

Environmental Information Regulations 2004

Decision Notice

Date: 9 June 2010

Public Authority: London Borough of Bexley
Address: Chief Executive's Department
Room 338
Civic Offices
Broadway
Bexleyheath
Kent
DA6 7LB

Summary

The complainant made a request to the London Borough of Bexley (the 'Council') for a copy of the legal opinion obtained by the Council in relation to a transfer of Council housing stock to two housing associations. The issue concerns the status of roads and footpaths on transferred estates and whether the Council or the housing association was liable for carrying out and paying for their upkeep and maintenance post-transfer. The public authority refused to disclose the legal opinion on the basis of the exemption contained in section 42 of the Act.

The Commissioner has investigated the complaint and, whilst noting the Council's submissions as to why it considered the request under the Freedom of Information Act 2000 regime, he has concluded that the request should have been handled under the Environmental Information Regulations 2004 because he considers the information requested to be environmental information. The Commissioner has upheld the public authority's claim that the requested information is exempt because it is subject to legal professional privilege, but because he has decided that the requested information is environmental, the exception provided by regulation 12(5)(b) may be claimed instead. This exception is similar to the exemption provided by section 42 and covers legal professional privilege. The Commissioner has also considered the public interest in relation to this exception and is of the view that the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner requires no steps to be taken.

The Commissioner's Role

1. 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

2. The complainant is part of a group known as the Orbit Bexley Housing Association (OBHA) Independent Leaseholders Group whose Committee Members are in the process of taking a complaint against their current landlord Orbit South to the London Leasehold Valuation Tribunal.
3. OBHA is challenging the Council's decision to sell on the land, grounds, highways, roads, footpaths, and playgrounds to Orbit South all of which they claim to be public amenities enjoyed by the public that were previously paid for from the General Rate Fund, and which now, as Orbit South leaseholders, they are having to pay for in addition to the rates paid to Bexley Council. OBHA asserts that the Council should be carrying out and paying for the costs of maintenance of various roads and footpaths within their estates as opposed to the housing association landlords who recovered their costs through the service provisions of the relevant leases. The complainant, as part of OBHA, is challenging the Council's right to sell on what was formerly "common law owned land" and cites recent case law relevant to this matter, namely *Gulliksen v Pembrokeshire County Council* heard in the Appellant High Court in 2002.
4. At a meeting on 20 June 2009 between OBHA's landlords and their former landlords, Bexley Council, the complainant was informed of a legal report which Bexley Council had commissioned from a lawyer in relation to this issue. The complainant requested the report from the Council with a view to assisting OBHA as to whether or not they should proceed with their case to the Leasehold Valuation Tribunal.

The Request

5. On 22 June 2009 the complainant made the following request. The request below formed part of a longer communication sent to the Council after OBHA had met with the relevant Councillor, representatives from the Council's Legal Department and Orbit South senior managers.

"We would respectfully request [name redacted] that at least Bexley Council could provide us with the report it commissioned from a leading QC as mentioned by a member of your Legal Department [name redacted] into the implications of the Gulliksen v Pembrokeshire County Council case upon Bexley Council, in relation to its own liabilities following the outcome of the case which as I had to point out to the assembled members, has to this day not been appealed to the Law Lords in the House of Lords and as so still remains enshrined in Case Law."

6. The Council provided a written response on 24 June 2009 stating that it had considered the complainant's request for a copy of the legal advice obtained by the Council, and refused to provide the information on the basis that it had applied section 42 of the Act because the communications between the QC and the Council "are privileged and are not to be disclosed to a third party." It stated that it considered the public interest test in withholding the requested information outweighed the public interest in disclosing it.

7. On 26 June 2009, the complainant wrote to the Council to request an internal review of the Council's decision, stating that he considered the requested information to be in the public interest. The complainant submitted the following to the Council:

"..my colleagues and I can see no reason why such information should be withheld from Bexley Rate Payers who paid for this report to be commissioned by a leading QC. It is our considered opinion that the refusal to allow this information to be released to us can only be because Bexley Council must have something to hide which is detrimental to the complainant and advantageous to our cause."

8. On 4 August 2009 the complainant wrote further to the Council stating that he had not had any acknowledgement of his request for review and requested the Council respond immediately.

9. The Council wrote to the complainant on 5 August 2009, apologising for the delay, and advised that it would send the result of the review within the next few days.
10. On 17 August 2009 the Council wrote to the complainant to advise him of the outcome of the internal review and clarified that the requested legal opinion was not that of a QC, but of an experienced counsel. The Council upheld its original decision to refuse to provide the legal advice on the basis of the exemption in section 42(1) of the Act. The Council explained that it was applying both categories of legal professional privilege to the request, in that it was applying litigation privilege because the legal opinion had been sought in addition to existing in-house legal advice in response to OBHA's statements that it intended to pursue the matter via the Lands Tribunal if it could not be resolved. The Council also applied legal advice privilege to the request because the advice covered legal rights.
11. The Council stated that it had considered the public interest test in accordance with the Commissioner's guidance and concluded that because the opinion is relatively recent, and as the advice relates to issues which are still relevant and may be relied upon if OBHA were to litigate, it would be unfair to the Council to disclose the opinion.

The Investigation

Scope of the case

12. On 7 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. The Commissioner has considered whether section 42 was appropriately applied. In doing so, he has also considered whether the information request should have been handled in accordance with the Environmental Information Regulations 2004 (EIR) as opposed to the Freedom of Information Act 2000 (the Act).

Chronology

14. The Commissioner wrote to the Council on 1 October 2009 to request a copy of the withheld information, which was subsequently provided.
15. On 16 November 2009 the Commissioner wrote to the Council outlining the complaint and his investigation. In his letter the Commissioner asked the Council to provide its arguments for applying section 42 together with its considerations relating to the public interest test.
16. On 15 December 2009 the Council provided further arguments in relation to its application of section 42(1), explaining why it had applied both legal advice and litigation privilege to the requested information.
17. On 22 December 2009 the Commissioner wrote to the Council to gain further clarification about its application of litigation privilege and to request its consideration of the public interest test associated with legal advice privilege. In addition, the Commissioner asked the Council to consider whether the request was covered by the EIR as opposed to the Act.
18. After agreeing to an extension to the time limit for the Council to provide its response, the Council submitted further arguments supporting its application of litigation privilege together with details of its consideration of the public interest test associated with legal advice privilege. The Council submitted arguments in support of its decision to deal with the request under the Act as opposed to the EIR.

Analysis

Is the requested information environmental information?

19. The definition of "environmental information" is set out in regulation 2(1) of the EIR. This is detailed in the Legal Annex which can be found at the end of this Notice.
20. The Council argued that regulation 2(1) of the EIR does not apply because the regulation does not include information concerning legal liabilities for the maintenance of roads and footpaths. It stated that the legal advice does not concern the elements and

factors referred to within regulation 2(1), in particular the information does not concern the “state of the elements” of the “soil or land” and does not include “built structures” such as roads and footpaths. The Council argued that none of the other elements could possibly apply.

21. The arguments submitted by the Council in favour of considering the request under the Act relate primarily to regulations 2(a) and (b) of the EIR. Whilst the Commissioner has noted the Council’s position and has some sympathy with its view in respect of 2(a) and (b) he has concluded that, in this case, the relevant part of the EIR definition is regulation 2(1)(c). This defines environmental information as information on 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. In this instance, the information in question is legal advice surrounding the status of roads and footpaths within transferred Council housing estates. It also relates to which entity (the Council or the housing association) is responsible for funding and maintaining the roads and footpaths post-transfer. The Commissioner considers that the legal liabilities are a measure, as defined in regulation 2(1)(c), likely to affect the use and therefore the state of the land, and that the information in question is information on (concerning or about) that measure. Therefore the Commissioner is of the view that the information in question is information on a measure which is likely to affect the elements and factors referred to in (a) and (b). Accordingly the Commissioner finds that the complainant’s request is a request for environmental information and ought to have been dealt with as such by the Council. He is satisfied therefore that the information is exempt under section 39 of the Act. The effect of the exemption provided for at section 39 of the Act is to divert the complainant’s request to a different information access regime, in this case, the EIR.
22. The Commissioner, in considering the withheld information between the Council and its legal advisors (both internal and external) is mindful of the Information Tribunal’s decision in the case of Malcolm Kirkaldie v Information Commissioner and Thanet District Council (Appeal no EA/2006/001, “the Kirkaldie case”.) In this case the Tribunal decided that the information requested by the applicant was environmental and that both the Commissioner and Thanet District Council were incorrect in dealing with this request under the provisions of the Act rather

than the EIR. At paragraph 44 of that decision the Tribunal referred to this issue in the context of such information and dealt with the transfer of exemptions/exceptions as between differing access regimes. The Tribunal states:

"We would be reluctant to find that a public authority could not argue that a similar exemption or exception could not be applied under the correct legal instrument. However we would not necessarily extend this finding to other exemptions or exceptions which had no relationship to the original exemption or exception claimed."

23. The Tribunal in the Kirkaldie case expressed the view that the purpose of regulation 12(5)(b) was reasonably clear, stating that "it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial." It continued that to do this, the exception "covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation" (paragraph 21). The Tribunal therefore decided that the exception is "similar" to the exemption.

Exceptions - Regulation 12 (5)(b) (course of justice)

24. As stated above, the Commissioner is satisfied that the legal advice falls within the definition of environmental information as provided in regulation 2(1)(c).
25. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the 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 communications or exchanges come into being for the purpose of preparing for litigation." (paragraph 9). * The Commissioner assumes this should read [third parties].
26. 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.

27. 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.
28. The Council confirmed that the withheld information is subject to both legal advice privilege and litigation privilege. The Council explained that legal advice privilege applies because the information is a communication between the Council and its professional legal adviser, and that the opinion was created for the purpose of the Council obtaining legal advice as to the status of roads and footpaths on estates transferred under a housing stock transfer. The Council stated that it believed litigation privilege applies because the complainant had expressed his intention to bring legal proceedings against the Council to challenge its decision to transfer the housing stock (including roads and footpaths) to Orbit Housing Association.
29. On the basis of the above, 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.
30. The Commissioner has gone on to consider whether the disclosure of the withheld information would have an adverse affect on the course of justice, with particular reference to legal professional privilege.
31. 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. The confidence that discussions between clients and their advisers will remain private would become weaker and their discussions may therefore become inhibited. He considers the likelihood of this happening to be more probable than not and therefore finds that the exception at Regulation 12(5)(b) is

engaged. He is satisfied that disclosure of that information would have an adverse effect on the course of justice or the ability of a person to receive a fair trial.

32. Both regulation 12(5)(b) of the EIR and section 42 of the Act are subject to the public interest test. The Commissioner has gone on to consider the public interest test arguments submitted by the Council in its application of section 42 and has considered them in relation to regulation 12(5)(b). The public interest test in relation to both types of privilege favours disclosure unless in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. Regulation 12(2) of the EIR sets out a presumption in favour of disclosure and the Commissioner has applied this requirement in carrying out his assessment of the public interest test.

Public interest test

Factors in favour of maintaining the exception

33. 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 exemption are relevant:
- a. Protecting the ability of the Council to communicate freely with internal and external legal advisors in order to obtain advice in confidence regarding matters related to its liabilities post housing stock transfer.
 - b. Preserving the Council's general ability to seek and obtain informed legal advice about matters related to its general functions, duties and responsibilities. The Council argued that the confidentiality between public authority and legal adviser should be maintained to ensure that the Council receives advice which is appropriate for it alone without concern that this advice will be disclosed outside the Council.
 - c. Ensuring that public authorities make decisions on the basis of fully informed and thorough legal advice.
 - d. Preserving the ability of the public authority to defend its decision in the event of legal challenge.
 - e. The relative age of the legal opinion.
 - f. The matter is live in that the Council has been advised by the complainant that he intends to bring litigation proceedings. This is not a case where time has reduced the inbuilt weight of the privilege. The Council argued privilege should be

maintained in circumstances of the existing dispute asserting potential substantial financial and resource based consequences for the Council.

- g. Preserving the general concept of legal professional privilege.

Factors in favour of disclosing the requested information

34. The Commissioner has also considered the arguments in favour of disclosing the requested information. He considers the following factors to be relevant in this particular case:
 - a. Disclosure would inform public debate about which organisations are liable for roads and footpaths on housing estates post-transfer and on what basis.
 - b. Releasing the information would help the public to understand the legal basis as to which entity is responsible for the maintenance and funding of the roads and footpaths following a transfer of Council housing stock to a housing association.
 - c. Disclosure would promote accountability and transparency for the decision taken by the Council in respect of transferring its liability for the maintenance and funding of roads and footpaths to the new landlords and subsequently to the leaseholders post-transfer.

Balance of the public interest arguments

35. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.
36. In deciding the weight to attribute to each of the factors on either side of the scale 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 decision to transfer liability for the maintenance and funding of roads and

footpaths with the sale of housing stock to the new landlords, and consequently the transfer of funding to the leaseholders through service charge provisions of the relevant leases.

- The number of people impacted by the Council's decision to transfer housing stock and consequently associated roads and footpaths and the financial impact of such a decision.
 - The timing of the request and the status of the advice.
37. 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).
38. 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 timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would harm the candour between the Council and its legal advisors. The advice was obtained relatively recently, in April 2009, and at the time of the request it remained live, in that the public authority was still relying upon it in relation to its liabilities post-transfer and in view of potential litigation proceedings. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisors and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
39. The Commissioner also 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.
40. The Commissioner is also conscious that legal advice is required in relation to a wide range of issues for which the Council is responsible. This may include matters that involve a significant amount of public funds and/or which would have a substantial impact upon the public. It is also possible that further advice on similar matters may also be required, for example future housing stock transfers. Therefore the harm arising from a reduction in candour of exchanges between it and its legal advisors is likely to be significant and could arise relatively frequently. This argument is also deemed to have significant weight as a result.

41. Whilst the Commissioner recognises the weight of the arguments in favour of releasing the requested information he has, on balance decided that they are outweighed by the arguments in favour of maintaining the exception. As explained above the timing of the request and the fact that the advice remains live and that litigation proceedings have been contemplated have been key factors when reaching this decision.

Procedural Matters

Regulation 14: refusal of a request

42. Given that the Council provided a refusal notice under section 17 (3)(b) of the Act, the Commissioner finds that it breached regulation 14(3)(a) and (b) of the EIR which states that:

“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 test under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

The Decision

43. The Commissioner finds that the request should have been considered under the EIR because the requested information is environmental information.
44. The Commissioner considers that the Council was entitled to apply legal professional privilege to the requested legal opinion, but should have withheld the opinion under regulation 12(5)(b) of the EIR instead of applying section 42 of the Act.
45. Due to the Commissioner's conclusion that the request should have been handled under the EIR, he also finds that the Council breached regulation 14(3)(a) in its handling of the request.

Steps Required

46. The Commissioner requires no steps to be taken.

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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

48. 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 9th day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

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

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

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

“the Commissioner” means the Information Commissioner;

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

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(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.

Section 42 - Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“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.”