

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

Decision Notice

Date: 18 May 2011

Public Authority: Bassetlaw District Council
Address: Queen's Buildings
Potter Street
Worksop
Notts
S80 2AH

Summary

The complainant requested a copy of a document circulated to the council's planning committee in a public planning meeting. The information was refused on the grounds of section 42 of the Freedom of Information Act 2000, that it attracted legal professional privilege. The Commissioner decided that the information was environmental information and advised the council to reconsider its response under the Environmental Information Regulations. The council undertook to do so, but continues to rely on the provisions of section 42 of the Act. The Commissioner's decision is that the information has lost its confidential nature through being discussed in open session of the council planning committee and the council has incorrectly withheld the information. He finds breaches of regulation 5 and regulation 14 and orders the information to be disclosed.

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. The complainant attended a public meeting of Bassetlaw District Council's planning committee, at which the public were provided with a pack containing information relating to all the planning applications which were to be decided on in the meeting. During the meeting, members of the planning committee were provided with a copy of a paper by the Council Solicitor. The contents of this paper were discussed in the course of the meeting, but the public was not provided with copies.

The Request

4. The complainant made a verbal request to Bassetlaw District Council (the council) in January 2010, for a copy of a paper circulated to members of a planning committee for a public planning meeting held on 20 January, which had not been provided to the attending public.
5. The council wrote to the complainant on 21 January 2010, refusing to provide the information on the grounds that it was legally privileged information and the council was not prepared to release it.
6. The complainant wrote to the council on 22 February 2010, asking it to reconsider its response.
7. The council wrote again to the complainant on 24 March 2010, formally refusing to disclose the requested information on the grounds of section 42 of the Act, that the information was exempt because of legal professional privilege. It stated:

"Pursuant to section 17 of the Act I am refusing your request for this information insofar as the exemption provided by section 42 of the Act applies, that is Legal professional privilege. This exemption is subject to the public interest test, in applying this test I have determined that the public interest in withholding the information outweighs the public interest in disclosing the information."

8. The complainant wrote again to the council on 26 March 2010, observing that the information contained in the document was discussed in open session of the planning committee during the council meeting.

9. The council conducted an internal review and wrote to the complainant on 22 April 2010. The internal review upheld the decision to refuse the requested information under section 42 of the Act.

The Investigation

Scope of the case

10. On 3 February 2010, the complainant contacted the Commissioner to enquire about whether the way her request for information had been handled was correct. The complainant specifically asked the Commissioner to consider the following point:
 - whether she had the right to see the requested information, given that it was referred to in public during the council planning meeting.
11. The Commissioner advised the complainant of the requirement to request an internal review before her complaint could be taken further. Having done so, the complainant wrote to the Commissioner at intervals during 2010, also providing copies of the council's various responses.
12. The complaint was subsequently accepted and the Commissioner wrote to the council, indicating his view that the request was likely to be for environmental information, and requesting it to reconsider the request under the terms of the EIR. The council undertook to do so and to write to the complainant in early January 2011, with the outcome.
13. The Commissioner spoke to the complainant, who confirmed that the complaint related to the council's refusal to disclose the requested information. She also said that she had not received any response from the council since late 2010.
14. The Commissioner has therefore investigated the council's refusal to disclose the requested information on the grounds that the information attracts legal professional privilege.

Chronology

15. The Commissioner wrote to the complainant and the public authority on 17 November 2010 to confirm acceptance of the complaint. He indicated his view that the requested information was environmental and requested the council to reconsider its response under the terms of the EIR. He informed the council that, if it intended to withhold any information, the Commissioner would require a copy of the letter of refusal which was sent to the complainant, a copy of any withheld

information, and the council's arguments as to why the information should be withheld.

16. He received no response from the council and followed up with a second letter, and telephone message, on 20 December 2010. On 21 December the council telephoned the Commissioner and indicated that it had reviewed the request under the terms of the EIR, and determined that exceptions applied to the requested information. It agreed to provide him with the details of its position, and a copy of the withheld information.
17. On 4 January 2011, the council wrote to the Commissioner to inform him of its view that the information was exempt under the EIR, by virtue of legal professional privilege, and undertook to write to the complainant in the week commencing 10 January 2011 with that view.
18. The Commissioner telephoned the council and left messages on 8 February and 11 February 2011, and wrote to the council on 11 February to remind it that he had not received, as requested, any copy of a refusal notice sent to the complainant, nor the withheld information or its arguments in support of its position.
19. The Commissioner spoke to the complainant on 14 February 2011. She confirmed that she had not had any communication with the council on the matter since late 2010.
20. On 14 February 2011, the Commissioner wrote again to the council. He informed the council that the complainant had not received the letter which was expected in early January. He also observed that the contents of the withheld information had been discussed in an open session of the council's planning committee. He reminded the council that he required a copy of the withheld information and sought its views as to why the withheld information was considered not to have lost its confidential quality in the circumstances.
21. On 15 February 2011, the council sent the Commissioner a copy of a letter to the complainant (dated 4 January 2011 but understood from the metadata within the document to have first been printed on 17 January 2011), and a copy of a document.
22. The Commissioner wrote again to the public authority, asking it to confirm that the document he had received was the withheld information, and asking whether he could expect to receive anything further from the council in the matter. The council replied, confirming that the document was the withheld information, but that it would not be sending any further material. Despite subsequent prompting about outstanding enquiries, the council has not responded further to the Commissioner.

Findings of fact

23. The Commissioner is satisfied, from an examination of the withheld information, that it contains elements which will attract legal professional privilege, because the document is advice from the council's solicitor which relates to the prospect of legal action and those elements constitute legal advice.

Analysis

The Environmental Information Regulations 2004

24. It is the Commissioner's view that information relating to planning matters will normally fall within the EIR under regulation 2(1)(c) and that verbal requests are valid under the EIR. The Commissioner asked the public authority to reconsider its response (that, as legally privileged, the information was exempt under section 42 of the Act) under the EIR, and it undertook to do so.
25. Unlike the Freedom of Information Act 2000, which contains a specific exemption for information subject to legal professional privilege at section 42, there is no specific exception within the EIR under which legally privileged information can be refused. There is, rather, the exception at regulation 12(5)(b) which permits a public authority to refuse to disclose information if that 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"*.
26. The Commissioner agrees that legal professional privilege is an important principle in 'the course of justice' and that this exception can therefore be considered analogous to section 42 of the Act in respect of legally privileged material. This is also the view of the Information Tribunal, expressed variously as follows:

"...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' and therefore, regulation 12(5)(b) was the appropriate exception to apply" Creekside Forum v ICO and DCMS (EA/2008/0065)¹ (paragraph 29).

¹ See

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i314/Creekside_Forum_v_IC_&_DC_MS_\(0065\)_Decision_28-05-09_\(w2\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i314/Creekside_Forum_v_IC_&_DC_MS_(0065)_Decision_28-05-09_(w2).pdf)

*"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'"* Rudd v IC & Verderers of the New Forest (EA/2008/0020)² (para 29).

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice " Woodford v IC (EA/2009/0098)³ (para 27).

Regulation 14

27. Despite agreeing to reconsider the matter under the EIR, the refusal notice, dated 4 January 2011, which was sent to the complainant states:

"Because your request is for information held by the Council [...] and relates to environmental issues I am processing your request under the Environmental Regulations Access regime.

Therefore pursuant to the Council's duty to confirm or deny whether or not it holds the information requested I confirm that I am refusing the request for the following reasons:

Section 42

That is Legal professional privilege. In short the decision is subject to legal privilege given that the basis of the decision was caused to be produced so as to enable the Solicitor to advise the organisation in respect of potential legal liability. This exemption is subject to the public interest test, in applying this test I have determined that the public interest in withholding the information outweighs the public interest in disclosing the information."

28. The Commissioner observes that, aside from the addition of the section *"given that the basis of the decision was caused to be produced so as to enable the Solicitor to advise the organisation in respect of potential legal liability"* this response is substantially similar to the one given to the complainant on 24 March 2010 and quoted at paragraph 7, above,

² See

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20\(EA-2008-0020%20\[FER01483371\]\)%20Decision%2029-09-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20(EA-2008-0020%20[FER01483371])%20Decision%2029-09-08.pdf)

³ See [http://www.informationtribunal.gov.uk/DBFiles/Decision/i388/EA-2009-0098%20Woodford%20v%20IC%20-%20Decision%2021-04-10%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i388/EA-2009-0098%20Woodford%20v%20IC%20-%20Decision%2021-04-10%20(w).pdf)

even to the extent that it continues to refer to 'section 42', 'legal professional privilege' and an 'exemption'. The council has therefore failed to show any evidence that, in any reconsideration it may have undertaken, it has given sufficiently reasonable and diligent consideration to the requirements of the EIR, failing even to edit its previous response to acknowledge the relevant exception which may be applicable.

29. The Commissioner has asked the council if he may expect to receive any further submissions from it in this case, and it has confirmed that it does not intend to provide anything else. He has therefore reached his decision on the basis of the information available to him.
30. By failing to cite regulation 12(5)(b) in its refusal, the council has breached regulation 14(3)(a). By its failure to specify the matters the council considered in reaching its decision with respect to the public interest, the council also breached regulation 14(3)(b).
31. On the understanding that, irrespective of the failings in the council's refusal notice, it intended to refuse the requested information under the corresponding provisions provided within the EIR, the Commissioner has gone on to consider the application of regulation 12(5)(b) to the requested information.

Exceptions

Regulation 12(5)(b)

32. The Commissioner has examined the withheld information and, as noted in the 'Findings of Fact' section, above, he accepts that the withheld document contains information which attracts legal professional privilege and which therefore falls within the scope of regulation 12(5)(b).
33. The Commissioner also recognises the complainant's comment, that the document was discussed in an open session of the council's planning committee. This is confirmed in the minutes of the meeting, which the Commissioner has downloaded from the council's website⁴. Those minutes corroborate the complainant's account of events, that the advice was publicly discussed in an open session of the council committee. The minutes of the meeting state:

"The Council Solicitor presented a supplementary report which had previously been circulated to the Members earlier that day.

⁴ See <http://www.bassetlaw.gov.uk/docs/pl200110.2.doc>

The report contained legal advice following the receipt of Leading Counsel's advice. Following certain questions raised by the Members, the view was taken that the Council's Solicitor's advice should be followed and the recommendations set out be carried forward."

34. The minutes do not record the specific elements which were aired in open session of the committee meeting, however the Commissioner contends that, had the council been concerned about the confidentiality at the time, it could have taken steps to enable councillors to consider the advice privately, rather than in an open session of the council planning committee.
35. It is clear from the minutes that questions about the contents of the advice were asked in open session, therefore there was no expectation that those questions, or their answers, were to be treated as confidential. Therefore, if the council has not chosen to take steps to preserve the confidentiality of the advice, but has permitted the advice to be examined and discussed by the committee in a public meeting, the Commissioner takes the view that this indicates that the legal advice can no longer be considered confidential. The Commissioner is satisfied that it has lost any confidential quality which would permit it to be withheld under the exception at regulation 12(5)(b) and that therefore this exception has been incorrectly applied to the withheld information.

Procedural Requirements

Regulation 5

36. Because the information has been incorrectly refused, the council has breached regulation 5(1) by failing to disclose environmental information on request.

The Decision

37. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the regulations.
 - The public authority failed to apply the correct access regime to the requested information and, in failing to disclose environmental information on request, it breached regulation 5(1).
 - The public authority incorrectly applied the provisions of regulation 12(5)(b) to the withheld information.

- The public authority failed to provide a refusal notice to the complainant which specified the exception relied on under the EIR, or any public interest considerations, and therefore breached regulation 14(3)(a) and 14(3)(b).

Steps Required

38. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Disclose the withheld information to the complainant.
39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

40. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

41. 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

42. 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.
43. 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 18th day of May 2011

Signed

**Lisa Adshead
Group Manager**

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

Legal Annex

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1)

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2)

Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3)

To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4)

For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5)

Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6)

Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

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
- (a) 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(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 –
 - 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - 1. has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

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 –

- (h) any exception relied on under regulations 12(4), 12(5) or 13; and
- (i) 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).

Regulation 14(4)

If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5)

The refusal shall inform the applicant –

- (j) that he may make representations to the public authority under regulation 11; and
- (k) of the enforcement and appeal provisions of the Act applied by regulation 18.