

## Freedom of Information Act 2000 (Section 50)

### Environmental Information Regulations 2004

#### Decision Notice

Date: 3 December 2008

**Public Authority:** Halton Borough Council  
**Address:** Municipal Building  
Kingsway  
Widnes  
Cheshire  
WA8 7QF

#### Summary

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The complainant made a request for information to Halton Borough Council (the "Council") on 6 June 2006. The request was refused under the Freedom of Information Act 2000 (the "Act") on the grounds that the information was protected by legal professional privilege, that the Council's commercial interests would be harmed by the disclosure of the information, and that the information was likely to be published at a public inquiry. The internal review into the handling of the request upheld the Council's decision to withhold the requested information. The Commissioner reviewed the withheld information and decided that the request should have been properly considered under the Environmental Information Regulations 2004 (the "EIR"). During the course of the Commissioner's investigation, the Council disclosed or agreed to disclose much of the information requested, however at the date of this Decision Notice the Council remains of the view that five of the documents relevant to the request are exempt from disclosure under regulation 12(5)(b) of the EIR. The Commissioner's decision is that the information is not exempt and should be disclosed to the complainant.

#### The Commissioner's Role

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1. 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 Act are imported into the EIR.

## The Request

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2. On 6 June 2006 the complainant wrote to the Council by email and requested the following information:

“We want a copy of all correspondence with the DfT [Department for Transport] that deals with tolling. Will you give me some idea of the volume of this. We also want a list of all communications (including emails) in the possession of the Council (whether the council is the addresser or addressee or not) that refer to tolling on the proposed and/or existing bridge. When we have the list we may be making further requests to see some or all of the documents...”

3. The Council responded on 27 July 2006 and refused to provide the requested information. It claimed that the information was exempt from disclosure under the Act on the grounds that the information was protected by legal professional privilege, that the Council's commercial interests would be harmed if the information were made public and that the information was likely to be published in the future at a public inquiry. Further, the Council outlined its view that the public interest in withholding the information outweighed the public interest in disclosing it.
4. The complainant contacted the Council later the same day and requested an internal review of the decision to withhold the information.
5. On 25 August 2006 the Council contacted the complainant and advised that its decision to withhold the information had been upheld.

## The Investigation

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### Scope of the complaint

6. On 20 October 2006 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the Council's refusal to supply it with the requested information.

### Chronology

7. The Commissioner wrote to the Council on 11 July 2007 and asked it to ensure it had identified all of the information it held which was relevant to the complainant's request. In addition, he asked the Council to explain if it had considered whether the information requested constituted environmental information within the meaning of regulation 2(1) of the EIR.
8. The Council responded on 1 August 2007. It stated that it had considered whether the request should be handled under the Regulations, however had

- concluded that the information did not constitute environmental information. On 8 August 2007 the Commissioner wrote to the Council and explained that he was required to determine whether the information was environmental information before he could investigate other elements of the complaint. The Commissioner asked the Council to provide him with copies of the withheld information, by 28 August 2007, so that he may make this determination.
9. The Council responded on 30 August 2007 and provided copies of the requested information.
  10. On 7 December 2007 the Commissioner wrote to the Council. He explained that he considered the requested information to fall within the definition of environmental information as defined by regulation 2(1) of the EIR. He asked the Council to explain why the information was to be withheld from the complainant, with reference to the exceptions and public interest test set out at regulations 12 and 13 of the EIR. The Commissioner asked the Council to provide this explanation by 10 January 2008.
  11. Having not received a response, the Commissioner sent a reminder to the Council on 15 January 2008. The Commissioner asked the Council to respond by 29 January 2008.
  12. The Council responded on 29 January 2008 and set out which exceptions it believed to apply to the withheld information and why.
  13. On 27 February 2008 the Commissioner telephoned the Council to discuss its application of exceptions. He suggested that, on an initial reading, it appeared that some of the exceptions did not apply to the requested information. The Commissioner invited the Council to make further representations as to why the information should be withheld, and asked the Council to do this by 19 March 2008.
  14. The Council wrote to the Commissioner on 19 March 2008 and informed him that some of the requested information would shortly be disclosed to the complainant (documents 1, 3, 5, 7, 9 and 12 in appendix 1). The Commissioner received confirmation from the Council that this information was provided to the complainant on 4 April 2008. Having not received any further representations as to why the remaining information was to be withheld, the Commissioner wrote to the Council on 7 April 2008 and extended the deadline for provision of such information to 21 April 2008.
  15. On 9 May 2008 the Council wrote to the Commissioner. It confirmed that documents 2, 6, 10, 15, 16 and 17 (in appendix 1) had been disclosed to the complainant that day and provided a further explanation as to why it believed the remaining information should be withheld.
  16. Following discussions with the complainant regarding the volume of information the Council held which was relevant to the request, the Commissioner contacted the Council on 19 May 2008 and asked it to conduct a further search to ensure that all of the information to which the request relates had been located and

- supplied to the Commissioner for his consideration. The Commissioner asked the Council to supply any further information located to the complainant or, if it was considered exempt from disclosure, for the Council to set out which exceptions were applicable and the public interest factors the Council had taken into account when deciding that the information should be withheld from disclosure. The Commissioner also asked the Council to provide some further information in support of its use of one of the exceptions. The Commissioner asked the Council to respond by 4 June 2008.
17. Following receipt of this communication, the Council contacted the Commissioner and requested an extension to this deadline. The Commissioner agreed that the Council could respond by 11 June 2008.
  18. The Council contacted the Commissioner on 9 June 2008 and provided six further documents which it had identified as falling within the scope of the complainant's request (documents 18 – 23 in appendix 1). It explained that the Council was taking advice as to whether these documents could be disclosed to the complainant, however did not provide any explanation as to which exceptions may be applicable.
  19. On 10 July 2008 the Commissioner served an Information Notice under section 51 of the Act, to require the Council to provide a response to the outstanding questions arising from his previous correspondence.
  20. The Council responded on 7 August 2008 and confirmed that the six documents it provided to the Commissioner on 9 June 2008 (documents 18 to 23 in appendix 1) would shortly be disclosed to the complainant. It also provided a response to the questions posed in the Information Notice.
  21. On 12 August 2008 the Council provided the complainant with copies of the six documents referred to in paragraph 20 above.

### **Scope of the decision**

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22. Appendix 1 lists the information identified by the Council as being relevant to the complainant's requests.
23. The complainant requested all of the documents, in their entirety, which fell within the first part of his request, however only a list of documents which fell within the second part of his request, with a view to making an additional request for items from this list at a later date. During the course of the Commissioner's investigation, the Council disclosed to the complainant documents 1 to 3, 5 to 7, 9, 10, 12, 15, and 19 to 23 in relation to the first part of the request. In relation to the second part of the request, the Council did not disclose a list of documents, however disclosed the documents themselves in full. The Commissioner has not considered whether the Council correctly withheld the information it has now disclosed at the time of refusing the complainant's requests. However,

procedural breaches which arise in respect of any aspect of the complainant's requests for information will be addressed in this Notice.

## Analysis

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24. Each of the regulations referred to below is set out in full in the legal annex to this Notice.

### Procedural matters

### Relevant legislation

25. Regulation 2(1) provides a definition of the term "environmental information" -

"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)."

26. The Commissioner must take care not to disclose, in this Decision Notice, the information which the Council has chosen to withhold from the complainant. However it is clear, from the complainant's request, that some details of the

Council's plans to introduce tolling in the borough had been publicly available. In particular, it was known that, at the time of the request, it had been proposed that a new bridge would be built in the borough and that the Council hoped to charge users of the new bridge.

27. The Council originally dealt with the complainant's requests under the Act and not the EIR. It explained:

"it is perhaps arguable that the requested information falls within paragraph 2(c) [of Regulation 2 EIR], but we believe that the documents are ones prepared *in contemplation* of measures and activities (the tolling), which measures might have an environmental impact. As such, the documents are too remote to fall within the definition (as explained in 'the Boundaries between EIR and FOI' published on the DEFRA website)" (the Council's emphasis).

28. The Commissioner has examined all of the withheld information and is of the opinion that it falls within the definition of environmental information set out in regulation 2(1)(c), namely that information relating to the building of a new bridge and to tolling is information on a measure which is likely to affect the elements of the environment referred to in regulation 2(1)(a), in particular the land and the landscape. Building a new bridge inevitably changes the landscape. The proposed bridge would also affect the use of land, as it is intended to divert traffic away from the existing bridge and on to the new one.

29. The Commissioner does not agree that, at the time of the request, the possibility of introducing a congestion charging scheme and building a bridge was too remote to fall within the definition of environmental information. Instead, he has taken into account Council Directive 2003/4/EC (derived from the Aarhus Convention) which is implemented into UK law by way of the EIR. The Directive sets out that one of the purposes of the legislation is to allow the participation of the public in environmental decision making at the earliest stages. This has been interpreted as meaning that information which would help the public contribute to the preparation of a plan which is likely to have an affect on the environment should be dealt with as a environmental information under the EIR. The Commissioner's view is that the fact a plan may not come to fruition does not prevent the information from being environmental. Further, the Commissioner has interpreted the phrase "information on" widely, to include information which is "about" a particular measure or activity. For these reasons, the Commissioner considers that all of the withheld information falls within the definition of environmental information as set out in Regulation 2(1) of the EIR and should properly have been considered as a request for information under that legislation.

### **Duty to make environmental information available upon request**

30. Regulation 5 provides –

(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."



- (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."
31. On 9 May 2008, the Commissioner contacted the complainant, following the Council's undertaking to supply some of the previously withheld information, and explained that 17 documents had been identified as falling within the scope of the complainant's request. Of those 17, the Council was to continue to withhold five documents. The complainant disputed that the Council held only 17 documents which were relevant to its request. The Commissioner was requested to ensure that all information relevant to the request was put before him for consideration.
32. The Commissioner explained to the complainant that the Council was only to consider information it held up to the date of the internal review; the Council had provided correspondence generated after the date of the internal review, however the Commissioner had deemed this not to be relevant to the request. Further, the Council had provided to the Commissioner copies of correspondence between it and the complainant, however the Commissioner had not included this correspondence within the scope of his investigation, as the complainant would already have copies of this correspondence. The Commissioner did, however, undertake to write to the Council to ensure that all relevant information had been identified.
33. The Commissioner wrote to the Council and advised it of the complainant's concerns. He asked the Council to carry out a further search to ensure all relevant information had been identified, and to explain to him how the Council could be satisfied that it did not hold further information which was relevant to the complainant's request.
34. On 9 June 2008 the Council contacted the Commissioner and provided 6 further documents that had been identified as being held by the Council and falling within the scope of the complainant's request. The Council later explained, on 9 August 2008, that it could be satisfied that it did not hold any further information, as all relevant information was held by its Mersey Gateway project team in paper files. Any electronic correspondence relevant to the project is printed off and stored in those files. The Council explained that identifying the relevant information was a relatively "straightforward" exercise. The project team had examined the files on three occasions following receipt of the complainant's request and therefore the Council could now be satisfied that the relevant information had now been identified and supplied to the Commissioner.
35. For the reasons given in paragraph 34 above, the Commissioner is satisfied that the Council does not hold any further information relevant to the complainant's request, other than that which has been provided to him.
36. The complainant requested environmental information from the Council on 6 June 2006. On 19 March 2008, 9 May 2008 and 7 August 2008 the Council explained to the Commissioner that some of the requested information could be disclosed to the complainant.

37. In line with the decisions of the Information Tribunal (the 'Tribunal) in *King v the Information Commissioner and the Department for Work and Pensions* (EA/2007/0085) and *McIntyre v the Information Commissioner and the Ministry of Defence* (EA/2007/0065) the Commissioner has recognised that the internal review procedure, provided for by regulation 11 of the EIR, exists to allow public authorities the opportunity to put right mistakes they may have made when first responding to a request. The Commissioner will not usually find a public authority in breach of the duty to disclose information where the information was disclosed after the statutory time limit for compliance, but before or by the date of the internal review being completed. Further, the Tribunal in *King* explained that failure to provide disclosable information by the relevant date would constitute a breach of the duty to communicate information (section 1 of the Act) and in addition would also constitute a breach of the time limit (either section 10 or section 17 of the Act, depending upon the circumstances of the case). The cases of *King* and *McIntyre* were brought under the Act rather than the EIR, however the Commissioner is of the view that the principle described above can be applied to complaints arising from requests for environmental information.
38. The internal review mechanism is provided for in regulation 11(4) of the EIR, which states that internal reviews should be completed no later than 40 working days after the request for internal review. The complainant's request for internal review was made on 27 July 2006. The internal review outcome was communicated to the complainant on 25 August 2006, within the time for compliance with regulation 11(4). The date by which the Council should have disclosed any information to which the complainant was entitled, to avoid being found in breach of regulation 5(1), was therefore 25 August 2006.
39. In respect of the first part of the complainant's request (the documents requested in full and which the Council has now provided to the complainant) the Council has breached regulations 5(1) and 5(2) of the EIR (documents 1 to 3, 5 to 7, 9, 10, 12, 15, and 19 to 23).
40. In respect of the remaining information falling within the first part of the complainant's request (documents requested in full which the Commissioner considers should be provided to the complainant, but which the Council has maintained are exempt from disclosure) the Council has breached regulations 5(1) and 5(2) of the EIR (documents 4, 8, 11, 13 and 14).
41. In respect of the second part of the complainant's request (list of documents) the Council has not provided such a list and therefore has breached regulations 5(1) and 5(2) of the EIR. The Council provided such a list to the Commissioner and agreed, on 8 August 2008, that the Commissioner could publish the list of documents relevant to the second part complainant's request as an appendix to this Decision Notice. Further, the Council has voluntarily disclosed, in full, all of the information relevant to the second part of the request and therefore the Commissioner shall now not require the Council to provide the list to the complainant as a 'step required' under this Decision Notice.



## Refusal to disclose information

42. Regulation 14 provides –

- (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.”
- (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.”
- (3) “The refusal shall specify the reasons not to disclose the information requested, including –
  - (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).”
- (5) “The refusal shall inform the applicant –
  - (a) that he may make representations to the public authority under regulation 11; and
  - (b) of the enforcement and appeal provisions of the Act applied by regulation 18.”

43. The complainant requested information on 6 June 2006. The refusal notice was issued on 27 July 2006 and the internal review outcome communicated to the complainant on 25 August 2006.

44. The Council’s letters of 27 July 2006 and 25 August 2006 purported to refuse to provide the information under the Act rather than under the EIR. By failing to state which exception(s) under regulations 12(4), 12(5) or 13 applied to the requested information, the Council failed to comply with regulation 14(3)(a) EIR.

45. The refusal notice of 27 July 2006 did not set out the public interest factors the Council had taken into account when concluding that the requested information should be withheld, however simply stated that the public interest in maintaining the exemptions outweighed the public interest in disclosure. The internal review outcome of 25 August 2006 set out a number of public interest factors the Council had taken into account when confirming its decision to withhold the requested information. Therefore, as the Council corrected its failure to provide the complainant with details of its public interest considerations, by providing these at the internal review stage, the Commissioner has not found the Council to be in breach of regulation 14(3)(b) EIR.

46. In paragraph 37 above, the Commissioner explained that where a public authority corrects its earlier failings at the internal review stage, it will not normally be found in breach of the EIR for those early procedural failings. The Council's refusal notice of 27 July 2006 did not inform the complainant of the details of its internal review procedure and thus appeared to breach regulation 14(5)(a) EIR. The complainant went on to request an internal review of the handling of its request for information, which the Council duly carried out. The Council did not advise the complainant of the details of its internal review procedure at this stage, however to do so would have served no purpose. For this reason, the Commissioner considers that a public authority has one opportunity to comply with regulation 14(5)(a) EIR, and that opportunity arises at the time the refusal notice issued, and has therefore found the Council to be in breach of regulation 14(5)(a) EIR.
47. The Council's refusal notice of 27 July 2006 did not inform the complainant of its right to complain to the Commissioner. However, its letter of 25 August 2006, at which the outcome of the internal review was communicated, did advise the complainant of this right. The Commissioner therefore considers that the Council corrected its earlier failing at the internal review stage and has not breached regulation 14(5)(b) EIR.

## Exceptions

### Regulation 12(5)(b)

48. Regulation 12(5) provides –

“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

49. The Council had claimed that some of the information requested was exempt from disclosure by virtue of the fact that it was protected by legal professional privilege, and later stated that the exception provided for in regulation 12(5)(b) EIR applied to that information (documents 8, 11, 13, 14 in appendix 1). The Tribunal in the case of *Kirkaldie v the Information Commissioner and Thanet District Council* (EA/2006/0001) stated that the exception in regulation 12(5)(b) covered legal professional privilege.
50. The Commissioner acknowledges that the concept of ‘the course of justice’, as set out in regulation 12(5)(b), is broader than that of legal professional privilege, and therefore that sometimes disclosure of information that cannot be protected by legal professional privilege may adversely effect the course of justice. However, in this case the Council argued only that the information was exempt from disclosure because it was protected by legal professional privilege. It did not address the broader concept of ‘course of justice’ and therefore the

Commissioner has only considered the arguments the Council did raise in relation to this case.

51. The Commissioner shall firstly determine whether the withheld information is legally privileged information, before considering whether disclosure of the information requested 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.
52. Legal professional privilege protects communications between a lawyer and client. There are two types of privilege: litigation privilege and advice privilege. Litigation privilege protects confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated, however where the communications are between a client and its professional legal adviser, acting in a professional capacity and made for the dominant purpose of obtaining or providing legal advice. The Council did not make it explicitly clear whether it was relying upon advice privilege or litigation privilege; it refers both to obtaining legal advice to ensure the lawfulness of its actions and also to the possibility of a legal challenge of its decisions in the future. The Commissioner has examined the withheld information and considers that, if the exception applied, the information would fall within the category of advice rather than litigation privilege. This is because the majority of the communications are concerned with exchanging views and negotiating on particular aspects of the bridge project, rather than discussing any likely litigation.
53. Before the principle of legal professional privilege (advice privilege) can be said to apply to the requested information, the Commissioner must be satisfied that:
  - (i) the communications that the public authority seeks to protect are confidential;
  - (ii) the communications have been made for the dominant purpose of obtaining or providing legal advice; and
  - (iii) the protected communications are between a professional legal adviser, acting in a professional capacity, and his or her client.
54. Finally, a claim to legal professional privilege cannot be maintained where the advice has been waived (ie shared, copied or disclosed free from restriction, to any party).
55. The Council provided little explanation as to why it believed legal professional privilege applied to the requested information, except where the Commissioner explicitly requested clarification of one particular point in the Information Notice. The Commissioner has considered the above three criteria against each of the withheld documents in turn, to reach a conclusion as to whether the exception applies to the information contained therein.

## Document 8

### i) Communications must be confidential

56. Document 8 is a letter from the Department for Transport (the "Department") to the Council. It is in response to the Council's letter to the Department of 6 August 2004 (document 19 in appendix 1). The Council has agreed that document 19 may be disclosed. The Commissioner considers that the information provided in the letter constitutes the Department's policy advice, which would apply to any local authority seeking such advice, rather than specific, confidential advice which would apply only to the particular Council in a set of precise circumstances. Therefore, the Commissioner believes that the information contained within document 8 is not confidential and so cannot be protected by advice privilege. However, for the sake of completeness, he has gone on to consider the remaining two criteria.
57. Further, whilst the Commissioner must consider whether the information was correctly withheld at the time of the request being made (or at least the statutory time for complying with it) and not the time at which he makes his decision, he would like to note that the letter confirms discussions between the Department and the Council which have either been disclosed in document 19, or may be inferred from the information contained within that document. Therefore, he sees no reason why the Council maintains that this document is exempt from disclosure.

### ii) Communications must be for the dominant purpose of obtaining or providing legal advice

58. The Commissioner does not consider that the reason for the Department's communication with the Council of 22 September 2004 (document 8) was for the dominant purpose of obtaining or providing legal advice. As may be seen from the information which the Council has agreed to disclose, many of the letters which have passed between the Council and the Department concern negotiations regarding the building of the New Mersey Crossing and the implementation of a congestion charging scheme. The discussion contained within document 8 could be described as continuing negotiations. The communication could not therefore be considered to be made for the dominant purpose of obtaining or providing legal advice, and therefore advice privilege cannot apply.

### iii) Communications must be between a professional legal adviser and his or her client

59. As it was not immediately clear whether the official at the Department who wrote document 8 was a lawyer, the Commissioner asked the Council to clarify this in his Information Notice dated 10 July 2008. By way of the Information Notice, the Commissioner also asked the Council to explain why it considered the contents of this official's letters to constitute legal advice. The Council explained that, whilst the official is not a lawyer, it considered the information contained in his letters to contain legal advice, for the following reasons:

- (a) the Council considered that it was involved in a joint endeavour with the Department and as such were “sharing their views” on certain aspects of the project, including the potential weaknesses of those aspects;
  - (b) the information contained within the official’s letter did not originate from him, however was “generated by the Department’s in-house legal advisors and then shared with others by other officers...[the official] was imparting the legal views of the Department’s lawyers; and
  - (c) “the advice shared was intended to inform the joint endeavour, and because the advice was essentially produced by the lawyers for consumption within that joint endeavour, it is considered by the Council to constitute legal advice”.
60. The Commissioner has contemplated the relationships that are apparent from an examination of the all of the withheld information. The Council is represented by Herbert Smith Solicitors and presumably has in-house lawyers. The Council also appears to have instructed Counsel in respect of one particular issue, as there is a reference to Counsel’s advice in one of the withheld documents. Therefore, confidential communications, made for the purpose of obtaining legal advice, between these parties would be lawyer/client communications, thus satisfying the third criterion at paragraph 53 above, and would likely be protected by the doctrine of legal professional privilege.
61. The Council has explained that the Department is advised by in-house lawyers. Again, communications between a specific section of the Department and the in-house lawyers would be lawyer/client communications and, subject to the other criteria in paragraph 53 above being met, the communications would be protected by advice privilege.
62. However, the communication which the Council seeks to protect here is one between the Department and the Council. The Council claims that it was involved in a “joint endeavour” with the Department, however each party to this endeavour took its own legal advice. Therefore, any legal advice was not jointly obtained. The relationship between the Department and the Council is not one between a client and professional legal adviser. The lead case on the lawyer/client relationship aspect of legal advice privilege is *Three Rivers District Council and others v The Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474 which applied a restrictive interpretation to the term ‘client’. In that case, the Court of Appeal excluded certain categories of communications from being protected by advice privilege, where previously privilege would have been thought to apply to these communications. It also clarified that, where litigation privilege could extend to protect communications between a client, the professional legal adviser and third parties advice privilege could only protect communications between a client and professional legal adviser. The Commissioner has been guided by the Court of Appeal’s decision when reaching a view as to whether the communications the Council sought to withhold were protected by advice privilege. The Commissioner has also referenced this

decision in his guidance on the application of legal professional privilege, which is available online at the following link:

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/legal\\_professional\\_privilege.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/legal_professional_privilege.pdf)

The Commissioner's decision is that legal advice privilege cannot apply to the information contained in document 8, because the communications are not between a client and professional legal adviser.

63. Given that the Commissioner has found that advice privilege does not apply to the requested information, he has not gone on to consider the concept of waiver of privilege, adverse effect, or to assess the balance of the public interest test with regard to the disclosure of the information.

#### *Document 11*

##### i) Communications must be confidential

64. Document 11 is a letter from the Council's solicitor to the Department. It summarises meetings between those parties and sets out the Council's views with regard to particular aspects of the Mersey Gateway project. The Council's letter is quite specific to the circumstances and although the letter has been copied to a number of individuals, they have all had prior involvement in the project. The Commissioner therefore considers that this communication can be categorised as confidential.

##### ii) Communications must be for the dominant purpose of obtaining or providing legal advice

65. The letter communicates the Council's legal views with regard to a particular aspect of the project. It also summarises advice given by Counsel. It is questionable as to whether the dominant purpose of the communication is to provide legal advice to the Department or simply to state the Council's legal position. On the balance of probabilities, the Commissioner shall accept that the dominant purpose of the communication was to provide the Council's legal views to the Department and can therefore be said to constitute legal advice.

##### iii) Communications must be between a professional legal adviser and his or her client

66. The communication is between a legal adviser acting in his professional capacity (the Council's solicitor) and the Department. For reasons explained at paragraphs 59 to 63 above, the relationship between the Council and the Department is not a lawyer/client relationship. Therefore, the withheld information is not protected by advice privilege, and the regulation 12(5)(b) exception cannot apply.
67. As the Commissioner has concluded that the information in document 11 is not protected by advice privilege, he is not required to consider whether privilege has



been waived, consider the adverse effect test, or balance of the public interest test.

*Document 13*

i) Communications must be confidential

68. Document 13 is a letter from the Department to the Council's lawyers, dated 27 April 2005. It was sent in response to document 11. Given that it responds to many of the points raised by the Council in document 11, which the Commissioner has found to be confidential, as explained at paragraph 64 above, the Commissioner also considers the Department's reply to be confidential.

ii) Communications must be for the dominant purpose of obtaining or providing legal advice

69. It is suggested that the letter communicates the Department's legal views with regard to a particular aspect of the project. It is questionable as to whether the dominant purpose of the communication is to provide legal advice to the Council or simply to state the Council's legal position. However, on the balance of probabilities, the Commissioner shall accept that the dominant purpose of the communication was to provide the Department's legal views to the Council and can therefore be said to constitute legal advice.

iii) Communications must be between a professional legal adviser and his or her client

70. The communication is between the Department and a legal adviser acting in his professional capacity (the Council's solicitor). For reasons explained at paragraphs 59 to 63 above, the relationship between the Council and the Department is not a lawyer/client relationship. Therefore, the withheld information is not protected by advice privilege, and the regulation 12(5)(b) exception cannot apply.
71. As advice privilege does not apply to document 13, the Commissioner has not considered the concept of waiver, adverse effect, or the public interest test in relation to this information.

*Document 14*

i) Communications must be confidential

72. Document 14 is a letter from the Council's solicitors to the Department. It briefly summarises the position the Council has reached with regard to a particular aspect of the project. The Commissioner does not consider that the information contained within this letter is confidential, as it appears trivial and does not have the necessary quality of confidence about it for the information to be considered confidential. Therefore advice privilege does not apply.

73. As the Commissioner has determined that advice privilege does not apply to document 14, he has not gone on to consider the other elements of privilege, waiver, adverse effect or the public interest test.
74. The Commissioner has considered whether any of the other exceptions, provided for by regulation 12, are applicable to the information the Council sought to withhold under regulation 12(5)(b). He has concluded that no other exceptions may be applied and therefore the Council is required to disclose documents 8, 11, 13 and 14 to the complainant.

### **Internal communications**

75. Regulation 12(4) provides -

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(e) the request involves the disclosure of internal communications.”

76. The EIR do not define “internal communications” except to state that:

“For the purposes of paragraph (4)(e), internal communications includes communications between government departments” (regulation 12(8) EIR refers).

77. The Council has claimed that regulation 12(4)(e) EIR applies to document 4 in appendix 1, which is guidance provided to the Council, from the Department, on the subject of congestion charging schemes.
78. During its discussions with the Commissioner, the Council argued that because it was involved in project discussions with the Department, a relationship had been established that would make communications between those parties internal. The Council further explained that as a local authority, it could be considered to be an “arm” of government and in that sense all communications between public bodies could be considered to be internal communications.
79. The Commissioner is not persuaded by the Council’s arguments. Article 4(2) of EC Directive 2003/4/EC, which the EIR implement, states that “the grounds for [refusing environmental information]... shall be interpreted in a restrictive way”. If the Commissioner were to accept that the exception covered communications between two separate public authorities which are not government departments, he would be interpreting regulation 12(4)(e) in a broad way, and would potentially reduce the availability of information to the public. Further, regulation 12(8) makes specific mention of communications between government departments being covered by the exception. This regulation would serve no purpose if any state communication was to be deemed ‘internal’ for the purposes of regulation 12(4)(e).
80. The Commissioner has therefore concluded that the exception is not engaged and that the information must be disclosed to the complainant. As the Commissioner finds that the exception is not engaged, there is no reason for him to consider the public interest test in relation to this information.

81. However, the Commissioner would like to note that the Council has agreed to disclose document 23 to the complainant, which it has stated is “merely a draft version of document 4”. He therefore fails to understand why the Council persisted that the exception applied to the completed version of this document but not to the draft, and that the public interest favoured maintaining the exception.

## The Decision

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82. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
- The Council corrected, at the internal review stage, its earlier failure to explain the public interest factors it had taken into account when deciding to withhold the information, and the complainant’s right to appeal to the Information Commissioner. It has therefore complied with the requirements of regulation 14(3)(b) and 14(5)(b).
83. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:
- The Council has breached regulation 5(1) by refusing to provide to the complainant information to which it was entitled.
  - The Council has breached regulation 5(2) by failing to provide this information within twenty working days of receipt of the request.
  - By failing to explain to the complainant which exceptions under the EIR applied to the requested information (relying instead on exemptions under the Act), the Council failed to comply with regulation 14(3)(a).
  - The Council did not provide the complainant with details of its internal review procedure and therefore failed to comply with regulation 14(5)(a).

## Steps Required

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84. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose to the complainant, in full, documents 4, 8, 11, 13 and 14.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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85. 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.

## Other matters

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Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

86. During the course of his investigation, the Commissioner has encountered considerable delay on account of the Council's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the Council's reasons for invoking particular exceptions. The delays and resistance were such that the Commissioner was forced to issue an Information Notice in order to obtain details relevant to his investigation.

Accordingly the Commissioner does not consider the Council's approach to this case to be co-operative, or within the spirit of the Act. As such he will be monitoring the Council's future engagement with the ICO and would expect to see improvements in this regard.

87. During the course of the Commissioner's investigation the Council identified further information falling within the scope of the request and overturned in part, at the prompting of the Commissioner, its decisions in relation to the application of exceptions. Whilst further information has been disclosed, the Commissioner wishes to record his concerns about the practice of 'piecemeal' disclosure.

Piecemeal disclosure describes request handling which has the effect of delaying, whether intentional or otherwise, an applicant's access to information falling within the scope of their request. The Commissioner would expect that in its future handling of requests the Council will provide information in a manner which conforms to the letter and the spirit of the EIR.

## Right of Appeal

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88. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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 3rd day of December 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Appendix 1

### List of information falling within the scope of the request

#### **Request part one: correspondence with Department for Transport dealing with tolling**

1. Email dated 16 February 2004
2. Meeting note dated 6 February 2004
3. Email dated 1 April 2004
4. Guidance from the Department for Transport on congestion charging
5. Email dated 2 July 2004
6. Halton Borough Council draft Transport Strategy
7. Email from Department for Transport to Council dated 22 September 2004
8. Letter from Department for Transport to Council's solicitor dated 22 September 2004
9. Email to Department for Transport dated 11 October 2004
10. Progress Report September 2004
11. Letter from Council's solicitor to Department for Transport dated 17 March 2005
12. Email from Department for Transport dated 27 April 2005
13. Letter from Department for Transport to Council's solicitor dated 27 April 2005
14. Letter from Council's solicitor to Department for Transport dated 27 June 2005
15. Halton Borough Council Cross Mersey Transport Strategy
  
19. Letter from Council's solicitor to Department for Transport dated 6 August 2004
20. Annual Progress Report Appendix 1
22. Letter from Department for Transport to Council dated 7 January 2005
23. Department for Transport draft guidance on congestion charging

#### **Request part two: list of communications that refer to tolling on the proposed and/or existing bridge**

16. Email dated 23 September 2004
17. Email dated 6 January 2005
  
18. Minutes of the New Mersey Procurement Group 11 January 2005
21. Minutes of the New Mersey Procurement Group 8 January 2004



## Legal Annex

### Interpretation

**Regulation 2(1)** provides –

“In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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 –

- (g) 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;
- (h) 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);
- (i) 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;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) 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);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act;

and

“working day” has the same meaning as in section 10(6) of the Act.”

**Regulation 2(2)** provides –

“Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
  - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
  - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
  - (i) has public responsibilities relating to the environment;
  - (ii) exercises functions of a public nature relating to the environment; or
  - (iii) provides public services relating to the environment.”

**Regulation 2(3)** provides –

“Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.”

**Regulation 2(4)** provides –

“The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and
- (d) “personal data”.

**Regulation 2(5)** provides -

“Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.”

### **Duty to make environmental information available upon request**

**Regulation 5(1)** provides –

“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)** provides –

“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)** provides –

“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)** provides –

“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)** provides –

“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)** provides –

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

**Representation and reconsideration**

**Regulation 11(1)** provides –

“Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.”

**Regulation 11(2)** provides –

“Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.”

**Regulation 11(3)** provides –

“The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.”

**Regulation 11(4)** provides –

“A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.”

**Regulation 11(5)** provides –

“Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;

- (b) the action the authority has decided to take to comply with the requirement;  
and
- (c) the period within which that action is to be taken.”

### **Exceptions to the duty to disclose environmental information**

**Regulation 12(1)** provides –

“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(2)** provides –

“A public authority shall apply a presumption in favour of disclosure.”

**Regulation 12(3)** provides –

“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)** provides –

“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)** provides –

“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 12(6)** provides –

“For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).”

**Regulation 12(7)** provides –

“For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.”

**Regulation 12(8)** provides –

“For the purposes of paragraph (4)(e), internal communications includes communications between government departments.”



**Regulation 12(9)** provides –

“To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”

**Regulation 12(10)** provides –

“For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.”

**Regulation 12(11)** provides –

“Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.”

**Refusal to disclose information**

**Regulation 14(1)** provides –

“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)** provides –

“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)** provides –

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

- (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).”

**Regulation 14(4)** provides –

“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)** provides –

“The refusal shall inform the applicant –

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