

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

Decision Notice

Date: 20 September 2010

Public Authority: Brighton and Hove City Council
Address: King's House
Grand Avenue
Hove
East Sussex
BN3 2LS

Summary

The complainant requested legal advice concerning the commencement of a major development project in Brighton. Brighton and Hove City Council ("the Council") refused to supply the information, stating that it was exempt under section 42(1) of the Freedom of Information Act 2000 ("the FOIA") and the public interest favoured maintenance of the exemption. The Information Commissioner ("the Commissioner") investigated and decided that the request should have been handled under the Environmental Information Regulations 2004 ("the EIR"). He therefore considered the application of regulation 12(5)(b) and found that it was engaged and the public interest favoured maintenance of the exception. He found breaches of regulation 14(2) and 14(3) but does not require any steps to be taken.

The Commissioner's Role

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 Commissioner. In effect, the enforcement provisions of Part 4 of the FOIA are imported into the EIR.

Background

- Plans for a major development on land at and adjacent to Brighton's West Pier were submitted to the Council on 17 July 2006. The development consisted of two applications: a full planning application and a listed building consent application. Planning permission and listed building consent for both applications was granted at the Planning Applications Sub-Committee on 11 October 2006. The plans included partial demolition of the existing pier structure and construction of an observation spire, approximately 183 metres in height, and a heritage centre. The scheme, known as the "i360" was submitted by Marks Barfield, the creators of the London Eye. The Commissioner understands that work on the project is ongoing.

The Request

- As part of an exchange of correspondence regarding the development, the Council wrote to the complainant on 27 November 2009 stating the following:

"The pre-commencement conditions of the full planning permission and listed building consent are met, with the exception of conditions relating to hard landscaping and the WWII gun emplacement located beneath the West Pier. The developer has submitted details pursuant to these conditions. Further discussion and agreement is required before these conditions can be fully discharged. The Planning Authority has taken legal advice on commencement and is satisfied that the development may be treated as having lawfully commenced".

- The complainant replied on 16 December 2009 and made the following request for information:

"I should like to make a FOI request for 'the legal advice on commencement' of the i360 development referred to [in the Council's email]"

- On 12 January 2010, the Council replied. It stated that it had decided to refuse to supply the legal advice requested because it was covered by legal advice privilege and was therefore exempt under section 42(1) of the FOIA. The Council briefly addressed the public interest test associated with the exemption and referred to one of the Commissioner's published decisions relating to legal professional privilege (FER0222561).

6. On 12 January 2010, the complainant wrote to request an internal review. The complainant pointed out that the previous decision of the Commissioner did not set a precedent as each case should be considered on its own merits. He questioned whether section 42(1) was engaged but added that even if it was, he felt that the public interest favoured disclosure of the information.
7. The Council completed its internal review on 16 February 2010. The Council stated that it wished to maintain its position that section 42(1) was engaged and that the public favoured maintenance of the exemption. It elaborated further on its reasons for withholding the information by quoting various passages from the Commissioner's previous decision notice which it had referred to in its refusal notice.

The Investigation

Scope of the case

8. On 16 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly refused to supply the legal advice he had requested.

Chronology

9. On 5 March 2010, the Commissioner wrote to the Council asking to be provided with a copy of the withheld information.
10. On 31 March 2010, the Council replied to the Commissioner. It provided a chain of emails which contained the withheld legal advice.
11. On 3 June 2010, the Commissioner contacted the complainant to set out his understanding of the complaint. He asked the complainant to confirm that his understanding was correct and he also invited the complainant to present any information he felt may be relevant to the Commissioner's considerations in this case.
12. On 7 June 2010, the Commissioner wrote to the Council to ask for information to help him to consider the complaint. At this point, the Commissioner pointed out to the Council that his view was that the information should have been considered under regulation 12(5)(b) of the EIR rather than the FOIA. He also asked the Council to be more

- specific about what information comprised the withheld legal advice from the chain of email correspondence supplied.
13. On 22 June 2010, the Council responded to the Commissioner's enquiries. It confirmed that it accepted the Commissioner's view that it should have considered the request under the EIR. It also stated that it wished to claim the exception in relation to legal advice contained in emails from the Council's senior solicitor.
 14. On 24 June 2010 the complainant replied to the Commissioner confirming that his complaint had been correctly understood. He stated that the only thing he would add is that he had questioned the applicability of the Commissioner's previous decision that had been used by the Council to justify the refusal. The complainant stated that he would write again in due course to present background details and arguments concerning why, in his view, the public interest favoured disclosure of the information.
 15. On 20 July 2010, the complainant wrote to the Commissioner again submitting background details and arguments in respect of the public interest test.
 16. On 27 July 2010, the Commissioner wrote to the Council pointing out that it had come to his attention that some of the emails in the exchange of correspondence provided, other than those from the senior solicitor, contained references to the legal advice that had been received from the senior solicitor regarding commencement. The Commissioner stated that his view was that this information also falls within the scope of the request and he asked the Council to confirm whether it also wished to claim the exception under section 12(5)(b) in relation to this information.
 17. On 17 August 2010, the complainant sent a further email to the Commissioner adding to his comments in respect of the public interest in disclosing the information.
 18. On 18 August 2010, the Council replied confirming that it also wished to apply the exception to the references to legal advice on commencement contained within emails other than those from the senior solicitor as described in paragraph 16 above.

Analysis

Substantive Procedural Matters

Should the request have been considered under the EIR?

19. As already stated in the chronology, the Commissioner's view is that the request should have been considered under the EIR. This view was not disputed by the Council. Regulation 2(1)(c) of the EIR specifies that "environmental information" is any information on (meaning concerning or relating to) "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". One of the elements listed is land. At the very least, the construction of the i360 would affect the land and probably other elements and factors pertaining to the environment.

Exception – regulation 12(5)(b)

Was the information covered by Legal Advice Privilege?

20. Under this exception, a public authority can refuse to disclose information to the extent that 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".
21. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege and, even though the Council originally relied on section 42(1) of the FOIA, the Commissioner considers that it is appropriate to consider the equivalent exception under regulation 12(5)(b) of the EIR.
22. The principle of Legal Advice Privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is contemplated or pending). In this case, the Council has stated that Legal Advice Privilege applied in the circumstances.
23. The Commissioner inspected the chain of emails provided by the Council and was satisfied that it contained relevant legal advice from a

solicitor at the Council. The Commissioner was therefore satisfied that the information was covered by Legal Advice Privilege.

24. Having satisfied himself that the relevant information was covered by Legal Advice Privilege, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived in this case. Even if information is privileged, this can be lost (waived) if the client has shared it with third parties and it has lost its confidentiality. When the Council was asked about this, it stated that it was not aware that the information had been shared with anyone else apart from the council officers concerned. In the absence of any evidence to the contrary, the Commissioner accepts that the legal advice remains confidential.

Would disclosure have caused an adverse effect?

25. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
26. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
27. The Council argued that disclosure of information that is subject to Legal Advice Privilege would have an adverse effect on the course of justice through a weakening of the general principle behind Legal Professional Privilege.
28. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described Legal Professional Privilege as, "a fundamental condition on which the administration of justice as a whole rests".
29. The Commissioner accepts that disclosure of the legal advice would undermine the important common law principle of Legal Professional Privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the Council's ability to defend itself if it ever faced a challenge in connection with this aspect of the development. The Council should be able to defend its position and any claim made

against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.

30. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant legal advice.

Public interest arguments in favour of disclosing the requested information

31. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities.
32. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to planning matters, especially where the development in question is on a large scale. It is clear that the i360 affects a historic part of Brighton and will affect a significant amount of people. It is important that the public are able to be involved in decisions affecting this plan as far as possible. Disclosure of the legal advice would enable the public to consider more fully the question of whether the development was commenced lawfully in view of the conditions associated with the plans.

Public interest arguments in favour of maintaining the exemption

33. The Commissioner's published guidance on Legal Professional Privilege states the following:

"Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice".

34. In light of the above, there will always be a strong argument in favour of maintaining the exception because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...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 case..."

35. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.
36. In relation to the specific circumstances of this case, the Council has explained to the Commissioner that at the time that the request was made, the legal advice on the i360 project was still recent and was being relied upon in relation to the legality of the commencement of the i360 project and in relation to another planning application. The Council has explained that the legal advice was given in the context of considering a separate planning application for the "Brighton O". This concerned a plan to erect a temporary 60 metre high Ferris wheel on Brighton seafront. The Commissioner understands that this application was problematic because of a site overlap with the i360 project. The application was in fact withdrawn in February 2010 but it was still under consideration by the Council at the time of the complainant's request. The Council has stated that the legal advice was being relied upon at the time and was affecting its consideration of the planning application for the "Brighton O". The Council has explained that if the i360 planning permission could not be implemented, the problem in respect to the site overlap would not have been an issue.

Balance of the public interest arguments

37. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to planning activities, particularly large scale developments affecting a significant amount of people. He accepts that disclosure of the legal advice would help the public to consider more fully the question of whether the project was commenced lawfully in view of the conditions associated with the planning application.
38. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest inherent in maintaining the Council's right to consult with its lawyers in confidence. The Council has been transparent about the fact that it received advice on the commencement of the development and it has confirmed that following this, it was satisfied that the development commenced lawfully. It has

also explained which conditions have not been met and why. Having considered the nature of the advice, the Commissioner can see no obvious signs of wrong doing or evidence that the Council has misrepresented the advice it received in any way. He has also taken into account that at the time of the request, the advice was recent and was being relied upon. It is important that the Council should be able to consult freely and frankly with its lawyers in relation to such questions and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs most heavily in the balance of the public interest test in this case.

39. The complainant has raised particular concerns in his correspondence to the Commissioner about delays regarding the project, and he has questioned whether the pre-commencement planning conditions have been fulfilled satisfactorily and whether any works that might constitute "development" had commenced prior to the expiry of the planning permission that was granted in 2006. The Commissioner notes that the complainant has particular concerns about the project, but in the circumstances, he was not persuaded that public disclosure of the legal advice would be a fair and proportionate response to these concerns. It was also not clear to the Commissioner how disclosure of the legal advice would affect the delays that the complainant states have caused him concern or answer some of the other questions he has raised with the Commissioner regarding the project.

Procedural Requirements

40. The Council did not handle the request under the EIR. It therefore breached regulation 14(2) for failing to rely on the exception under regulation 12(5)(b) within 20 working days. It also breached regulation 14(3) for failing to cite regulation 12(5)(b) by the date of its internal review.

The Decision

41. 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
- Although the Council only relied upon the exception under regulation 12(5)(b) following prompting from the Commissioner during his investigation, the Commissioner finds that the exception was engaged and that the public interest in maintaining the exception outweighed the public interest in disclosing the information.

42. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The Council breached regulation 14(2) and 14(3) of the EIR because it did not consider the request under the EIR initially and had not rectified this by the date of its internal review.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: 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 sent.

Dated the 20th day of September 2010

Signed

**Andrew White
Group Manger – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex – Environmental Information Regulations 2004

Regulation 2 - Interpretation

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;

Regulation 5 - Duty to make available environmental information on request

Regulation 5(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.

Regulation 12 - Exceptions to the duty to disclose environmental information

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

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

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 –

- (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;

Regulation 14 - Refusal to disclose information

Regulation 14(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.

Regulation 14(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.