

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

### Decision Notice

Date 3 July 2007

**Public Authority:** Dover District Council  
**Address:** White Cliffs Business Park  
Dover  
Kent  
CT16 3PJ

### Summary

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The complainant requested legal advice received by the public authority. The public authority applied section 42 of the Freedom of Information Act to withhold the information. The Commissioner found that the request should have been dealt with under the Environmental Information Regulations 2004. He considered that the exception under regulation 12(5)(b) of those Regulations did not apply as legal professional privilege had been waived due to the public authority publishing a summary of the legal advice in a report available on its website. Since regulation 12(5)(b) was not engaged, there was no need for the Commissioner to consider the public interest test under regulation 12(1)(b) of the Regulations. Therefore, the Commissioner ordered the public authority to disclose the information.

### The Commissioner's Role

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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.

### The Request

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2. On 11 April 2005, the complainant wrote to Dover District Council (the Council) setting in context the information he was requesting as follows:
  - "I read with interest the *Report of the Chief Planning Officer* on the section of the Dover District Council (the "Council") website dedicated to the Aylesham

Masterplan. I note that counsel's opinion has been sought by the Council regarding the possible registration of the land in question as a village green. The public interest nature of this request is self-evident and supported by the actions of the Council in publishing a summary of the advice obtained. Please send me a full copy of the opinion of counsel referred as soon as possible and in any event within the time limit prescribed in the 2005 Act."

3. The Council responded on 12 April 2005 stating that the requested information was exempt under section 42 (legal professional privilege) of the Act and the public interest is not in favour of disclosure. The complainant requested a review on 15 April 2005, to which the Council responded on 20 May 2005, upholding its original decision.

## The Investigation

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### Scope of the case

4. On 27 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:
  - whether the Council was entitled to refuse to provide the information under section 42 of the Act

### Chronology

5. On 21 August 2006, the Commissioner wrote to the Council expressing his initial view that the information was not exempt under section 42 as he considered legal professional privilege to have been waived. He asked the Council for a response to this view and the Council responded by maintaining its position of exempting the information. The Commissioner wrote to the Council on 15 September 2006 asking for a copy of the withheld information, which the Council provided on 11 October 2006.
6. On 3 January 2007, the Commissioner wrote to the Council expressing his reconsidered view that the information was environmental information. He stated that he would therefore consider the exception under regulation 12(5)(b) of the EIR instead of the exemption under section 42 of the Freedom of Information Act (the Act).

### Findings of fact

7. The Council is seeking to progress proposals which involve development of the land. In this context, the Council asked the opinion of a barrister as to the possibility of registering the land referred to as the 'Central Open Space' in Aylesham as a town or village green.

8. The legal advice from counsel received by the Council was dated 9 June 2004. The Report of the Chief Planning Officer (full title 'Report of the Chief Planning and Building Control Officer'), referred to in the complainant's request at paragraph 2 above, is estimated by the Council to have been finalised in the second or third week of June 2004.
9. The Council has stated that the Report of the Chief Planning Officer was taken to a number of Committees of the Council and to the Cabinet and will have been drafted in the lead up to the first of those meetings, which was on 28 June 2004.

## Analysis

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### Whether the information is environmental

10. As stated at paragraph 7 above, the Council is seeking to progress proposals which involve development of the land and the legal advice is given on the possibility of the Council registering the land in this context. The Council's proposals could also be described as plans or activities which are likely to affect the state of land, being one of the elements of the environment. Therefore, the Commissioner considers that the legal advice falls within Regulation 2(1)(c)<sup>1</sup> of the definition of environmental information.

### Exception

#### Regulation 12(5)(b) – course of justice

11. The Commissioner has considered whether regulation 12(5)(b) of the EIR can be claimed by the Council. Regulation 12(5)(b) 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."

12. The Information Tribunal case of 'Mr M S Kirkaldie and the Information Commissioner EA/2006/001 (4 July 2006)' outlines the similarity between regulation 12(5)(b) of the EIR and section 42 (legal professional privilege) of the Act at paragraph 21 of that case as follows:

"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."

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<sup>1</sup> See legal annex for relevant extract of legislation

13. The concept of legal professional privilege is therefore covered by regulation 12(5)(b) of the EIR. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client.
14. There are two separate categories within this privilege known as advice privilege and litigation privilege.
15. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations. Litigation privilege arises where litigation is contemplated or is in fact underway.
16. The Commissioner is satisfied that the withheld information is covered by advice privilege as it constitutes communications between a person (the Council) and a lawyer (the barrister) with the purpose of obtaining legal advice. Therefore, the Commissioner is satisfied that the exception under regulation 12(5)(b) of the EIR would be engaged.
17. Legal professional privilege may however be waived. At paragraph 26 of the Information Tribunal case of Kirkaldie, referred to in paragraph 12 of this Decision Notice, the Tribunal itself referenced case law in establishing a test for waiver as follows:

“Publication of privileged information to the general public will deprive the information of any privilege which previously existed. So, for example, any press release which makes use of privileged information will almost certainly result in a waiver of that privilege.” (*Chandris Lines v Wilson & Horton Ltd* [1981] 2 NZLR 600).
18. The complainant believes privilege has been waived in the Council's 'Report of the Chief Planning and Building Control Officer' (the Report) referred to at paragraph 6 above. The Report can be found on the Council's website.
19. Point 17 of the Report reads as follows: “Since the Draft Masterplan was prepared a High Court case regarding registration of land as a village green has been determined. A barrister's opinion on the relevance of this case to the central open space has been sought. In summary, the opinion is that there is a strong argument that the land has not obtained the status of a village green by reason that the land was held and managed pursuant to Housing Act powers. However, it is possible for an objector to make an application to the registering authority (KCC [Kent County Council]). This is however an issue for the Council as landowner, and will be important when considering the implementation of the Masterplan. The effect of registration would be to prevent any encroachment onto the land, such as by buildings.”
20. In applying the test of waiver from the Chandris Lines case set out at paragraph 17 above, the Commissioner has considered whether point 17 of the

Council's Report constitutes publication of privileged information. Whilst the Council's full legal advice has not been published, the Commissioner has considered whether the Council has published a summary of that advice, which would also result in privilege being waived.

21. In considering what constitutes a summary of advice, the Commissioner has taken into account the Information Tribunal case of Kirkaldie, referred to at paragraph 12 of this Decision Notice. Paragraph 41 of the Tribunal's decision states that "the Tribunal finds that the basis on which the advice had been sought and the main opinion given in that advice, were mentioned by Councillor Kirby at the public meeting." The Tribunal found this to be sufficient as to constitute a summary of advice.
22. In the present case, the Commissioner has had sight of the Council's full legal advice and finds that the main opinion given in that advice was mentioned at point 17 of the Report. The Commissioner therefore considers point 17 of the Council Report to constitute a published summary of legal advice and any privilege to that advice to have been waived.
23. The Commissioner considers that, since privilege has been waived, the exception under regulation 12(5)(b) of the EIR cannot be claimed. There is therefore no need to go on to consider the public interest test under regulation 12(1)(b) of the EIR.

## The Decision

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24. The Commissioner's decision is that the public authority was not entitled to rely on the exception under regulation 12(5)(b) of the Environmental Information Regulations 2004 to withhold the information as it has been considered that legal professional privilege has been waived. Therefore, the public authority did not comply with regulation 5(1)<sup>1</sup> of the EIR.

## Steps Required

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25. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:
  - release a copy of the barrister's opinion dated 9 June 2004 on the Aylesham Open Space as referred to in the Council's 'Report of the Chief Planning and Building Control Officer.'
26. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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27. 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

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28. 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](mailto: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 3 day of July 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal annex

**Regulation 2(1)** of the EIR provides the following definition for environmental information:

“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;

(a) 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);

(b) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 12(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 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 –

- (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;