

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

Decision Notice

Date: 11 July 2007

Public Authority: North Norfolk District Council
Address: Holt Road
Cromer
Norfolk
NR27 9PZ

Summary

The complainant requested the Council to release a copy of the legal advice it received in relation to the development of the North Lodge and the North Lodge Park. The Council considered the request and advised the complainant that it felt the information was exempt from disclosure under section 42 of the Act. The complainant remained dissatisfied and approached the Commissioner. After considering the case and the information being withheld, the Commissioner decided that the information was environmental and therefore that the Council should have dealt with the request under the EIR. The Council reconsidered the request under the EIR and claimed that exception 12(5)(b) applied in this case. The Commissioner considered the arguments presented from both parties and concluded that the Council was correct to rely on exception 12(5)(b) and that the public interest in maintaining the exception outweighed the public interest in disclosure, despite the presumption in favour of disclosure set out in regulation 12(2) EIR.

The Commissioner's Role

1. The Environmental Information Regulations (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. It came to the attention of the complainant that the Council had sought legal advice about the legal aspects of developing two properties; the North Lodge and

North Lodge Park. On 26 April 2005 the complainant made the following information request:

"I should be grateful if you would send me a copy of the advice you received".

3. The Council responded on 29 April 2005 and informed the complainant that it would not disclose the advice it sought from Counsel as it was exempt from disclosure under section 42 of the Act. It stated that the advice received was regarding a matter that may become subject to legal proceedings and therefore it was not in the public interest to disclose this information.
4. The complainant took no further action until 21 February 2006 when he made a second information request to the Council for this information. The complainant believed the situation may have changed during this period and therefore requested again that the Council release the advice it received from Counsel relating to the development of North Lodge and North Lodge Park.
5. The Council responded on 1 March 2006 reiterating its previous decision that it would not release the information, as it considered that it was exempt from disclosure under section 42 of the Act. It advised the complainant that it still felt the public interest favoured non disclosure.
6. As the complainant remained dissatisfied, he approached the Commissioner on 7 March 2006 to ask that he formally consider the Council's decision not to release the information he requested.
7. As the complainant had not exhausted the Council's internal complaints process, the Commissioner wrote to the complainant on 15 March 2006 to inform him that he would need to request the Council to conduct an internal review of its initial decision prior to the Commissioner accepting the complaint.
8. On 23 March 2006 the complainant wrote to the Council to request that it conduct an internal review. The Council responded on 12 April 2006 and informed the complainant that it was upholding its initial decision not to release the information and considered that section 42 of the Act still applied.
9. The complainant wrote to the Commissioner on 21 May 2006 to request that his case be reconsidered and forwarded a copy of the Council's further response dated 12 April 2006. As the complainant had now exhausted the Council's internal complaints procedure, the Commissioner wrote to the complainant on 24 May 2006 to confirm that his complaint was now eligible for formal consideration.

The Investigation

Scope of the case

10. Although the Council responded to the request under the Act and initially the Commissioner's investigation focused on the application of section 42 of the Act, once a copy of the withheld information was provided, it became clear to the

Commissioner that the information requested fell within the scope of the EIR under regulation 2(1)(a) and 2(1)(c).

11. The full text of the relevant regulations mentioned throughout this Notice can be found in the Legal Annex section at the end of this Notice. However, briefly subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements including land and landscape. Subparagraph 2(1)(c) extends this definition to include information on measures such as policies, legislation and activities affecting or likely to affect the elements described in subparagraph 2(1)(a) as well as measures or activities designed to protect those elements.
12. The advice provided by Counsel relates to the rights and obligations contained in title deeds and leases concerning the North Lodge Park in respect of the possible redevelopment of the park and the selling of the North Lodge building. It is the Commissioner's view therefore, that it is information on measures affecting land and landscape under regulations 2(1)(a) and (c). Counsel considered the options available to the Council in respect of the possible redevelopment of the park and referred specifically to obligations and rights contained within existing deeds and leases.
13. For the reasons explained in paragraph 12, the Commissioner is satisfied that the request falls within the scope of the EIR. His investigation has therefore sought to establish whether the Council handled the request in accordance with the EIR and whether it appropriately applied the exception to disclosure provided by regulation 12(5)(b) of the EIR.

Chronology of the case

14. The Commissioner wrote to the Council on 24 May 2006 to request a copy of the information being withheld to enable him to consider whether the exemption claimed had been appropriately applied.
15. The Council responded on 21 August 2006 providing a copy of the information withheld.
16. The Commissioner wrote to the Council on 4 December 2006 and requested further, more detailed explanations as to why it considered the information was exempt from disclosure.
17. The Council responded on 12 January 2007 providing some useful background to this request and further explanations as to why it considered that the information was exempt from disclosure under section 42 of the Act. The Council explained that the proposal for the development of North Lodge Park stems from the Cromer Regeneration Programme, which obtained funding from the European Regional Development Fund. It stated that the Programme identified much needed interventions to make a substantial and viable difference to the long-term economic health of Cromer Town and that the dominant purpose for its communications with Counsel was for advice on the rights and obligations of the Council in relation to the North Lodge building and park. The Council explained that it sought advice from Counsel on whether the proposed development or any

- future development would affect the rights of current tenants of the North Lodge building and park, and at a stage when it envisaged litigation in respect of its ability to sell the North Lodge.
18. As the dominant purpose of the communications with Counsel was for the provision of legal advice, the Council argued that the information was subject to legal professional privilege and therefore exempt from disclosure under section 42 of the Act. In respect of the public interest test, it confirmed that it felt the public interest in maintaining the exemption and the established principle of legal professional privilege outweighed the public interest in disclosure.
 19. The Commissioner contacted the Council on 8 February 2007 to request some additional information and to advise the Council that the information requested was environmental information and that the request should have been dealt with under the EIR.
 20. The Council responded further on 1 March 2007. It again explained the history of the Regeneration Programme and that it considered certain aspects of the legal advice still remained very much current. The Council confirmed that it had not discussed or disclosed the information in question with any third parties without restriction and therefore felt it was within its rights to claim legal professional privilege.
 21. In respect of the Commissioner's view that the request should have been dealt with under EIR, on reflection the Council agreed. However, it stated that a similar exception to disclosure to section 42 of the Act was available under the EIR, this being exception 12 (5) (b). The Council confirmed that it now wished to rely on this exception to withhold this information and explained that it felt this exception covers information that is subject to legal professional privilege, particularly when litigation is likely. With regards to the public interest test, the Council argued that it did not consider the public interest was best served by disclosure in this case, as this would adversely affect its ability to participate in any legal proceedings that may follow.

Analysis

Procedural issues

22. In its submissions the Council stated that it would not release the information requested because it is subject to legal professional privilege and exempt from disclosure under section 42 of the Act. However, as the Commissioner explained in paragraphs 10 to 13 of this Notice, he considers that the information requested falls within the scope of the EIR. The EIR does not contain a direct equivalent of section 42 of the Act, however, the Commissioner notes that the Information Tribunal concluded that regulation 12(5)(b) is similar in purpose to section 42 in the case of *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)*. This case also considered the implications of the request being addressed under the incorrect legislation. The tribunal confirmed that it would be reluctant to prevent a public authority from subsequently arguing that a

substantially similar exception or exemption applied under the appropriate regime. The Commissioner has accepted these findings and therefore treated the Council's refusal to supply the information in this case as a claim that regulation 12(5)(b) applies.

Exception 12(5)(b)

23. Under this regulation a public authority can 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 the case of *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)*, the Information Tribunal stated that the purpose of this exception was reasonably clear and that:

"It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

It is the tribunal's view that legal professional privilege is a key element in the administration of justice and that 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.

24. In the decision of *Archer v 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 disclosure would simply affect the matters set out in paragraph 23 above; the effect must be "adverse" and refusal to disclose 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.
25. Firstly, the Commissioner has considered whether disclosure would have an adverse effect and to what extent. If this cannot be substantiated, the exception cannot apply.
26. The Council confirmed that the dominant purpose for obtaining Counsel's opinion was for advice on the rights and obligations of the Council in relation to the North Lodge and North Lodge Park. It confirmed that the Council needed advice on whether the proposed development or any future development would affect the rights of the current tenants of the North Lodge building and park, and litigation was anticipated in respect of the Council's ability to sell the North Lodge. The council argued that the legal advice was provided on a confidential basis and is subject to legal professional privilege.

27. 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.
28. In addition, the Council explained that although the matter of the North Lodge building has been concluded, some aspects of the legal advice and issues it addressed are still very much current and live topics, for example, the proposed car park within the North Lodge Park. It described the history of this matter as “continuously evolving” and therefore the advice obtained continues to inform and remain relevant to the present position. The Council advised that the advice was also obtained at a stage when litigation was anticipated. It considers that there is still a possibility of litigation now and confirmed that the statutory period in which legal action can be taken against the Council has not yet expired. The Council believes that if the legal advice was released, this would adversely affect its ability to participate in legal proceedings were these instigated.
29. Prior to considering whether there would be an adverse affect, the Commissioner has considered whether the information is covered by legal professional privilege by carefully reviewing the information being withheld. He accepts that the information was created for the dominant purpose of the provision of legal advice and that the advice provided concerned a situation where litigation was anticipated. The Council confirmed that it has not shared, copied or disclosed the information to either the general public or a third party free of restriction. The Commissioner is therefore satisfied that legal professional privilege does apply in this case and that the Council has not in anyway waived its rights to claim legal professional privilege by disclosing it without restriction to any other party.
30. Turning now to the Council arguments on the adverse affect of disclosure, in the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)* the Information Tribunal sets out the various authorities relating to legal professional privilege and described it as:

“a fundamental condition on which the administration of justice as a whole rests”.
31. The Commissioner accepts that if information subject to legal professional privilege were to be disclosed to the public, this would undermine the common law principle on which it rests. He also accepts that it would adversely affect the Council’s ability to obtain such advice in the future. This would in turn adversely affect the Council’s ability to manage its assets effectively and make future decisions. As the statutory time limit in which legal action can be taken against the Council has not to date expired and the Council still anticipates that litigation is likely in respect of those issues that remain current, the Commissioner accepts that if disclosure were ordered, this would adversely affect the Council’s ability to participate in legal proceedings should such action be instigated.
32. In reaching his decision on whether disclosure would have an adverse affect, the Commissioner has considered the interpretation of the word “would”. It is the

Commissioner's view that the Information Tribunal's comments in the case of *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/0030)* in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse affect. The tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.

33. The Commissioner has carefully considered the arguments presented and he is satisfied that in this case it is more likely than not that disclosure of the legal advice would adversely affect the course of justice and therefore that the exception provided by regulation 12(5)(b) is engaged.

Public interest

34. The exception claimed is subject to the public interest test. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request under the legislation.

35. The Commissioner has carefully considered the arguments presented by both the complainant and the Council. He has kept the following in mind during his considerations, that the factors in favour of maintaining the exception relate to the particular interest which the exception is protecting. He has also considered the Tribunal's comments in *Bellamy*, when it stated:

"There is a strong public interest inbuilt into the privilege itself [legal professional privilege]. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

36. The Commissioner accepts that there is considerable local interest in the development proposals of the North Lodge Park and that the complainant requires access to the Council's legal advice to understand fully its decision making and the Council's legal justification for a particular course of action. He also accepts that disclosure promotes public debate and the accountability and transparency of public authorities.

37. However, it is the Commissioner view that there are stronger public interest arguments in favour of maintaining the exception. The Council argued that it needs to be able to obtain full and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain such advice in a timely fashion in the future and have the confidence that the advice given is done so freely without the consideration of its wider disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated that:

"if either lawyer or the client could be forced to disclose what either said to each other (whether orally or in writing) as part of that 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”.

38. It is also the Commissioner's view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to others persons not bound by the EIR or the Act. It is therefore the Commissioner's view that there must be a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.
39. For the reasons explained above, the Commissioner has concluded that in this case the public interest in maintaining the exception provided by section 12(5)(b) outweighs the public interest in disclosure.

The Decision

40. The Commissioner's decision is that the Council was correct to rely on exception 12(5)(b) of the EIR to withhold the information requested.

Steps Required

41. The Commissioner requires no steps to be taken.

Right of Appeal

42. 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

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 11th day of July 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act (2000)

Section 42 (1) provides 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.”

Environmental Information Regulation 2004

Regulation 2 (1)

In these Regulations –

“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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 12 (5) provides 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 –

- 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.

Regulation 14(3) provides that -

The refusal shall specify the reasons not to disclose the information requested, including

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