. In the case of [Kitchener v Information Commissioner and Derby City Council \[EA/2006/0044\]](#) the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The

client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."

53. In its summary of [*Bellamy v the Information Commissioner and the DTI \[EA/2005/0023\]*](#), the Information Tribunal stated 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."

The Tribunal referred to legal professional privilege as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases.

54. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in the non disclosure of the legally privileged information. 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, especially given the inherent public interest in allowing decisions to be taken on a fully informed basis.

Regulation 14(3)

55. Regulation 14(3)(a) provides that a public authority should specify the specific exception it relies upon in any refusal notice issued.
56. In its refusal notice of 23 August 2010, the Council stated that the requested information was exempt under section 42 of the Act. During the course of the investigation, the Commissioner has determined that the request should have been dealt with under the EIR. The Council accepted this and confirmed to the Commissioner that it relied upon the exceptions at regulation 12(4)(a) and 12(5)(b).
57. In this case, the Commissioner acknowledges that the Council failed to cite the exceptions in its refusal notice because it had considered the information under the Act rather than the EIR. However, the Council has breached regulation 14(3)(a) by failing to inform the complainant that the requested information was exempted under regulations 12(4)(a) and 12(5)(b).

The Decision

58. The Commissioner's decision is that:

- The Council correctly applied the exception at regulation 12(4)(a) because he accepts that on the balance of probabilities, it does not hold a formal 'report' of legal advice about the application.
- The Council correctly withheld the email summarising the verbal advice received under the exception at regulation 12(5)(b).
- The Council breached regulation 14(3)(a) by failing to cite the specific exceptions it relied upon in withholding the information in its refusal notice.

Steps Required

59. The Commissioner does not require the Council to take any further action.

Right of Appeal

60. 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 15th day of June 2011

Signed

**Andrew White
Group 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;

...

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 the 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(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;

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;

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) 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