

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

Decision Notice

Date: 4 October 2010

Public Authority: Merthyr Tydfil County Borough Council
Address: Civic Centre
Castle Street
Merthyr Tydfil
CF47 8AN

Summary

The complainant made a five part request for information relating to the Ffos-y-Fran land reclamation Scheme. The Council initially refused the request by virtue of regulation 12(4)(b) of the EIR. The Council subsequently confirmed that it did not hold information relevant to parts 1 to 4 of the request and that information relating to part 5 of the request was exempt under regulations 12(4)(e) and 12(5)(b). During the course of the Commissioner's investigation the Council also sought to rely on regulations 12(5)(d) and 12(5)(e) in relation to part 5 of the request. The Commissioner has investigated and determined that on the balance of probabilities the Council does not hold any additional information relating to parts 1 to 4 of the request. The Commissioner has also concluded that regulation 12(5)(b) is engaged in relation to part 5 of the request and the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner has also identified a number of procedural shortcomings in the way the Council handled the complainant's request but he has not ordered any steps to be taken.

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 original requests were submitted directly by the complainant to the Council. However, he later instructed solicitors to act on his behalf and it is his solicitors who made the complaint to the Commissioner on the complainant's behalf.
4. The East Merthyr Land Reclamation Scheme ('EMLRS') was conceived in the mid-1980s as part of a wider land reclamation scheme to deal with some 1300 hectares of derelict land in Merthyr Tydfil. The stated aim of the EMLRS was to improve the environment of East Merthyr by reclaiming extensive tracts of derelict land, stabilising the ground, introducing landscaping and, where appropriate, providing infrastructure for future development. It comprised of three separate, but interrelated phases – Phase 1 – land at Incline Top, Phase 2 – land at Great White Tip and Phase 3 – Land at Ffos-y-Fran. On 8 April 1993 the former British Coal Corporation, the former Mid Glamorgan County Council and former Merthyr Tydfil Borough Council entered into a Tripartite agreement to reclaim the three areas, which included recovery of coal by opencast mining ('the 1993 Agreement').
5. In 1988, applications for deemed planning permission were made by the former Merthyr Tydfil Borough Council for Phase 1 and the former Mid Glamorgan County Council in respect of Phases 2 and 3. Deemed planning permission was given for all phases in November 1988.
6. Phase 1 was carried out between January 1992 and June 1993 and Phase 2 was carried out between August 1993 and September 1997. Work on implementing the schemes was initially undertaken by British Coal Opencast and later, following coal industry privatisation, by Celtic Energy and their contractors, as agents for Mid Glamorgan County Council. A supplemental agreement was entered into on 5 November 1997 ('the 1997 Agreement') between Celtic Energy Limited and Merthyr Tydfil County Borough Council ('the Council'). This agreement provided for the Council to use its best endeavours to acquire land required for Phase 3.

7. The Council's Development and Planning Control Committee resolved on 30 August 1996 to proceed with a Compulsory Purchase Order in relation to land needed for Phase 3. Following a Public Inquiry in 1999, the appointed Inspector determined in January that the Order should not be confirmed and no certificate should be granted in respect of the Compulsory Purchase Order and a costs award was made against the Council.
8. In 1994 a deemed planning application was submitted for a scheme described as Phase 3A which would have covered a larger site than the original Phase 3 proposal. This application was withdrawn in May 1999 and in July 1999 a similar application for the same area of land was submitted by a consortium known as CLH Ltd. That application was subsequently withdrawn in June 2003.
9. The land ownership problems were resolved in 2003 and a new planning application was submitted by Miller Argent (South Wales) Limited ('Miller Argent') to the Council on 30 April 2003. As it was considered that the proposal would have wide effects beyond the immediate locality, the application was called in for determination by the National Assembly for Wales on 1 December 2003. An Inspector was appointed, a Public Inquiry was held in September 2004, and the Inspector's report published on 8 November 2004. The Inspector recommended that planning permission be granted and planning permission was formally granted on 11 April 2005.
10. Under section 288 of the Town and Country Planning Act, a local resident brought a challenge to the granting of this planning permission. The High Court considered the appeal and quashed the decision to grant planning permission. The National Assembly for Wales subsequently appealed to the Court of Appeal who overturned the High Court Decision and gave approval for the scheme on 27 November 2006.
11. Work began on the site in June 2009 and it is anticipated that work will continue on the scheme for 17 years. Since planning permission was granted, a number of legal challenges have been made by local residents in relation to the planning permission for the scheme, all of which have been unsuccessful¹.

¹ <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2009/1621.html&query=elizabeth+and+condron&method=boolean>
<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2010/534.html&query=elizabeth+and+condron&method=boolean>
<http://www.unece.org/env/pp/compliance/CC-27/CC27%20report%20Advance%20Unedited%20Copy%207.4.10.pdf>

12. The request in this case relates to an agreement entered into on 17 September 2004 ('the 2004 Agreement') between the Council, Celtic Energy and Miller Argent and communications which took place between the parties prior to the 2004 Agreement. The 2004 Agreement consolidated the position in respect of the 1993 and 1997 Agreements and was designed to deal with outstanding liabilities of the Council and the former Merthyr Tydfil Borough and Mid Glamorgan County Councils. The 2004 Agreement provided for: the Council to grant a licence to Miller Argent to access its land to carry out the works, a royalty payment to be paid into a Community Benefit Fund controlled by the Council in respect of each tonne of coal extracted, a £15m financial guarantee to ensure restoration of the site should the Company fail, Miller Argent to take on all future liability for the removal of three waste tips on the Ffos y Fran site and the establishment of a liaison committee with the local community.

The Request

13. Between August and September 2008 there was a series of correspondence between the complainant and the Council in relation to his requests for information. On 8 November 2008, the complainant made the following request to the Council:

"In my previous letter I referred to clause 16(2)(a)(i) of the land deal. By this I mean the agreement dated 17 September 2004 between MTCBC [the Council], Celtic Energy Limited and Miller Argent.

Clause 16(2)(a)(i) sets out obligations on the Council. In particular it stated "Such support shall include (but shall not be limited to) providing reasonable assistance to the Consortium in respect of its claim that landfill tax should not be payable in respect of the Scheme on the basis that it is primarily a scheme of land reclamation including (in particular) the signing and delivery of a letter in the form annexed".

My request is as follows:

1. Please provide any information, minutes of meetings, or correspondence in relation to any assistance provided by MTCBC in respect of Miller Argent's or the Consortium's claim that landfill tax should not be payable;
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2. Please provide a copy of the letter annexed to the 17 September 2004 agreement;
 3. Please confirm whether or not MTCBC wrote a letter as specifically requested in clause 16(2)(a)(i);
 4. If not, please provide minutes of meetings or correspondence explaining why this letter was not written despite being provided for in the 17 September 2004 agreement;
 5. On a separate matter, please provide me with information, minutes of meetings and/or correspondence relating to the issue of whether or not Miller Argent was to act as the agent of MTCBC in its mining activities at Ffos-y-Fran".
14. On 24 November 2008 the Council wrote to the complainant stating that the information it held relevant to the request was voluminous and gathering it "would be likely to involve a significant cost and diversion of resources from the authority's other work. This could mean that we might have to charge you for the work involved or even have to refuse the request under the exceptions in the Environmental Information Regulations 2004 covering requests that are manifestly unreasonable or formulated in too general a manner". The Council asked the complainant whether he was able to narrow his request to a specific time period or to further clarify exactly what information he was requesting.
15. The complainant responded to the Council on 11 December 2008 stating that in relation to parts 2, 3 and 4 he was unable to narrow or refine his request any further. In relation to part 1 of the request, the complainant agreed to limit the time period to information from September 2003 to the time of the request and in relation to part 5 of the request, he limited his request to information for the period 1 June 2002 to 1 October 2004.
16. On 6 January 2009 the Council responded stating that it considered the request to be manifestly unreasonable and that it had applied the exception to disclosure provided by regulation 12(4)(b) of the EIR. It considered that the public interest in maintaining the exception outweighed the public interest in disclosure and refused to provide the requested information.
17. On 28 February 2009 the complainant requested an internal review of the Council's decision.

18. The Council provided the outcome of its internal review on 24 March 2009. The Council advised that as no substantive response had been previously issued in relation to part 5 of his request of 8 November 2008, a further response relating to that part of the request would be issued in due course. In relation to parts 1 to 4 of the request, the Council stated that it did not hold a copy of the draft letter referred to in part 2 of the request and that having checked its records, it had been unable to locate any reference to the issue of the Council being asked to assist with any claim that landfill tax was not payable. As such, the Council stated that it did not hold the information requested.
19. On 3 April 2009, the Council provided a further response in relation to part 5 of the request. The Council stated that the information it held relevant to this part of the request was considered exempt by virtue of regulation 12(4)(e) and regulation 12(5)(b), and the public interest favoured non-disclosure.
20. The complainant requested an internal review of the Council's decision in relation to part 5 of his request on 9 May 2009.
21. The Council provided the outcome of its internal review in relation to part 5 of the request on 28 May 2009. The Council upheld its decision not to disclose the information requested. Although no specific exemptions were actually quoted in its internal review response, the Council stated that it did "not accept that the exemptions have been wrongly claimed or applied and I therefore do not uphold your appeal".

The Investigation

Scope of the case

22. On 22 July 2009 the complainant's solicitors contacted the Commissioner to complain about the way the request for information had been handled. They specifically asked the Commissioner to consider the following points:
 - The Council's refusal to provide the information requested;
 - Whether the Council had correctly applied the exceptions at regulation 12(4)(e) and 12(5)(b).
23. Following a discussion with the complainant's solicitors on 27 November 2009, it was agreed that the scope of the Commissioner's investigation, in relation to the request dated 8 November 2008, would be to determine:

- whether the Council held any information relevant to parts 1 to 4 of the request;
 - whether the Council should disclose information held in relation to part 5 of the request.
24. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
- The complainant asked the Commissioner to consider the Council's application of regulation 12(4)(b) to the request in its response dated 6 January 2009. The Commissioner advised the complainant that as the Council withdrew its reliance on this exception during the internal review on 24 March 2009, he would be unable to consider whether the Council were correct to apply the exception at regulation 12(4)(b).

Chronology

25. On 1 August 2009, the Commissioner wrote to the Authority to confirm that the complaint had been deemed eligible for formal consideration and to request copies of the withheld information.
26. On 8 September 2009 the Council provided the Commissioner with copies of the withheld information and some background information relating to the Ffos-y-Fran Scheme.
27. On 18 November 2009, the complainant confirmed that he wanted the Commissioner to investigate his complaint and that all future correspondence should be addressed to his solicitors.
28. On 23 and 27 November 2009 the Commissioner wrote to the Council asking for its further representations in relation to its application of the EIR to the request.
29. On 21 December 2009, the Council provided representations in relation to its application of the EIR to part 5 of the request.
30. On 14 April 2010, the Commissioner wrote to the Council asking for clarification on a number of points regarding its application of the exceptions in relation to part 5 of the request. The Commissioner also again requested details in relation to the searches which the Council carried out to determine whether information was held in relation to parts 1 to 4 of the request.

31. On 21 May 2010 the Council provided the Commissioner with a substantive response to the points raised. In this response, the Council introduced its reliance on regulation 12(5)(d). The Council also stated that in its internal review letter dated 28 May 2009 it had applied the exception at regulation 12(5)(e) to the request, although it admitted that this was not specifically stated in the letter.
32. On 22 July 2010 the Commissioner met with the Council to clarify a number of points. The Council provided a further written response to the Commissioner on 6 August 2010 and also provided the Commissioner with some additional information it had located falling within the scope of part 5 of the request. The Council confirmed that the additional information was considered exempt by virtue of regulations 12(5)(b), 12(5)(d) and 12(5)(e).

Analysis

Substantive Procedural Matters

Regulation 12(4)(a)

33. The Council stated that it does not hold information relevant to parts 1 to 4 of the request. The EIR are worded so that in cases where information is not held by a public authority, it does not mean that the only thing it is required to do is to say that it is not held. Instead the public authority is required to apply the exception found in regulation 12(4)(a), which allows a request to be refused where the information is not held. Although the Council failed to cite this exception when corresponding with the complainant, the Commissioner will go on to consider this case in this context and decide whether regulation 12(4)(a) of the EIR applied to this request. All sections of the legislation are reproduced in the attached legal annex.
34. The Commissioner appreciates that the wording of regulation 12(1)(b) specifies that 12(4)(a) is a qualified exception. It would therefore imply that a public interest test would need to be conducted when information is not held. The Commissioner believes that a public interest test in the event where the information is not held is not possible. This is because even if the public interest test favoured disclosure the public authority would still not hold the information to enable it to be released. He therefore cannot consider a public interest test when he adjudicates the application of regulation 12(4)(a).

35. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal (the 'Tribunal') in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency (EA/2006/0072)*. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.
36. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires consideration, where appropriate, of any other reasons offered by the public authority to explain why the information is not held.
37. In the Council's view, parts 1 to 4 of the request are dependent upon each other and relate to a draft letter referred to in clause 16(2)(a)(i) of the 2004 Agreement. This Clause sets out various obligations on the Council, and provides that "such support shall include (but shall not be limited to) providing reasonable assistance to the Consortium in respect of its claim that landfill tax should not be payable in respect of the Scheme on the basis that it is primarily a scheme of land reclamation including (in particular) the signing and delivery of a letter in the form annexed".
38. In its letter to the complainant dated 24 March 2009, the Council advised that, having checked their copy of the 2004 Agreement, no draft letter was attached as an annex to the agreement. The Council also checked the extensive correspondence, records of discussions and attendance notes they held relating to the period in question and could find no information that the Council had received any request to assist with the issue of land fill tax. The Council stated that although such an issue was anticipated when the 2004 Agreement was drafted, it appeared that the issue of land fill tax never arose as there was no reference to it in any of its files.
39. The Council has provided the Commissioner with details of the searches that it carried out in order to establish whether the requested information was held. The Council confirmed that files relating to this matter are held either within its Legal Department, its Planning Department, its Finance, Audit and Risk Management Department or in

the Deputy Chief Executive's office. At the time of the request, the Council carried out a search of all its legal, finance and planning files, which included electronic communications such as emails, paper records held on files, publications, reports and various other documents. In relation to the actual searches which were carried out the Council has provided the following details:

- Within the Legal Department, searches were carried out within the Legal Archives related to the Ffos-y-Fran land reclamation scheme. This included a thorough investigation of three large archive boxes, and several smaller files. Various documents were searched included emails, letters, files notes, minutes of meetings, briefs, and legal documents relating to judicial reviews and planning enquiries.
- The Council's head of Town Planning examined the planning application files relating to Miller Argents' consents proposals, which includes pre and post application proposals.
- The Council's Director of Finance, Audit and Risk Management searched the finance archives and the only documents held within that department related to the community fund which forms part of the agreed Scheme.
- The Council's Deputy Chief Executive searched through all the files held within his office relating to the Ffos-y-Fran Scheme and no information was found falling within the scope of the parts 1 to 4 of the request. These files were subsequently transferred to the Council's Legal Department and further searches carried out.
- Searches were also carried out within the Council's Finance Department and no information falling within the scope of the request was located.
- On receipt of the internal review request, the Head of the Council's Legal Department also carried out additional searches of all files held in relation to the Ffos-y-Fran Scheme

On the basis of these searches the Council concluded that no information falling within the scope of parts 1 to 4 of the request was held.

40. The Council has also explained that, to the recollection of its Deputy Chief Executive who was heavily involved in the matter of the Ffos-y-Fran Scheme, no such letter (about support in respect of the claim that landfill tax was not payable) was ever written, nor mentioned before or after the 2004 Agreement was signed. The Council's Director of Finance also pointed out that the Council would not have assisted Miller Argent with the actual payment of landfill tax (if it were deemed payable) as payment of such tax would have been the responsibility of Miller Argent themselves. The Council maintains its view that, although at the time the 2004 Agreement was concluded it was anticipated that

such a letter may be needed in the future, since the 2004 Agreement was signed the issue of support in respect of any claim that land fill tax should not be payable has not arisen and there has been no need for such a letter to exist.

41. In relation to part 2 of the request, whilst the Commissioner accepts that the wording of the 2004 Agreement suggests that a draft letter was actually attached to the agreement itself when it was drafted and agreed by both parties, he has been provided with a copy of the agreement and no such letter was attached.
42. Whilst the Commissioner cannot be certain whether a draft letter was originally attached to the 2004 Agreement and is not held somewhere within the Council's records, he does not consider it proportionate to expect the Council to extend the search beyond that already conducted.
43. Based on the information provided by the Council, the Commissioner is satisfied that the Council has searched the relevant departments where, if held, information relating to parts 1 to 4 of the request was likely to have been located and that the searches conducted were reasonable in the circumstances. The Commissioner has therefore concluded that on the balance of probabilities, the Council does not hold the information requested.

Exceptions

44. In relation to part 5 of the request, the Council has confirmed that it holds information relevant to the request, but the information is considered to be exempt under various exceptions under the EIR.
45. The withheld information in this case consists of various communications between the Council and/or its legal advisors and the Council and other third parties involved in the Ffos-y-Fran Scheme, namely Miller Argent and Celtic Energy (and/or their legal advisors).
46. The Council initially applied regulations 12(5)(b) and 12(4)(e) to part 5 of the request. During the Commissioner's investigation, the Council also sought to rely on regulation 12(5)(e) for all the withheld information because it stated that disclosure would adversely affect its own commercial interests. During the Commissioner's investigation the Council also sought to rely on regulation 12(5)(d) to some information relevant to the request.
47. Due to the nature of the withheld information, the Commissioner is unable to set out any level of detail about the nature of each document

(and therefore which exceptions are being applied to each individual document) in this Notice without revealing the content of the withheld information. A full summary of the documents falling within the scope of the request and the exceptions being applied to each document is therefore contained within a confidential annex to this Notice. This annex will be provided to the Council but not, for obvious reasons, to the complainant.

Regulation 12(5)(b)

Is the exception engaged?

48. Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

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

49. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

“...the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system”.

50. Legal professional privilege (‘LPP’) protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer

to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation”².

51. There are two types of privilege – legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
52. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
53. In this case, the Council considers the withheld information is subject to legal professional privilege and release of the withheld information would adversely affect the course of justice. The Council has claimed both litigation privilege and legal advice privilege in relation to the withheld information. It has argued that the legal advice remains live and relevant and will remain so throughout the duration of the Ffos-y-Fran Scheme.
54. Because the Commissioner’s analysis of the Council’s application of the 12(5)(b) exception necessarily includes references to some of the withheld information, the level of detail which the Commissioner can include in this Notice about the Council’s submissions to support its position in respect of its application of this exception and the Commissioner’s consideration of those arguments is very limited. Further details are set out in the confidential annex to this Notice.
55. The withheld information falls into the following three categories:
 - (i) Communications between the Council and its legal advisors (external solicitors and Counsel).
 - (ii) Part of a Committee report discussed at a closed session of a Council meeting on 12 February 2003.
 - (iii) Communications between the Council (including its legal advisors) and the companies involved in the scheme (including their legal advisors).

² EA/2005/0023, para 9

56. From the content of the withheld information, it is clear to the Commissioner that there was a real prospect of litigation between the Council and Miller Argent and/or Celtic Energy at the time the documents were created. The Commissioner also accepts the Council's view that there is a reasonable prospect of future litigation between itself and a number of parties, namely Miller Argent, Celtic Energy and members of the public. All of the communications were created during a period of mediation where all parties involved were trying to resolve the matter without recourse to formal litigation.
57. After considering the arguments presented to him by the Council and having reviewed the withheld information, the Commissioner is satisfied that both legal advice and litigation privilege apply in this case. Having assessed the information the Commissioner has concluded that the Council is the party entitled to legal professional privilege and that this privilege has not been waived in this case. He has therefore gone on to consider whether disclosure would have an adverse affect on the course of justice, with particular reference to legal professional privilege.

Adverse affect

58. In *Archer v ICO & Salisbury District Council* [EA/2006/0037] the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out above; the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse affect and that any statement that it could or might have such an effect was insufficient. The information is then subject to the public interest test and the Tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.
59. In reaching a decision on whether disclosure would have an adverse affect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council* [EA/2005/0026 & EA/2005/0030] in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse affect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.

60. In terms of adverse affect, the Council argues that disclosure would:
- Give rise to further litigation between the Council and local residents, and the Council and Miller Argent
 - Prejudice the Council's position in any future legal proceedings. As the scheme has attracted considerable controversy in relation to planning permissions and has been the subject of a number of legal challenges, the Council considers that there is a reasonable prospect of further legal challenges.
 - Affect its ability to obtain legal advice on its legal rights and obligations.
61. In reaching a view on the Council's arguments in relation to the adverse affect of disclosure the Commissioner has again noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], in which the Tribunal considered whether the disclosure of legal advice obtained by the public authority would have an adverse affect on the course of justice. In that case the public authority argued that:
- It was currently engaged in litigation where the subject of the legal advice had been raised. Disclosure would adversely affect its ability to defend its legal rights by disclosing advice that was the subject of current and potential future litigation.
 - It would adversely affect its ability to obtain legal advice in respect of other decisions or issues affecting the authority and its responsibilities.
 - It would undermine the relationship between the authority and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations.
 - Disclosure would lead to the authority not speaking frankly in the future whilst seeking advice.
 - Disclosure could lead to reluctance in the future to record fully such advice, or legal advice may not be sought – leading to decisions being made that would potentially be legally flawed.
62. After considering these arguments the Tribunal was satisfied that these matters related to the course of justice, and that disclosure would have an adverse affect upon them³.
63. The Commissioner has noted the views of the Tribunal as recorded above, and the similarities in the arguments presented by the public authorities in those cases and this one. Although the subject matter of

³ EA/2008/0020, paras 33 – 34

this request never reached the Courts, the Council considers that disclosure of the requested information would be prejudicial to it in any future legal disputes between the Council, members of the public and Miller Argent. The Council also believes that the level of public debate about the scheme and the number of legal challenges which have been made about the scheme indicates that there is a strong likelihood of further litigation.

64. The Commissioner is of the view that disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice. This is because the principle of legal privilege would be weakened if information subject to privilege were to be disclosed under the Act or the EIR. He considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information and the circumstances relating to the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
65. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test

66. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

67. The Commissioner believes that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He believes that this is especially the case where the public authority's actions have a direct effect on the environment.

68. The Commissioner also notes that, to some extent, disclosure would provide a degree of transparency and reassurance to interested parties that the Council's actions were in the best interests of the community and may assist the public in understanding the legal basis for this particular decision. Disclosure would also inform the public of the nature of the dispute which arose between the Council and Miller Argent and the legal processes which were followed in order to implement the scheme.

Public interest arguments in favour of maintaining the exemption

69. Having viewed the withheld information, taken into account the circumstances of this case and the submissions from the Council, the Commissioner has determined that the following factors in favour of maintaining the exception are relevant:
- Preserving the Council's general ability to seek and obtain informed legal advice about matters related to its general functions, duties and responsibilities.
 - Protecting the ability of the Council to communicate freely with its legal advisors in order to obtain advice in confidence regarding planning and legal matters relating to the Ffos-y-Fran Scheme.
 - Preserving the implied confidentiality of the negotiations between the Council and Miller Argent and Celtic Energy, which were carried out in order to avoid litigation.
 - Ensuring that public authorities make decisions on the basis of fully informed and thorough legal advice.
 - Preserving the ability of the public authority to defend its decision in the event of legal challenge. It is in the public interest that the Council is entitled to a level playing field for any future litigation.
 - The matter is live in that the Council and Miller Argent have been the subject of a number of legal challenges and there is a strong likelihood of future litigation which the Council believes will continue throughout the duration of the scheme. Should a future legal challenge be successful, the Council has advised that there would be significant financial consequences for the Council and all residents of the County Borough.
 - There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.

Balance of the public interest arguments

70. In considering the opposing factors in this case, the Commissioner is mindful of the overriding presumption in favour of disclosure. Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public

interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.

71. The Commissioner has also taken into account the Information Tribunal's comments in *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023]:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption.'

72. In deciding the weight to attribute to each of the factors on the competing sides of the public interest test and determining where the overall balance lies the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the following:

- The degree of concern and public debate regarding the Ffos-y-Fran Scheme and the number of people affected by it.
- The timing of the request and the status of the advice.
- The circumstances in which the negotiations between the Council, Miller Argent and Celtic Energy took place.
- The potential for future litigation between the Council, the public and Miller Argent.

73. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight he has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).

74. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition he considers that the issue and legal advice remains live in that the Council will continue to rely on the advice throughout the duration of the Ffos-y-Fran Scheme. The Commissioner considers that because the advice remains live the argument that disclosure may harm the public authority's ability to defend its position in the event of legal challenge also has significant weight. The Commissioner is also conscious of the weight invested in legal professional privilege, particularly the breaching of a trust between parties that may go on to undermine the possibility of frank and candid discussions.

75. Having established that all the requested information is exempt from disclosure by virtue of regulation 12(5)(b), the Commissioner has not gone on to consider the Council's application of the other exceptions claimed.

Procedural Requirements

Regulation 14

76. Regulation 14(1) requires public authorities to provide an applicant with a refusal notice that sets out in writing those exceptions on which it is relying in order to refuse to disclose the requested information. Regulation 14(2) requires that any refusal notice is provided within 20 working days following the date of receipt of the request. Regulation 14(3) provides that the refusal notice should specify the reasons the public authority considers the information should not be disclosed.
77. The Council's initial refusal notice dated 6 January 2009 stated that it was relying on 12(4)(b) in relation to the complainant's refined request of 11 December 2008. However, in its letter of 24 March 2009 in which it set out the findings of its internal review, the Council admitted that it had not provided a substantive response in relation to part 5 of the request. The Council subsequently issued a refusal notice on 3 April 2009 in relation to this part of the request and stated that the requested information was exempt by virtue of regulations 12(4)(e) and 12(5)(b). In failing to issue a refusal notice in relation to part 5 of the request within 20 working days, the Council breached regulation 14(2).
78. As the Council stated that it does not hold information in relation to parts 1 to 4 of the request, it should have cited the exception available at regulation 12(4)(a). In failing to cite this exception, either in its refusal notice or its internal review response, the Council breached regulation 14(3).
79. During the course of the Commissioner's investigation the Council also sought to rely on the exceptions at regulation 12(5)(d) and 12(5)(e) in respect of the part 5 of the request. In failing to specify these exemptions in its refusal notice of 24 March 2009, the Council breached regulation 14(3).

The Decision

80. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- Although the Council failed to cite regulation 12(4)(a) of the EIR when responding to the complainant's request, the Commissioner is satisfied that this exception applies to the circumstances of this case. As explained above, he is satisfied that on the balance of probabilities the Council does not hold any further recorded information relevant to parts 1-4 of the request.
- The Council correctly applied regulation 12(5)(b) to withhold information in relation to part 5 of the request.

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

- the Council breached regulation 14(2) for failing to issue a refusal notice in relation to part 5 of the request within 20 working days.
- the Council breached regulation 14(3) by not informing the complainant of the specific exception on which it relied when concluding no information was held in relation to parts 1-4 of the request.
- The Council breached regulation 14(3) for failing to specify exceptions on which it later relied in its refusal notice in relation to part 5 of the request.

Steps Required

81. The Commissioner requires no steps to be taken.

Right of Appeal

82. 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 4th day of October 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(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 course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from 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 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.

Regulation 14(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).

Regulation 14(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.

Regulation 14(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.