

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

Decision Notice

Date: 23 December 2009

Public Authority: Surrey Heath Borough Council
Address: Surrey Heath House
Knoll Road
Camberley
Surrey GU15 3HD

Summary

The complainant requested a copy of a council report into the conduct of its staff together with reports and legal advice on whether the council had been negligent in failing to impose a tree preservation order.

The council refused disclosure of the information under the Act but during the Commissioner's investigation it was withheld via the EIR. Several elements of the complaint were resolved during the course of the Commissioner's enquiries and the investigation ultimately concerned the council's refusal to disclose its originating letter to a planning adviser and his report in response.

These items were withheld via regulations 12(4)(e) and 12(5)(b).

The Commissioner found that the council had incorrectly applied the exceptions at 12(4)(e) and 12(5)(b) and had failed to comply with regulations 5(1), 5(2), 14(2), 14(3)(a) and 14(3)(b) of the EIR.

The Commissioner determined that the exception at regulation 13(2)(a)(i) applied to the planning adviser's report and ordered that the originating letter be disclosed.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (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.

Background

3. The complainant was concerned about the way the council permitted the felling of 200 trees by a neighbouring property owner. The council's monitoring officer produced a report into his complaint. However, the complainant was not allowed to see it. The council supplied him with a précis of the report containing references to documents and advice that the council had received regarding the matter. The complainant consequently requested a full copy of the report and a copy of the documents and advice that the report referred to.

The Request

4. On 12 July 2007 the complainant requested the following information from the council:

'(1) The report by Mrs Whelan dated 15 June 2007 into my complaint about officers at Surrey Heath Borough Council.

(2) A photo copy of the written file note from Jane Baldwin to Chris Pickett on Thursday 19 June 2003.

(3) A photo copy of the file note written by Ian Wright referring to a site visit and recording the file being close down on 20 June 2003.

(4) An opinion from an 'expert' who discusses whether or not the council was negligent in failing to impose a TPO. I would also like the originating letter from the council which brought about that response. The date of these communications would be 2006/2007.

(5) An opinion from an 'expert' regarding Gill Hillage's handling of enquiries about [named property] in 2000. I would also like the originating letter from the council which brought about that response. The date of these communications would be 2006/2007.

(6) Copies of the full advice given by the two 'experts' (an ex-local authority chief executive and planning officer and the expert in planning law) together with the originating letters from the council which brought about these responses. The date of these communications would be 2006/2007.

(7) Copy of the detailed report referred to as being from Baker Tilly as mentioned in the report dated 15 June 2007.

(8) Two letters relating to Ian Wright's site visit to [named site] made on 23 June 2003. These letters are referred to as Ian Wright's Witness Statement to DEFRA as 'IW3' and 'IW4' and would probably have been written to the Forestry Commission. The exact date of this correspondence is not known but it would probably be late June/early July 2003.

(9) I would like to know what personal information you keep about me on your files and would like to know if any personal comments have been made about me in the report dated 15 June 2007 mentioned above.'

5. On 17 August 2007 the council withheld or otherwise addressed the requested items as follows:
 - item (1) was withheld via s30 and s40(2)
 - item (2) was withheld via s30
 - item (3) was withheld via s30
 - item (4) was withheld via s42
 - item (5) was withheld via s42
 - item (6) was withheld via s42
 - item (7) was withheld via s36(2)(c)
 - item (8) – the council said it was unable to supply this information but failed to cite a relevant exemption. It advised the complainant to re-direct his request to DEFRA.
 - item (9) was dealt with by the council as a subject access request under the Data Protection Act 1998.
6. On 19 August 2007 the complainant wrote to challenge statements made by the council in its refusal notice. He questioned the validity of the s30 exemption on grounds that the exemption applied to criminal proceedings whereas his allegations concerned the conduct of council officers. He questioned whether a qualified person had actually exercised a reasonable opinion as required under the Act in exempting item 7 via s36(2)(c) when the information had already been made public at a council meeting. He particularly questioned the council's insertion of the word 'and' between 'legal' and 'professional' in its citing of the s42 exemption. By its insertion the complainant believed the council had misrepresented the range of expert opinion to which the exemption applied in order to incorporate its originating letter to the planning adviser and his response within the exclusion from disclosure. The correct phrase in the Act is 'legal professional privilege'.
7. The council's internal review of 16 November 2007 upheld its original decision to exempt item 1 via s30 of the Act. With reference to the complainant's query concerning the validity of s30, the council now specified the relevant sub section. It submitted that the information at item (1) was exempt via s30(2)(a)(iii) for the purpose specified at s31(2)(b) – that is the purpose of ascertaining whether any person is responsible for improper conduct.
8. The council's review also maintained its decision to exempt items 4, 5 and 6 via s42 but failed to address the complainant's charge that it had incorrectly extended the range of professional opinion to which the exemption applied.
9. The review did not uphold the council's decision concerning items 2, 3 and 8 and the information comprised by these items was disclosed to the complainant.
10. The review did not uphold the council's original decision to exempt item 7 via s36(2)(c). Instead it declared that the information was available on the council's website and that it was therefore exempt from disclosure by virtue of s21.
11. On 17 November 2007 the complainant advised the council that item 7 was unavailable on its website. He repeated his concern that the council had misrepresented the range of opinion to which the s42 exemption applied and that the originating letter to the planning adviser and his response should be released. The

complainant also repeated his concern that the council had failed to apply the public interest test in respect of its refusal to disclose the legal opinion that he had requested.

12. In a further review of 19 December 2007 the council acknowledged that item 7 was unavailable on its website and it now agreed to provide the complainant with a copy of that information. The further review maintained the council's position with regard to its reliance on s42 to withhold the instructions to counsel and the subsequent legal opinion together with the originating letter to the planning adviser and his response. The council also introduced the exemption at s31(2)(b) in order to withhold these four items of information. The council did not set out any public interest arguments in respect of its decision to exempt the information via s42 and s31(2)(b).
13. A year later, on 19 December 2008, as a result of further contact from the complainant, the council once again reviewed its decision to withhold the originating letter to the planning advisor and his response. The review did not confirm the council's earlier application of s31(2)(b), however, it maintained its reliance on s42 in order to withhold the information. The review alluded to the public interest test in respect of s42 but did not set out the public interest arguments.

The Investigation

Scope and chronology

14. The complainant contacted the Commissioner on 4 September 2007 to complain about the way his request for information had been handled by the council.
15. On 12 January 2009 the Commissioner asked the council to clarify a number of issues concerning the exemptions it had applied. He also asked the council to provide him with a copy of the information in order to ascertain whether it had been withheld appropriately.
16. The Commissioner advised the council that the withheld information was environmental information as defined in regulation 2 of the EIR. This was because the information related to planning matters and activities which have a direct impact on the use of land and landscape. The council agreed to re-consider the request under that regime.
17. Between January and March 2009 the Commissioner had cause to write several times to the council owing to its continuing delays in responding to his queries, its incomplete replies and the ambiguity of its responses. On 20 February 2009 he advised the council that in order to reach a clear decision when investigating a section 50 complaint he required clear responses from the public authority to each enquiry that he makes.
18. The Commissioner subsequently issued an Information Notice on 4 March 2009 requiring the council to provide him with the clarification and information that he required. The council was informed that failure to comply with the Information Notice could result in the Commissioner making written certification of this fact to the High Court and could be dealt with as a contempt of court.

19. The council supplied the information required by the Commissioner and ultimately confirmed that the information it had withheld consisted of five items:
 - (a) the council's report into staff conduct dated 15 June 2007
 - (b) instructions to counsel
 - (c) advice from counsel
 - (d) originating letter to the planning adviser
 - (e) response from the planning adviser
20. The council submitted its view to the Commissioner that:
 - item (a) was exempt from disclosure via regulation 13
 - items (a) to (e) were exempt via regulation 12(4)(e)
 - items (b) to (e) were subject to legal professional privilege and therefore exempt via regulation 12(5)(b).
21. The council did not provide its consideration of the public interest test under the EIR in relation to withholding these items. It referred briefly to a public interest argument in respect of withholding item (a) but in doing so relied on exemptions of the Act which the Commissioner had earlier advised were inapplicable.
22. During the course of the Commissioner's investigation the complainant obtained item (a) via alternative means. The complainant subsequently agreed with the Commissioner that item (a) of the complaint be withdrawn. He also agreed the removal of items (b) and (c) from the scope of his complaint.

Analysis

Procedural Matters

23. The council failed to inform the applicant of its refusal to disclose the requested information within 20 days of the receipt of the request. In failing to do so the council breached regulation 14(2) of the EIR.
24. The council refused the applicant's request under the Act and not the EIR. It consequently breached regulation 14(3) by failing to specify the EIR exceptions relied on.
25. The council failed to provide the public interest arguments it was required to consider in reaching its decision to withhold items (d) and (e). By failing to do so the council breached regulation 14(3)(b) of the EIR.

Exceptions

Regulation 12(4)(e)

26. The council's originating letter to the planning adviser and the adviser's subsequent response were withheld via the exception at regulation 12(4)(e).

27. The planning adviser was not a council staff member. He was a third party who operated a private consultancy service and was contracted on a temporary basis by the authority.
28. A public authority may only refuse to disclose information under regulation 12(4)(e) to the extent that the request involves the disclosure of internal communications. Because communications between a public authority and a third party do not constitute internal communications the Commissioner's view is that the exception is not engaged. In reaching his view, the Commissioner has taken into account the Tribunal's decision in *Secretary of State for Transport v Information Commissioner (EA/2008/0052)* where communications of an external adviser 'embedded' within the organisation were considered to be internal. The Commissioner is satisfied that in this case the planning adviser was insufficiently embedded within the council to warrant his reports being regarded as internal. As the exception at regulation 12(4)(e) is not engaged, the Commissioner has not explored the public interest arguments in this notice.

Regulation 12(5)(b)

29. The originating letter and the planning adviser's response were withheld under regulation 12(5)(b) on grounds that the information was subject to legal professional privilege (LPP).
30. There is no specific exception within the Regulations referring to information that might be subject to LPP, however, the Tribunal has previously decided that regulation 12(5)(b) can encompass such information. In *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)*, the Tribunal considered that the regulation "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 rights of individuals or organisations to a fair trial." It concluded that in order to do this, the exception covers LPP.
31. The council argued that the originating letter which commissioned the planning adviser's report was covered by legal advice privilege. The Commissioner considers that legal advice privilege will apply to confidential communications, made between a client and a legal adviser acting in their professional capacity, for the sole or dominant purpose of obtaining legal advice. In support of its claim the council supplied the Commissioner with a copy of a file note dated 18 December 2008 which stated that the planning adviser's report had been commissioned by a lawyer - the council's former monitoring officer. The council had similarly informed the complainant in its review letter of 19 December 2008 that the adviser's report had been commissioned by a lawyer. However, the Commissioner's investigation into the matter has determined that the originating letter is not a communication between lawyer and client as such is not covered by legal advice privilege.
32. The council argued that the planning adviser's report was also covered by legal advice privilege. In support of its claim the council referred the Commissioner to the same file note of 18 December 2008. The file note maintained that the planning adviser's response was integral to the council's report into staff conduct (item (a)) and that on this basis LPP should apply. However, the Commissioner's examination of item (a) has revealed that it makes slight reference to the planning adviser's response. The single comment from the adviser's response which is quoted in the report had already

been disclosed by the council to the complainant. In any case, the report at item (a) itself has not been considered by the council to be subject to LPP. It is clear to the Commissioner that both the planning adviser and the barrister had been asked by the council to provide two independent reviews into complaints that the authority felt unable to investigate in house. The barrister herself did not seek the planning adviser's report and although it may have been forwarded to her it does not become a document covered by advice privilege because of this.

33. Owing to the apparent disparity between the council's submissions as to who commissioned the planning adviser's report the Commissioner requested an explanation from the authority. In particular he asked it to explain the basis for its submission to the complainant that the report had been commissioned by the council's former monitoring officer and he requested a copy of the commissioning letter that would substantiate that fact. The council was unable to provide evidence of such a letter. Instead it maintained that the former monitoring officer – a lawyer - had made an oral request to the planning adviser. The Commissioner cannot attach any weight on the basis of this submission that LPP applied to the planning officer's report. In any case the Commissioner's view is that it is only in a litigation privilege context, and not in a legal advice privilege context, that communications with third parties outside the lawyer-client relationship may potentially be covered by LPP.
34. Whilst the Commissioner's decision is that items (d) and (e) are not subject to LPP, he has considered whether disclosure of the information would cause adverse affect as he would with any complaint concerning information withheld via regulation 12(5)(b).
35. A public authority that is reliant on 12(5)(b) in order to withhold information is required by the regulation to demonstrate that disclosure of the information '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 enquiry of a criminal or disciplinary nature. The Tribunal in the case of *Archer v Information Commissioner and Salisbury District Council EA/2006/0037* held that it must be satisfied that disclosure "would" have an adverse affect not that it "could" or "might". The definition of "would" in the context of the phrase "would prejudice" was considered in the case of *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030* where the Tribunal held that "would" must be demonstrated as more probable than not. The Tribunal has agreed with the Commissioner that the *Hogan* definition of "would" is transferable to the EIR. The Commissioner has therefore considered whether or not the council in this instance has demonstrated that sufficient probability of adverse effect would arise from disclosure of the information.
36. When the council reconsidered the request under the EIR it repeated its earlier assertion that items (d) and (e) were subject to LPP. The council incorrectly submitted that LPP fell within the exception at 12(4)(e) rather than that at 12(5)(b) but later accepted the Commissioner's advice that the regulation encompassing LPP was 12(5)(b). However, the council failed to supply any convincing argument to demonstrate that the specific disclosure of items (d) and (e) would result in adverse affect as required by the regulation.
37. Because the council failed to demonstrate that disclosure would have an adverse effect upon the course of justice, the Commissioner's decision is that the exception at

regulation 12(5)(b) is not engaged. Because the exception is not engaged, the Commissioner is not required to consider the public interest test.

Regulation 13

38. The Commissioner has identified the contents of the planning adviser's report to be the personal data of a third party. The information contained in the report is therefore subject to the exception at regulation 13(2)(a)(i) of the EIR. The council did not rely on this exception in order to withhold the report.
39. Regulation 13(1) provides an exception for information which is the personal data of an individual other than the applicant and where one of the conditions listed in regulations 13(2) or 13(3) is satisfied. In the Commissioner's view the condition at regulation 13(2)(a)(i) is satisfied. This condition prevents release of information to the public if the disclosure contravenes any of the data protection principles in the Data Protection Act 1998 (DPA). The text of regulation 13 is set out in the legal annex of this notice.
40. For the exception at 13(2)(a)(i) to apply the requested information must fall within the definition of personal data. Personal data is defined in section 1 of the DPA as data which relates to a living individual who can be identified:
 - from that data or
 - from that data and other information which is in the possession of or is likely to come into the possession of the data controller or any other person in respect of the individual. It includes any expression of opinion about the individual and any indication of intentions of the data controller or any other person in respect of the individual.

Having reviewed the information the Commissioner is satisfied that the whole of the planning adviser's report falls within the description of personal data as defined by the DPA. Whilst the report contains references to council planning files which might not at first appraisal appear to be personal data the Commissioner has needed to consider this within the remit and context of the report as a whole.

41. The Commissioner has gone on to consider whether the release of this information would be in breach of the data protection principles. He has first considered whether disclosure of the withheld would breach the 1st principle of the DPA which requires that personal data is processed fairly and lawfully. The Commissioner has initially considered whether the disclosure of this information would be unfair.
42. Having viewed the withheld information it is the Commissioner's view that disclosure of the information would be unfair. Any release of information under the EIR has to be considered as a disclosure to the wider world and not to the requestor alone. The Commissioner notes that this information relates to a third party's acting in their personal capacity. It is unlikely that they would have provided their information with an expectation the information they have supplied in this context would have been released into the public domain. In this case the Commissioner finds that the third party had a legitimate expectation that information they provided would not be disclosed to the public.

43. The Commissioner recognises that there is a legitimate public interest in ensuring that the planning process is as open and transparent as possible. However he does not consider that disclosure of this information is necessary to meet that public interest.
44. In this case, where the third party has provided information in the expectation of confidentiality the Commissioner finds that disclosure would be unfair. The Commissioner therefore considers the planning advisor's report to be exempt from disclosure.

The Decision

45. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR. In respect of the originating letter to the planning advisor the council failed to comply with its obligations under regulations 5(1) and 5(2) which require that environmental information shall be made available on request and no later than 20 working days after receipt of request.

The council incorrectly applied the exceptions at regulations 12(4)(e) and 12(5)(b) of the EIR in order to withhold the originating letter and the planning officer's report.

The council breached regulation 14(2) of the EIR by failing to inform the applicant of its refusal to disclose the requested information within 20 days of the receipt of the request.

The council breached regulation 14(3)(a) of the EIR by failing to specify in its refusal notice the EIR exceptions relied on.

The council breached regulation 14(3)(b) of the EIR by failing to provide the public interest arguments it was required to consider in reaching its decision to withhold environmental information.

Steps Required

46. The Commissioner requires that the council shall within 35 calendar days of the date of this decision notice disclose the originating letter described as item (d) in this notice.

Failure to comply

47. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

48. The Commissioner wishes to highlight the following matters of concern:

During the course of his investigation, the Commissioner has encountered considerable delay on account of Surrey Heath Borough 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 handling the request as it did. 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 Surrey Heath Borough Council's approach to this case to be particularly co-operative or within the spirit of the Act. As such he will be monitoring the council's future engagement with the ICO and will expect to see improvements in this regard.

Right of Appeal

49. 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.

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 served.

Dated the 23rd day of December 2009

Signed

**Lisa Adshead
Deputy Commissioner**

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

Legal Annex

Environmental Information Regulations 2004

Regulation 2 states that:

(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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 5 states that:

- (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.
- (3) 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.
- (4) 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.
- (5) 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 a standardised procedure used.
- (6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 states that:

- (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.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) 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.
- (4) 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 the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -
 - (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
 - (f) the interests of the person who provided the information where that person -
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these 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 13 states that:

- (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.
- (2) The first condition is -
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene -
 - (i) any of the data protection principles; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing

- the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998[7] (which relate to manual data held by public authorities) were disregarded.
- (3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.
- (4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that -
- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.

Regulation 14 states that:

- (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).
- (4) 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.
- (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.

Freedom of Information Act 2000

Section 21 states that:

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Section 30 states that:

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

- (i) whether a person should be charged with an offence, or
- (ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if-

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

- (i) investigations falling within subsection (1)(a) or (b),
- (ii) criminal proceedings which the authority has power to conduct,
- (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
- (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

(4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

(5) In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,
- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(6) In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

Section 31 states that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Section 36 states that:

(1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and

- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6) Any authorisation for the purposes of this section-
 - (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
 - (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Section 40 states that:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Section 42 states that:

- (1) 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.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.