

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 13 August 2012

Public Authority: Bath and North East Somerset Council
Address: The Guildhall
High Street
Bath
BA1 5AW

Decision (including any steps ordered)

1. The complainant has requested legal guidance held by the council relating to its application of vehicle weight restrictions to a section of the A36 for an 18 month trial period. The council withheld the information under Regulation 12(5)(b); that disclosing the information would have an adverse effect upon the course of justice.
2. The Commissioner's decision is that Bath and North East Somerset Council was able to apply the exception in Regulation 12(5)(b).

Request and response

3. On 5 October 2011, the complainant wrote to BANES council and requested information in the following terms:

"I understand that BANES intends to implement a weight restriction on the A36 for an 18 month trial period. This would have the effect of shunting heavy traffic up the A350 running throughthe town of Westbury and villages of Yarnbrook and West Ashton.

Unilateral action of this sort is questionable given that the A36 is a trunk road and thus the responsibility of the Highways Agency and not BANES. However I am told that you have a legal opinion to the contrary. Since public funds will have been expended in obtaining any opinion it is right that it should be placed in the public domain. I would

be grateful if you could either now do so or identify the provisions in the Freedom of Information Act that you are relying on. "

4. The council responded on 4 November 2011. It stated that the information was held but that it was subject to legal professional privilege and therefore exempt under section 42 of the Act.
5. Following an internal review BANES wrote to the complainant on 19 December 2011. It stated that its initial decision was correct and that the information was exempt under section 42.
6. The complainant then made a complaint to the Commissioner. The Commissioner's initial decision was that the information is environmental information. On 4 April 2012 he issued a decision notice, FS50429444, requiring the authority to reconsider the information under the Environmental Information Regulations 2004.
7. On 2 May 2012 the council wrote to the complainant stating that the information was exempt from disclosure under Regulation 12(5)(b).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that the information should be disclosed because there was a strong public interest in that occurring.

Reasons for decision

9. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. In this case we are considering whether a disclosure of the information would have an adverse effect upon the course of justice.
10. BANES argues that the legal advice states that it is legally able to place traffic restrictions on the main highway. Restrictions on main highways are normally governed by the Highways Agency rather than the relevant local authority.
11. The complainant questions the legality of the restrictions which BANES has introduced. He argues that the restrictions force heavy vehicles to

use a different route, and that they then divert onto other roads, affecting other villages and towns and his community.

12. BANES argues that the advice is subject to legal professional privilege. There are two types of legal professional privilege: litigation privilege and legal advice privilege.
13. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
14. Legal advice privilege applies where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and legal advisor acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice. Communications made between an advisor and client in a relevant legal context attract privilege.
15. The Commissioner has considered the legal advice. It is from a qualified barrister and is legal advice specifically relating to a question of law asked by the council. He is therefore satisfied that the information is subject to legal professional privilege in the form of advice privilege.
16. Regulation 12(5)(b) does not specifically exempt information from disclosure where it is subject to legal professional privilege. However the First Tier Tribunal has recognised that where the relevant information is subject to legal professional privilege then the Regulation may be engaged if its disclosure would affect the course of justice.
17. The Commissioner is satisfied that the introduction of the weight restrictions could be subject to legal challenge. If so the legal advice would be relevant to the council's defence of its position in law. Hence he considers that a disclosure of the advice would affect the course of justice because disclosing the information would disclose the council's legal arguments in advance of any litigation taking place.
18. It does not matter that legal action has not been taken or started to date. The point is that legal action could be taken against the council, and if the advice was disclosed its legal arguments would be compromised prior to the hearing.
19. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test of "would adversely affect" for 12(5)(b) would be met by the general harm which would be caused to the principle of legal professional privilege, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information: "*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" (paragraph 27). This confirmed the decision in *Rudd v IC & Verderers of the New Forest* (EA/2008/0020) that 'the course of justice' does not refer to a specific course of action but "*a more generic concept somewhat akin to 'the smooth running of the wheels of justice'*" (paragraph 29). Consideration of the specific circumstances is however required when addressing the public interest test.

20. The Commissioner is therefore satisfied that Regulation 12(5)(b) is engaged.
21. Where the exemption is engaged the Regulation 12 requires the Commissioner to carry out a public interest test. The test is to determine whether, in all of the circumstances of the case, the public interest in maintaining the exception outweighs that of disclosing the information. If it does not then the information should be disclosed in spite of the fact that the exception is engaged.

The public interest

The public interest in the information being disclosed

22. The central public interest arguments in favour of the information being disclosed revolve around the effect the traffic restrictions have upon the environment and the villages and towns on the routes which the heavy vehicles now take.
23. Heavy vehicles are now more likely to use smaller roads, going through quieter areas of the country to reach their destinations. Previously they would have used the main highway, the A36. This diversion may increase any traffic congestion on the smaller roads, as well as cause greater strains on the highway and structures bordering these roads.
24. The Commissioner also notes that the use of the other roads may increase journey length and time, and therefore increase the amount of pollution and carbon emissions emitted for each journey. Additionally this might add pressure to the haulage companies through delayed journeys and the use of additional fuel to complete their journeys.
25. The impact upon the smaller communities themselves may be substantial, dependent upon the amount of additional traffic which is diverted onto the smaller roads or more congested routes. The Commissioner notes that the council has done research and estimations on the additional traffic the restrictions are likely to cause, however he also notes that the figures published have been disputed by other factions opposed to the restrictions.
26. A major question which has been asked by interested parties is whether the council has the legal powers to impose the weight restriction onto

the A36. The Commissioner therefore recognises that there is a public interest in the public being able to access information on whether the council is legally able to take the measures it has, given the inevitable additional pressure the restrictions will bring onto the communities affected.

27. If the council's imposition of the restrictions is not legally defensible then the villages and towns subject to the additional traffic are being subjected to this by the council where it has no legal right to do so. There is therefore a strong public interest in the public being able to ascertain whether the council's decision is legally defensible in the circumstances.
28. To an extent, the council's actions lack a degree of transparency. The Department for Transport has previously provided a view that local authorities are unable to make changes to the primary road network. The A36 is part of the primary road network. Additionally under EU Directive 89/460/EC, the PRN must provide unrestricted access to 40 tonne vehicles on the primary road network. The council however argues that that view is not correct, but has not publicly elaborated further on its reasons for stating that that is the case.
29. The extent of damage which might be caused by the disclosure of the advice might also be questioned. It is either correct or it is not. If it is correct then arguments surrounding the lawfulness of the council's actions would be resolved, leaving the question of whether the environmental decision which was taken was correct. Alternatively the advice may prove to be incorrect. If that is the case then the council would be able to amend its policies and consider alternative approaches, potentially avoiding the need for costly litigation at some point in the future. The Commissioner recognises however that there is always a potential that areas of legal interpretation may be arguable, and that a disclosure of legal advice might draw a party into a costly litigation regarding these areas of legal interpretation which would not otherwise have occurred.

The public interest in the exception being maintained

30. The central public interest arguments in favour of maintaining the exemption are those inherent within legal professional privilege itself. There is clearly a very strong, and recognised public interest in allowing clients, including public authorities, to seek full and frank advice from their legal advisers in confidence. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the

provision of the advice itself. This could lessen the effectiveness of the legal advice process and potentially undermine the client's legal position or his ability to make fully informed and robust legal decisions.

31. The Commissioner recognises that the council should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made. The Commissioner accepts that ordering disclosure of the requested information could inhibit the Council's ability to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure.

32. 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."

33. In its summary of *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023], the Information Tribunal commented 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."

34. 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.

35. The Commissioner notes that the advice is still 'live' and that BANES intends to introduce the restrictions on the A36 in the near future. It is therefore clear that the council's advice is still relevant and would play a part in any litigation which took place over the decision to implement the restrictions.

The balance of the public interest

36. The Commissioner recognises the impact which the restrictions may place upon the communities on the roads which the diverted traffic now travels through. The additional heavy vehicles may detrimentally affect the state of the minor road system and will also affect those communities themselves, potentially increasing wear and tear on the road system and the surrounding buildings, and increasing emissions within the areas.

37. The Commissioner cannot become involved in a discussion about whether the additional traffic estimates are correct or not. However he does recognise that this traffic would not be present if the restrictions were not in place.
38. The council's argument that the restrictions are lawful has been disputed. Clearly therefore there is a strong public interest in the public being able to access the legal advice which demonstrates why it believes that its actions are lawful.
39. However the Commissioner must also bear in mind the fact that the council has sought legal advice on this matter in a full and frank manner. If the information were to be disclosed, its legal arguments for making the decision would be open to any interested parties seeking to overturn the restrictions.
40. The First Tier Tribunal has outlined a non-exhaustive list of factors which might be taken into account in countering that weight, such as where large amounts of public money is concerned, or a large number of people are affected. Clearly both of these factors have some relevance in the current decision.
41. In spite of having read the advice it is not the Commissioner's place to make a judgement as to whether the council's decision is lawful or not. He can however take into account whether the council's actions were in accordance with the advice or whether it has misrepresented that advice in statements that it has made in support of its position.
42. The Commissioner recognises that both the imposition of the restrictions and the reasons for overturning the restriction are both arguments based upon environmental protection.
43. The Aarhus Convention, from which the Regulations ultimately derive, places emphasis on individuals and local communities having a greater say in decisions which affect the state of the environment around them by improving access to information on environmental issues. In essence, an open and informed dialogue about the imposition of the restrictions would be in line with this aim. A disclosure of the legal advice upon which the council's decision was based would aid in that debate.
44. However the legal advice simply addresses whether the local authority is able to place the restrictions in the first instance. Discussions surrounding whether the decision was the right decision for the environment are, to an extent, a separate debate to this. These discussions relate to the environmental impact of imposing the restrictions.

45. The Commissioner notes that interested parties who disagree with the council's decision are able to take legal action if they question whether the decision is lawful. He also understands, (although he cannot take this into account), that very recently an appeal has been made about the intention to introduce the restrictions. Interested parties are also able to take their own legal advice in the first instance to question whether the council has a legal case to answer for implementing the restrictions.
46. Bearing in mind the recognised strong public interest in maintaining the ability to seek legal advice in confidence and in a full and frank manner, the Commissioner has considered where the balance of the public interest lies.
47. The Commissioner's decision is that the public interest in the information being disclosed is outweighed by the inherent public interest arguments for maintaining legal professional privilege in this instance. The council was therefore correct to apply Regulation 12(5)(b) to the information.

Right of appeal

48. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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