

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated: 15 December 2005

Name of Public Authority: Richmondshire District Council

**Address of Public Authority: Swale House
Frenchgate
Richmond
North Yorkshire
DL10 4JE**

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint which states that in January 2005 the following information was requested from Richmondshire District Council (the "Council") under section 1 of the Freedom of Information Act 2000 (the "Act"):

A copy of the legal opinion on which the Council bases its policy of noise control of the Croft motor racing circuit and copies of correspondence between the Council and counsel relating to that opinion and matters flowing from it.

It is alleged that:

The Council failed to provide the complainant with that information in accordance with their obligations under section 1(1) because they applied the Section 42 (1) (Legal professional privilege) exemption from disclosure inappropriately.

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The Commissioner's decision is as follows:

Section 42(1) states that "*Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*" The

Reference: FS50070183

Commissioner agrees that this exemption applies and has decided that the public interest in maintaining this exemption currently overrides the public interest in disclosing the requested information. A further explanation of this decision is provided in the attached Statement of Reasons.

Action Required

In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he does not require any remedial steps to be taken by Richmondshire District Council.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 15th day of December 2005

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Statement of Reasons

Richmondshire District Council (the “Council”) asserted that release of the information requested would seriously jeopardise their legal position.

Section 42(1) states that *“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”*

The legal professional privilege exemption is a class based exemption. It is therefore not necessary to demonstrate that prejudice might occur if the information were to be released. The exemption is also a qualified exemption and therefore subject to a public interest test. The Council asserted that the public interest in maintaining the exemption outweighed the public interest in releasing the information.

The Commissioner reviewed the information in question and agreed that the legal professional privilege exemption applied. This is because the information sought comprises legal advice provided to the Council by external counsel, and correspondence between the Council and external counsel relating directly to that advice. Having established that the exemption applied the Commissioner then considered the public interest arguments for and against maintaining the exemption.

The public interest test – legal professional privilege

The Commissioner recognises that the operation of the Croft motor racing circuit has been a source of local contention going back over many years, particularly for those who live in close proximity to the track. The current operating arrangements for the circuit are set out in the section 106 agreement signed in 1998. There is a view among some local residents that the Council should be taking legal action against the owners of the circuit for what the residents believe to be breaches of the section 106 agreement. It is therefore understandable that, as the Council have not so far taken such action, residents would wish to have access to the detailed legal opinion informing the Council’s attitude on this matter although the Council’s general position is in the public domain. Residents are also themselves in the process of taking legal action against the owners of the circuit so might also find the legal opinion helpful in that context.

The Council’s position is that they have regularly sought legal advice over a number of years in relation to the operation of the circuit, primarily (although not exclusively) with a view to determining whether or not they would be able to mount a successful legal action against the owners of the circuit for breach of the agreement. This would primarily have been through the issuing of a Noise Abatement notice. Although no prosecution is imminent the matter is under continuous review. The Council would not, therefore, wish the nature of their legal advice to be made public as it would have a serious impact on their ability to take successful legal action should they decide to take that step.

The Commissioner recognises that the section 106 agreement currently defines the scale of activities at the motor racing circuit. It is for the Council to decide whether or not to take legal action against the operators of the circuit for any alleged breach of that agreement. In order to make such a decision the Council need to be able to receive clear and frank advice from their legal advisers as to the likely outcome of any such action. Given the public concern about this matter it is likely that the Council will continue to need to seek advice as to what action they should take. It is the Commissioner's view that it is in the public interest that the Council should receive appropriate advice as it would not be in the public interest for the Council to spend money in taking action which then failed to produce a successful outcome. It is less likely, in the Commissioner's view, that the Council will in future be able to receive such appropriate advice and, equally, to brief counsel clearly themselves if it was known that such information would be likely to find its way into the public domain. The Commissioner therefore takes the view that, in this case, the public interest would be best served by ensuring that the Council remained able to receive frank and candid legal advice about a matter of considerable local concern in which they might well decide to take action. The public interest in this case, therefore, argues for maintenance of the exemption.

The Commissioner considered whether it might be possible to release some of the earlier advice in this case, particularly advice provided before the creation of the section 106 agreement in 1998. The Commissioner, however, is of the view that the history of this matter is a continuously evolving one in which the earlier advice informs, and remains relevant to, the present position. In his view it would therefore not be in the public interest to release the earlier material at this stage.

The Commissioner has also looked at the possible applicability of the Environmental Information Regulations 2004 (the "EIR") to the information in question. Although the EIR were not initially cited by the Council they said in subsequent correspondence (letter dated 17 August 2005) that they would have applied section 12 (5) (b) of the EIR had they applied that legislation. The Commissioner is satisfied that this would be the appropriate exception. This exception states that: *"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."* Legal professional privilege falls within this exception. All exceptions in the EIR are subject to a public interest test. The Commissioner has noted that the test under the EIR is that disclosure of the information would cause an adverse effect. It is his view that disclosure of the information would cause such an effect, for the reasons set out above and that, for the very same reasons, the public interest test would operate under the EIR (if those regulations were to be applied) in precisely the same way as under the Act.

Summary of the Commissioner's Decision

The Commissioner has noted that the operation of the Croft motor racing circuit remains a subject of local controversy which may at some stage require the Council to take legal action on behalf of the local community. He recognises that the Council need to have access to clear and frank legal advice on this matter on a regular basis. The Commissioner has therefore decided that the public interest in the Council continuing to be able to both solicit and receive frank and candid legal advice in relation to this matter outweighs the public interest in the advice so far received being released into the public domain.