

Environmental Information Regulations 2004

Decision Notice

21 June 2007

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

Summary

The complainant asked Bath & North East Somerset Council for a copy of legal advice supplied to it by its legal adviser, in connection with sewage and drainage issues relating to the Combe Down Stone Mines Project. The request was declined by the Council on the basis that the information was subject to Legal Professional Privilege and was therefore excepted under the EIR regulation 12(5)(b). After requesting a copy of the withheld information and further information about the refusal, the Information Commissioner concluded the claim that the information was subject to legal professional privilege was applicable and the information was exempt from disclosure by virtue of Regulation 12(5)(b).

The Commissioner's Role

1. The Environmental Information Regulations 2004 (the "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.

The Request

2. The complainant made the following request for information dated 7 March 2006 to Bath and North East Somerset Council:
 - a) "... Please would you provide me with a copy of the council's Instructions to Counsel and Counsel advice (Richard Macrory) on sewage & contamination..."

- b) "...Please may I also have copies of correspondence that has taken place between the council and the Environment Agency that leads you to state that "The Council cannot guarantee that the Environment Agency will continue indefinitely to find the existing arrangements satisfactory."
3. The Council refused request a) under the EIR citing Regulation 12(5)(b), also mentioning section 1 of the Freedom of Information Act 2000 in passing, in a letter dated 6 April 2006. In relation to request b) the Council advised this is a statement of the normal position and is not a summary of any correspondence. As such the Council does and could not hold any information of the nature requested and the request does not trigger any obligation for the Council under the EIR or section 1 of the Freedom of Information Act 2000.
4. The complainant asked the Council for an Internal Review of the decision in a letter dated 3 May 2006.
5. The Council confirmed its decision not to release the information in a letter dated 10 August 2006. The Council argued that the Information Commissioner has issued guidance which states that exception 12(5)(b) covers information which is covered by legal professional privilege (LPP). The concept of LPP is well established in common law and exists to protect communications between a professional legal adviser and client from being disclosed, even to a court of law.
6. The council also stated the Commissioner has also issued guidance on LPP which addresses its application under Section 42 of the Act. As LPP is defined in common law and is not unique to the Act, the council confirmed there is no reason why this guidance should not be extended to cover the application of LPP under the EIR. This guidance falls into two forms of privilege: advice and litigation privilege. The Council formed the view that the information requested falls into the latter category.
7. The Council confirmed the correct exception had been applied and then considered whether the application of the public interest test and was satisfactory. The council confirmed that the public interest in maintaining the exception outweighed the public interest in disclosing the information requested. However the council conceded the original response should have provided greater clarity on the issue and therefore further information, by way of a schedule detailing the reasoning behind the application of section 12(5)(b) of the EIR, was attached to their letter of 10 August 2006. The letter also advised the complainant of his right to complain to the Information Commissioner if he remained dissatisfied.

The Investigation

Scope of the case

8. The Commissioner has identified that the advice provided by Counsel relates to sewage or contamination issues in the Combe Down Stone Mines Project which

is an ongoing live project of public importance. This information can be classed as environmental information, as defined in Regulation 2(1)(a) – (f). The waste (sewage) is a factor listed in 2(1)(b), likely to affect the following elements listed in 2(1)(a): water, soil, land. In this case the subject matter of the advice relates to waste or contamination and any advice could determine or affect, directly or indirectly, policies or administrative decisions taken by the council. This means the Commissioner considers that the information falls within the category of information covered by regulation 2 (1) (c). This is in accordance with the decision of the Tribunal in case *EA/2006/001 Kirkaldie v IC and Thanet District Council*. In view of this, the Commissioner has identified that the complainant's request has been correctly treated by the public authority as having been made under the EIR and has gone on to consider whether the Council handled the request in accordance with the EIR.

9. On 27 August 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The complainant specifically asked the Commissioner to consider whether the complainant's request to Bath & North East Somerset Council for information under EIR 2004/ EC Directive 2003/4/EC had been handled correctly. In doing so, he put forward some arguments into the legality of the Council's decision and specifically referred to the ECJ Ruling in case C-321/96 (Mecklenburg).
11. The complainant also raised other issues that are not addressed in this Notice because they are not relevant to the requirements of Regulation 12 and fall outside the Commissioner's powers.

Background

12. In reaching this decision, the Commissioner has considered the Mecklenburg case C-321/96, which arose as a result of an ECJ ruling on Directive 90/313 EC. This is discussed further in paragraph 48.
13. The Council is currently engaged in consultation with legal and environmental experts, as well as residents, regarding the Combe Downs Stone Mines Project and whether the sewage and drainage plans will affect the residents in the area. The consultation is designed to ensure that the Council fulfil all of its legal and environmental obligations if and when it carries out the project.

Chronology

14. The Information Commissioner contacted the council on 17 November 2006 and asked for copies of the withheld information.
15. The council responded in a letter dated 5 December 2006, enclosing the withheld information. It explained that it had considered in its review of the decision to refuse the complainant's request, that its use of the exception within 12(5)(b) was applicable and the public interest consideration under 12(1)(b) had been addressed.

16. The Council also provided a list describing all of the Counsel's Advice/Instructions to Counsel given and received in relation to the project. It confirmed that legal professional privilege is likely be engaged in respect of the documents on the list and that access to this particular information had not previously been requested by the complainant. However, the Council would arrange access for the complainant to view these documents if he so wished. The Council had not made any judgements regarding FOI/EIR exemptions or the public interest issues, in relation to these documents.
17. Following a review of the withheld information, internal discussions about the issues raised by the case and having made the necessary enquiries with the Council, the Information Commissioner is satisfied that the legal advice sought by the Council was for such purposes as to ascertain the status quo of the Council on certain legal issues that may result in foreseeable litigation.
18. The Information Commissioner sent an informal assessment letter to the complainant outlining his view on the case on 8 February 2007.
19. The complainant responded in a letter to the Commissioner dated 14 February 2007 requesting information regarding the procedure by which to either withdraw his complaint or how to progress matters further.
20. The Commissioner duly sent a response to the complainant in a letter dated 16 February 2007 providing the information requested.
21. A further letter was then received from the complainant dated 19 February 2007 again requesting that the Commissioner take into account the Mecklenburg case when making his decision.
22. The Commissioner responded to the complainant in a letter dated 9 May 2007 to confirm a Decision Notice was shortly to be issued to him.
23. An issue did arise as to whether the Council had waived legal professional privilege in that the Commissioner was informed a "summary" of the legal advice had been sent to all residents. This matter was investigated and the Commissioner is satisfied that a statement of the Council's position had been issued to residents but this statement did not contain any wording or reflection of the legal advice obtained by the Council. The Commissioner has therefore decided that legal professional privilege has not been waived.

Analysis

24. The full extent of the relevant regulations can be found in the Legal Annex.

Exception

25. In considering whether the exception is valid, the Commissioner has to take into account that the EIR is designed to be applicant blind and that disclosure should

be considered in the widest sense; that is, to the public at large. In view of this, the Commissioner has proceeded with the investigation on the basis that if the information were to be disclosed, it should be available to any member of the public.

26. When examining arguments in favour of disclosure of the information requested and the maintenance of the exception, the Commissioner has taken into account evidence gathered from the complainant and the Council.
27. The Council has argued that the information requested is subject to legal professional privilege and is exempt under section 42 of the Act. However, the Commissioner considers that the information falls within the scope of the EIR. The EIR contain no direct equivalent of section 42 of the Freedom of Information Act 2000 (where an exemption exists for legal professional privilege) however, in case EA/2006/001 Kirkaldie v IC and Thanet District Council (para 22), the Information Tribunal decided that regulation 12(5)(b) is similar in purpose to section 42. The Commissioner accepts this view.

Regulation 12(5)(b)

28. The Commissioner has considered whether the Council was correct to apply the exception at regulation 12(5)(b) of the EIR. He has firstly considered whether the information is subject to legal professional privilege, then gone on to consider whether there would be an 'adverse effect' through disclosure of the information. The Commissioner has considered the application of Regulation 12(5)(b) taking into account the presumption in favour of disclosure as set out in Regulation 12(2) in accordance with the decision of the Information Tribunal in Mr R P Burgess v The Information Commissioner and Stafford Borough Council (EA/2006/0091) ("Burgess"),

Legal Professional Privilege

29. The Commissioner has considered the barrister's advice and is satisfied that the information contained within it constitutes legal advice to the Council. The advice discusses points of law in relation to sewage and contamination legislation and case law and was supplied to the Council in confidence.
30. The Commissioner is satisfied that the information was supplied by legal counsel. The document itself is in the standard format used to provide Counsel's opinion and includes the name of the barrister who provided the advice and the name of the chambers where he practices from. The Commissioner is therefore satisfied that the Legal Adviser was competent to provide the opinion.
31. In determining whether legal professional privilege continues to apply to the requested information, the Commissioner has considered whether the Council has waived legal professional privilege by publicly disclosing the legal advice. The Council has provided an assurance that the advice has not been disclosed to any third parties. There is no evidence to suggest that this is not the case therefore the Commissioner is satisfied with this assurance.

32. The Commissioner therefore believes that this advice is subject to legal professional privilege and that the privilege has not been waived.

Adverse effect

33. In the decision of Benjamin Archer vs. Information Commissioner and Salisbury District Council (EA/2006/0037) the tribunal also highlighted the requirements needed for this exception to be engaged. It explained that it is not enough that the information requested is subject to legal professional privilege; the effect of disclosure must be “adverse” and refusal to disclosure is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure “would” have an adverse effect and that any statement that it could or might have such an effect was insufficient. The information is then subject to the public interest test and the tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.
34. Legal professional privilege is a key element in the administration of justice and advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.
35. The Commissioner has confirmed that the Council needed advice on the sewage and drainage issues affecting the Combe Down Stone Mines Project and the effect this would have on residents in terms of any possible leakage and contamination. The Council explained that if disclosure were ordered, this would adversely affect its ability to obtain legal advice in respect of other decisions it may make in the course of its duties in the future. It confirmed that disclosure of information covered by legal professional privilege would undermine the relationship between a client and lawyer and that it should be allowed to conduct a free exchange of views as to its rights and obligations with those advising them without the fear of intrusion or potential disclosure.
36. In the circumstances of this decision the Commissioner is satisfied that it is more likely than not that the disclosure of the legal advice would adversely affect the course of justice, a decision which is in accordance with that taken by the Tribunal in Burgess.

Public Interest

37. Under regulation 12(1) (b) all the exceptions provided by the EIR are subject to a public interest test. So, it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Again, the Commissioner took into account the presumption in favour of disclosure following the Tribunal decision in Burgess as mentioned at paragraph 27 above.

Public interest – in favour of disclosure

38. The Commissioner recognises that there is significant public interest in public authorities being transparent in the decisions they take in relation to the Combe

Down Stone Mines Project, in order to promote accountability. If reasons for decisions are made public, there is a strong argument that this should improve the quality of future decisions.

39. The Commissioner accepts there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them were taken by public authorities and in them having the ability to challenge those decisions.
40. The Commissioner accepts that there is a public interest in disclosing information which will help determine whether public authorities are acting appropriately. So, it is in the public interest that as much information as possible relating to the Combe Down Stone Mines Project, be available for public scrutiny, so as not to undermine public confidence in the Council.
41. The Commissioner has taken into account the aims of the European Directive 2003/4/EC(d) and the Aarhus Convention 2005/370/EC. These aims include ensuring public awareness on environmental issues and to provide the public with more information about issues which may affect them. The Commissioner has therefore considered this information in the context of the information being environmental in nature and the impact that the Combe Down Stone Mines Project could have on people living in the area.

Public interest – in favour of maintaining the exemption

42. However, the Commissioner also acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In case EA/2005/0023 *Bellamy v the Information Commissioner and the DTI* (para. 35), the Tribunal stated that “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.
43. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. This reflects the decision in *Bellamy* (para 35) where the Tribunal observed “it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...”
44. In *Burgess*, the Tribunal reaffirmed this decision, stating that, “there is a strong public interest in maintaining legal professional privilege, for the reasons set out in *Bellamy* and other cases. Public authorities should be able to obtain free and frank advice and to be able to give full information to its legal advisors, including matters that would adversely affect public authorities opinion (for the avoidance of doubt we make no comment one way or the other as to whether there is in fact any such issue within the legal advice, we are merely using it by way of an example).”

45. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR. English law considers “privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned” (Bellamy, para 8). Therefore, there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.
46. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exception under regulation 12(5)(b) of the EIR because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of legal professional privilege in this case outweighs the factors in favour of disclosure.
47. The Commissioner found in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information notwithstanding the presumption of such disclosure.
48. As stated in paragraph 20, the complainant asked the Commissioner to look at the ruling in the Mecklenburg case. Having studied it, the Commissioner notes that this ruling was based on Directive 90/313/EC. However, since the Mecklenburg ruling was issued, Directive 90/313/EC has been repealed by Directive 2003/4 EC. He therefore considers that the ruling is not binding to the considerations in this case involving the EIR. The Commissioner also considers that the ruling does not offer any guidance or assistance of relevance to this case.

The Decision

49. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the EIR, in that it correctly applied the exception under 12(5)(b) of the EIR in withholding the information.

Steps Required

50. The Commissioner requires no steps to be taken.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 21st day of June 2007

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the 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 –

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