Information Commissioner's Office

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

Decision Notice

Date 12 February 2007

Public Authority: Staffordshire Moorlands District Council ('the Council')
Address: Moorlands House
Stockwell Street
Leek
Staffordshire Moorlands
ST13 6HQ

Summary

The Commissioner's decision is that the Council has not dealt with the complainant's request in accordance with Part I of the Act. He considers that the information requested by the complainant constitutes environmental information. Therefore the information is exempt under section 39 of the Act and the request should have been dealt with under the Environmental Information Regulations 2004 ('EIR'). The Commissioner is satisfied that the exceptions in Regulations 12 (4) (e) and 12 (5) (b) apply to the requested information, however in this case the public interest in maintaining the exception does not outweigh the public interest in disclosure. Therefore the Council has breached Regulation 5 in failing to disclose information to the complainant. The Commissioner has therefore ordered the Council to disclose the requested information to the complainant.

The Commissioner's Role

1. The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to Staffordshire Moorlands District Council ('the Council') has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 ('the Act').

2. Where a complainant has made an application for a decision, unless:

   - a complainant has failed to exhaust a local complaints procedure, or
   - the application is frivolous or vexatious, or
   - the application has been subject to undue delay, or
   - the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

3. The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

The Request

4. The complainant has advised that on 1 January 2005 the following information was requested from the Council in accordance with section 1 of the Act,

   "The Council's "Considered view" in respect of Extant Planning Permission SM/237" ("the considered view").

   "The Building Control Files (1974/1975) referred to by Mr C Hatton, Head of Building Control, at the time, in his evidence to a Public Inquiry on May 23rd 2000 (SM99-00771 Appeal)" ("the Building Control files").

5. On 18 January 2005 the Council issued the complainant with a Refusal Notice in accordance with section 17 of the Act. The Notice stated that the considered view was exempt under section 42 and the Building Control files under section 40 of the Act.

6. On 4 February 2005 the complainant submitted a request for an internal review of the decision to refuse access to the requested material. The complainant did not consider that the exemptions in sections 40 or 42 had been correctly applied by the Council.

7. The Council communicated the outcome of the internal review to the complainant on 15 March 2005. It upheld the application of sections 40 and 42 and explained that in relation to section 42 it felt that the public interest favoured maintaining the exemption.

Review of the case

8. On 22 March 2005 the complainant applied to the Commissioner for a decision about whether the request had been processed in accordance with the Act. The complainant did not specify any particular alleged breaches of the Act. On the basis of the correspondence the Commissioner understood that the complainant considered that the Council had misapplied the exemptions cited.

9. The Commissioner corresponded with both the complainant and the public authority through the course of the investigation. Where possible the Commissioner aims to resolve complaints informally. In December 2005, following the Commissioner's intervention, the Council agreed to supply the

complainant with copies of the commencement notices from the Building Control files. Where no commencement notices were available the Council agreed to provide the complainant with an explanation of why that information was not present on the file. The complainant was content with this proposal and as a result of the disclosure in December 2005 the second aspect of the complaint was withdrawn on 13 February 2006.

10. In view of the above, the remainder of this notice will exclusively focus on whether the Council has complied with the Act in refusing to provide the complainant with the considered view.

11. Section 39 of the Act states that,

"*Information is exempt if the public authority holding it –*

(a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or

(b) *would be so obliged but for any exemption contained in the regulations*".

12. The regulations under section 74 are the Environmental Information Regulations 2004 ('EIR'). At the beginning of his investigation the Commissioner invited the Council to reconsider the request in accordance with the EIR. This was on the basis that the considered view constituted information on a measure affecting elements of the environment, in this case a particular planning permission. The definition of what constitutes environmental information in the EIR includes the following:

"*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".

13. However in a letter dated 19 May 2005 the Council explained that it did not consider that the considered view did constitute environmental information. It stated that 'legal advice is not a "measure" as defined which affects or is likely to

affect land, etc. It is, rather, an opinion as to the legal effect of a given set of circumstances, not something done which impinges upon any of those things defined, or a person's rights or abilities to deal with them or take steps in relation to them".

14. Following this response the Commissioner agreed to consider the information under the Act. Therefore the Council supplied arguments relating to section 42 of the Act. However in light of further experience and the policies that the Commissioner has developed when interpreting the EIR and having read the considered view, the Commissioner has concluded that the information does constitute environmental information. Therefore the request should, in his view, have been processed in accordance with the requirements of the EIR.

15. Information falling within Regulation 2(1)(c) must be information about a measure of a specified kind. The specification is that it must be a measure affecting or likely to affect the elements and factors included in Regulation 2(1)(a)&(b). The Commissioner considers planning permission to be a measure that affects or is likely to affect the environment, in particular land and landscape. In the Commissioner's view the definition in regulation 2 (a) is broad in that it specifies "**any** information in written, visual, aural, electronic or any other material form **on**" the particular elements, factors or measures affecting them. In this particular case he is satisfied that the considered view is an opinion on a given set of circumstances as they relate to planning permission which has already been granted. The advice will inform the Council's decision about what, if any, action to take in respect of that planning permission. Therefore the considered view is information on a measure which would or would be likely to, affect the elements of the environment.

16. The Commissioner has also had regard for the Information Tribunal ('the Tribunal') decision in the case of Kirkaldie vs Thanet District Council ('the Kirkaldie Appeal' - Number EA/2006/0001). In that case the legal advice sought related to the enforceability of a section 106 Agreement made under the Town and Country Planning Act 1990. The Tribunal found that such Agreements are "environmental agreements" which fall within Regulation 2 (c). Therefore legal advice relating to such an Agreement would also fall within Regulation 2 (c) and should have been processed in accordance with the EIR.

17. In light of the above conclusion, the Commissioner's decision is based upon an analysis of the relevant provisions of the EIR. In considering the EIR he has taken full account of the arguments that the Council has made to support its decision that the public interest favours maintaining an exemption from the duty to provide the information, in this case section 42 of the Act. However the Commissioner is also satisfied that if the information were considered under the Act the application of the public interest test would produce the same result.

18. As explained in more detail below, the Commissioner issued a Preliminary Decision Notice (PDN) to the Council in this case on 13 September 2006. In its response to the PDN dated 22 November 2006 the Council confirmed that it was satisfied that the considered view did fall within Regulation 2 (1) (c) of the EIR.

The Investigation

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19. The Commissioner invited the Council to provide additional information to justify the refusal to disclose the considered view. In particular he requested further material on the factors considered by the Council when deciding that the public interest favoured maintaining the exemption. The arguments put forward by the Council will be considered in more detail in the Analysis & Findings section of this notice.

20. In addition the Commissioner has considered the evidence supplied by the complainant to support the contention that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The complainant has argued that in his view the Council's actions in relation to the planning issue at hand constitute maladministration.

21. As previously mentioned the Commissioner has read the considered view during his investigation. He is satisfied that it is information which attracts legal professional privilege in that it is advice given to a client, in this case a member of the planning department, by a legally qualified individual within the Council. The communication was made for the dominant purpose of giving legal advice on a particular planning matter and therefore attracts advice privilege. In this case all the advice was sought for and given by the Council's in-house lawyers, so the privileged communications were internal to the Council.

22. In addition he has reviewed the following key documents:

    i. Letter to the complainant dated 11 December 1998 which communicated the response to the informal application in respect of application SM/237.

    ii. The complainant's reply dated 5 January 1999.

    iii. The Council's letter communicating its refusal to accept that the planning permission had been implemented dated 12 February 1999.

    iv. The Refusal of Certificate of Lawful Use or Development (CLUD) dated 1 October 1999.

    v. Legal advice provided to the Development Control Manager on 30 September 1999.

    vi. The Delegated Decision Form which records the decision to grant a CLUD on 23 December 2002.

23. The Commissioner has also consulted the planning guidance issued by the Office of the Deputy Prime Minister (ODPM) at www.odpm.gov.uk/index.asp?id=1144448 and the Department for Environment,

Food and Rural Affairs ('DEFRA') guidance on the EIR at http://www.defra.gov.uk/corporate/opengov/eir/guidance/index.htm.

24. On 13 September 2006 the Commissioner served a PDN on the Council. The PDN set out the decision that the Commissioner was minded to make in this matter. The Commissioner decided to issue a PDN in this case because his views shifted considerably during the final stages of the investigation as a result of additional information that came to light.

25. The PDN specified that representations must be made within 30 days of the date of the notice. However, the Council requested an extension of the deadline for a response because of the complexity of the issues involved. The Commissioner agreed to a new deadline of 30 November 2006.

26. The Council provided representations against the PDN on 22 November 2006. The Commissioner has considered the arguments put forward by the Council and has commented on them in the Analysis and Findings section below.

Analysis

Background

27. In 1974 the complainant got planning permission to build two small dwellings on a plot of land that he owns. The development of the site did not progress as planned and in 1998 the complainant wrote to the Council with an informal submission asking whether the planning permission (SM/237) was extant. This submission provided evidence to show that the planning permission had been implemented by the complainant.

28. Legal advice was sought by the Development Control Manager (DCM). On 11 December 1998 the DCM advised the complainant that the permission was subject to a condition that before any development commenced the facing materials must be approved. The DCM was unable to find any record of such approval having been obtained which was considered fundamental to the implementation of the condition. The letter also stated that the DCM was concerned about the backfilling of the trenches that had been dug as well as the long lapse of time with no further work being carried out. The letter invited the complainant to provide further evidence on these two points. The complainant provided further evidence in support of his position but on 12 February 1999 was informed that this was not sufficient to overcome the fundamental problem of proving that the facing materials were approved prior to any development commencing.

29. Subsequently the complainant applied for a CLUD on 7 June 1999. The same DCM dealt with the application and sought further legal advice. The application was refused and a notice issued to that effect on 1 October 1999. The Council has explained that as the decision referred to reasons included in the second

legal advice obtained in respect of the formal application that advice was disclosed to the complainant on request in 2004.

30. The complainant appealed against the decision to refuse the CLUD application and a public inquiry was held on 23 May 2000. The appeal was dismissed by the Planning Inspector who highlighted two unresolved issues, (1) whether the planning conditions had been complied with and (2) whether the permission had in fact been implemented.

31. The Commissioner understands that in 2002 the complainant located a copy of a letter from the Council, originally sent to him in 1979, which confirmed that the facing materials had been approved. The letter, together with a report by a Soil Consultant which was submitted by the complainant, was used as the basis for a further CLUD application. On 23 December 2002 the principal planning officer agreed the proposal to issue a CLUD. In a telephone call on 20 March 2006 the Council confirmed to the Commissioner that a CLUD was indeed issued during 2002.

The Data Protection Act 1998

32. In the representations in response to the PDN the Council asserted that, having given further consideration to this matter, it had determined that the considered view in fact constituted the complainant's personal data. Therefore it argued that the request should have been treated as a subject access request under section 7 of the Data Protection Act 1998. It also stated that the considered view could not be considered environmental information because of Regulation 5 (3).This states that "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".

33. The Council also explained that it does not consider that it is under an obligation to supply the information to the complainant because paragraph 10 of schedule 7 of the DPA is deemed to apply. This provides that a data controller does not have to supply personal data to a data subject if it is material in respect of which a claim to legal professional privilege could be maintained in legal proceedings. This is an absolute exemption and is not subject to any other test.

34. The Council has asserted that this conclusion accords with the Commissioner's decision in a similar case involving Mid Devon District Council (Reference: FER0070849). In that case the complainant requested information held on a planning file within the authority. The information included internal legal advice which the Commissioner decided was the complainant's personal data.

35. The Commissioner is obliged to consider each complaint on its merits, taking into account the specific circumstances of the case. He has compared the information that was deemed to constitute personal data in case FER0070849 with the considered view. He is satisfied that in this case the considered view does not constitute the complainant's personal data. This is because the focus of the considered view is not the complainant but the planning issue that was in dispute. The facts in this case are substantially different from those in case FER0070849

and therefore it would not be inconsistent to reach a different conclusion on the personal data issue.

Exceptions

36. The Commissioner is satisfied that if the request were considered under the Act section 42 would apply. The inclusion of this exemption in the Act reflects the inherent public interest in preserving the common law concept of legal professional privilege which is a cornerstone of the British legal system. However the Regulations do not contain an exception identical to section 42. The EIR are based upon European Directive 2003/4/EC and legal professional privilege is not a concept that is recognised or applicable in other Member States. Therefore the Commissioner has considered whether the arguments presented by the Council in relation to the legal professional privilege exemption under the Act engage any of the exceptions available under the EIR. He has also considered whether the public interest arguments in favour of withholding information under section 42 would equally apply to such exceptions.

Regulation 12 (4) (e) – Internal communications

37. In this case the Commissioner is satisfied that the exception in Regulation 12 (4) (e) which deals with internal communications, applies to the considered view.

38. Regulation 12 (1) states that,

> "*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 (4) (e) states that,

> "*For the purposes of paragraph (1) (a), a public authority may refuse to disclose information to the extent that –*
>
> (e) *the request involves the disclosure of internal communications*".

39. The DEFRA guidance on Regulation 12 (4) (e) states that the exception can apply to information in whatever form it may take, including memos, notes of meetings or e-mails. It can cover information such as minutes and briefing notes passed between officials in the course of their duties. The guidance also explains that "as a matter of European and domestic law, the scope of this exception is very wide". It does, however also note that the exception is subject to a public interest test. The Commissioner agrees with this interpretation of the EIR and in this instance is satisfied that the considered view constitutes an internal communication between officials in the legal and planning departments of the Council.

Regulation 12 (5) (b) – The Course of Justice

40. The Commissioner has also considered whether Regulation 12 (5) (b) would apply. This states that –

> "*a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – ….*
>
> *(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature*".

41. In the Kirkaldie Appeal, the Tribunal considered the scope and purpose of the exception in Regulation 12 (5) (b) and concluded the following,

> "*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.*
>
> *Therefore this exception is similar to the exemption under s.42 FOIA*".

42. The Commissioner is satisfied that Regulation 12 (5) (b) also applies to the considered view. His view is that the exception is not limited to covering information subject to litigation privilege but that it can also apply where advice privilege attaches, as in this case. The Commissioner accepts that if information subject to legal professional privilege were regularly disclosed this would reduce the ability of public authorities to seek and obtain unfettered, frank advice, without fear of intrusion.

43. The Commissioner has also considered the outcome of the Kirkaldie Appeal and in particular the issue of waiver of legal professional privilege. Paragraph 26 of the Tribunal's decision in that appeal states that "*the test for waiver is whether the contents of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver*". The Commissioner has considered these comments in the context of this case and is satisfied that the Council has not waived privilege in respect of the considered view.

44. In its response to the PDN the Council commented that the Commissioner had raised the point that it had "waived legal privilege in relation to the considered view because the second legal opinion has already been released by the Council". The Commissioner wishes to clarify that in fact he has not argued that privilege has been waived in relation to the considered view, as is confirmed in the paragraph above. However he did refer to the fact that the Council had opted to waive privilege in relation to the second legal advice. This is relevant because it demonstrates that the Council felt that it was able to disclose some information on this matter that was subject to legal professional privilege without causing the

significant harm that it claims would arise if the considered view were disclosed. This point is addressed in further detail in the public interest test section below.

45. Though the Commissioner accepts that disclosing the considered view would result in an adverse effect on the course of justice, he does not consider that such adverse effect would be substantial, given that the matter to which it relates has been concluded. Nevertheless, he is satisfied that the exception in Regulation 12 (5) (b) applies.

The public interest test

46. Regulations 12 (4) (e) and 12 (5) (b) are subject to a public interest test. Public authorities can only refuse to supply information where the public interest in maintaining the exception outweighs the public interest in disclosure.

47. The Commissioner has considered the level of harm that would arise as a result of disclosure when determining whether the public interest in maintaining the exceptions outweighs the public interest in disclosure. In this case because the considered view is subject to legal professional privilege, he is satisfied that the disclosure would result in some harm to the maintenance of that principle. Given that the importance of legal professional privilege has been recognised and upheld by the courts and the Tribunal, the Commissioner has given considerable weight to the arguments in favour of maintaining the exceptions. In particularly, he recognises that arguments about public authorities being able to seek free and frank internal advice, relevant to Regulation 12 (4) (e), may be stronger because in this case that advice is an exchange between a client and a lawyer.

Arguments in favour of maintaining the exception

48. In a letter dated 19 May 2005 the Council argued that if legal advice, which frequently addresses the strengths and weaknesses of a particular course of action, were released it could be used to the detriment of the public authority. This would ultimately be detrimental to the interests of the general public and the taxpayer if legal proceedings arose.

49. The public authority also suggested that if legal advice were released local authorities may in future decline to take legal advice at appropriate times which would be detrimental to good public administration.

50. The public interest in legal professional privilege is rooted in the proper administration of justice. A client needs to be confident that information shared with a lawyer, and advice received from that lawyer, will remain confidential. Without such confidence there are risks of lack of openness between client and lawyer. The detailed policy arguments supporting the doctrine were most recently considered and fully set out in the judgment of the House of Lords in *Three Rivers DC v Bank of England (No. 6) [2004] UKHL 48.*

51. More directly, the Commissioner has also taken into account the Information Tribunal's ("the Tribunal") decision of 27 April 2006 in Christopher Bellamy -vs- The Information Commissioner and the Secretary of State for Trade and Industry

(Appeal No: EA/2005/0023). The judgement comments on the public interest inherent in maintaining legal professional privilege and states that:

> "*there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases …for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.*" (Paragraph 35)

52. The Commissioner also acknowledges that there must be a reasonable degree of certainty that privileged information will remain confidential so that the principle is not undermined. If the perception were to develop that legally privileged information would likely be disclosed the opinions expressed may not be as full and frank as they should be. Further, clients may also be discouraged from providing their lawyers with all the information relevant to the situation about which they have sought advice if they are under the impression that there is a strong likelihood of that information becoming public.

Arguments in favour of disclosure

53. However it is important that these factors are balanced against the arguments in favour of disclosing the material. The Commissioner considers the following points to be of particular relevance to this case.

54. There is a public interest in people understanding the reasons for decisions made by public authorities, in this case in respect of the planning permission. Greater transparency about decisions taken by public authorities also promotes accountability. There is also a strong argument that disclosing more information about the way in which decisions are reached generally will improve the quality of those decisions and the processes surrounding them.

55. The Commissioner also accepts that there is a strong public interest in disclosing information which would enable people to determine from a more informed standpoint whether public authorities are acting appropriately and in accordance with the law.

56. There is also a public interest in material being disclosed which would help people to understand how specific decisions are made by public authorities. In many cases this will further the public's understanding of how decisions affect them and where appropriate, enable them to challenge those decisions.

Weighing up the public interest

57. The Commissioner recognises that there is a very strong public interest in protecting the principle of legal professional privilege. If the considered view were disclosed it would be detrimental to the principle that legally privileged information will remain confidential. This in turn may reduce the willingness of the Council to seek and be able to obtain free and frank legal advice. However, taking legal advice will often be necessary to ensure that it acts lawfully and in the best

interests of the community it serves. Legal advice should also contribute to high standards of public administration.

58. The Commissioner is mindful of the fact that all exceptions under the EIR are subject to a public interest test, as is the exemption in section 42 of the Act. Therefore Parliament clearly anticipated that, notwithstanding the strength of the principle of legal professional privilege, information can only be withheld, on a case by case basis, where the public interest in maintaining the exception is stronger than the public interest in disclosure. In specifying this balancing test the EIR recognise the importance of making more information available to enable the public to understand why public authorities have reached specific decisions, to improve trust and confidence and to enable citizens to understand how those decisions affect them from a more informed standpoint.

59. In this case the Commissioner has taken into account the timing of the request when assessing the level of harm and where the public interest lies. He understands that the issue to which the legal advice relates was resolved at the point that the request was received by the Council. On 23 December 2002 the Council approved the proposal to issue a certificate under section 191 of the Town and Country Planning Act 1990. Therefore the issue to which the considered view relates has been concluded. In view of this and the time that has elapsed since the advice was provided, the Commissioner considers that the level of harm would be less significant than if the issue remained live. Therefore the arguments in favour of disclosure have considerably more weight. Section D of the Commissioner's Awareness Guidance 4 on Legal Professional Privilege also recognises that there may be stronger public interest arguments in favour of disclosure where legal advice has served its purpose.

60. In its response to the PDN the Council referred to the complainant's assertion that the handling of this particular planning matter constitutes maladministration. It argued that this demonstrates that the matter is not at an end and therefore the advice cannot be considered stale. The Commissioner has considered the Council's argument but remains satisfied that the planning issue that was the subject of the advice has reached a conclusion. This is evidenced by the CLUD which was issued during 2002. In the Commissioner's opinion the issue does not remain live simply because the complainant remains dissatisfied with the way the Council administered the applications during 1998 and 1999 and may attempt to pursue a complaint of maladministration.

61. When considering the public interest test the Commissioner has reviewed the information that has been disclosed to the complainant in relation to the formal and informal applications. The Commissioner understands that when the decision to refuse the formal CLUD application in 1999 was communicated to the complainant it referred to the second legal advice as giving the reasons for the decision. In light of this the Council opted to waive its privilege and disclosed the second legal advice to the complainant during 2004. The Commissioner acknowledges that the choice to waive privilege was available to the Council.

62. In contrast the Council did not specifically rely upon the contents of advice sought in relation to the informal application in 1998 when communicating the reasons for

the refusal to the complainant in letters dated 11 December 1998 and 12 February 1999. However the 11 December letter did refer to the fact that legal advice had been sought in respect of the informal application. Therefore it seems reasonable for the complainant to expect that the advice would provide further explanation of the decision.

63. The Commissioner recognises that a distinction can be drawn between a public authority opting to waive privilege and it being ordered to release privileged information under the EIR or the Act. Opting to waive privilege means that the client is still in control of the circumstances in which material is released but clearly this control is lost if a public authority is ordered to release privileged information. Nevertheless the Commissioner is satisfied that it is relevant that the Council decided that it was able to disclose the second legal advice without hindering its ability or willingness to seek unfettered advice in the future. He also considers that there is a strong argument for disclosing additional information, over and above that which it has opted to disclose, to explain how this matter has been handled. It is important to emphasise though, that each application for a decision should be considered on its merits. Therefore the fact that the Commissioner may order disclosure of privileged information in one case does not necessarily mean that he would reach the same conclusion in another.

64. The complainant has alleged that the Council acted inappropriately in seeking and relying upon a second legal view on the same planning matter. The Commissioner would point out that there is no restriction on the number of times that public authorities can legitimately seek legal advice on a particular issue. The onus of proof in CLUD applications lies with the applicant according to guidance issued by the ODPM. In light of this it is perhaps not surprising that more than one piece of legal advice may be required in a particular case, particularly where there may be additional evidence to consider. The Commissioner also wishes to point out that in reaching his decision he is not passing judgement on the appropriateness of the Council's conduct.

65. Notwithstanding the comments above, in this case the Commissioner considers that the argument in favour of greater transparency is compelling. On this occasion he is satisfied that the considered view would assist the public and the complainant in gaining a better understanding of how the decision on the informal application was reached. It would provide clarification as to why additional advice was obtained. This is a particularly strong argument given that the second advice was disclosed. The Commissioner has also given considerable weight to this argument because, in his opinion, the level of harm would be lower because the specific planning matter has now been resolved.

66. In the Commissioner's opinion the considered view would enable the public to gain a fuller background to the decision eventually made in respect of the CLUD application in 1999. Details of the reason for refusing the application were included on the planning file which was available to the public. The Commissioner considers that there is a public interest in people being able to access the requested information to further their understanding of how evidence submitted to the Council in support of such an application is assessed.

67. In view of the above the Commissioner's Decision in this matter is that the public interest in maintaining the exceptions in Regulation 12 (4) (e) and 12 (5) (b) is not strong enough to outweigh the public interest in disclosure in this particular case. Therefore, in failing to supply the considered view to the complainant the Council has contravened Regulation 5.

Steps Required

68. The Commissioner requires the Council to disclose a copy of the considered view to the complainant to ensure compliance with the EIR.

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

Failure to comply

70. 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.

Information Commissioner's Office

Right of Appeal

71. 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@dca.gsi.gov.uk

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 12th day of February 2007

Signed ………………………………………………..

Graham Smith
Deputy Commissioner

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SK9 5AF