

Information Commissioner

Reference FS50063318

29 March 2007

Public authority: Bury Metropolitan Borough Council

A complaint was lodged against the authority for failure to disclose legal advice it had received in the form of Counsel's Opinion relating to a claim that a way should be added to the definitive map as a footpath.

The Commissioner, exercising his discretion, waived the requirement of section 50 of the Freedom of Information Act 2000 that before lodging a complaint with the Commissioner, a complainant should have exhausted any complaints procedure provided by the authority in conformity with section 45 of the Act, there having been correspondence between the complainant and the authority prior to the implementation of the Act, with four requests for information having been lodged between January and April 2005. The Commissioner stressed that a complainant would normally be expected to exhaust an authority's internal review procedure before a complainant would be considered.

The Commissioner noted that since the information requested related to a way across land, the information could be considered environmental information and as such subject to the Environmental Information Regulations 2004. However, in the light of the decision of the Tribunal in *Kirkaldie v IC and Thanet District Council* (EA/2006/001) that regulation 12(5)(b) was equivalent to section 42 of the Act (legal professional privilege), the Commissioner, believing that were the matter to be considered under the Regulations, the outcome (as to whether the information was 'excepted') would be the same as it would be if dealt with under the Act, elected to treat the application as validly dealt with under the Act.

The Commissioner held that Counsel's Opinion relating to a claim for a way to be added to the definitive map, being legal advice to the authority on a point of law by a person competent to provide it, and in respect of which legal professional privilege had not been waived by disclosure to any third party, was exempt information under section 42. Since, he held, the public interest in maintaining the exemption outweighed the public interest in disclosing it, the authority had been entitled to withhold the information. The complaint was accordingly rejected.

Information Commissioner

Reference FS50130128

13 March 2007

Public authority: Crown Prosecution Service

[Complainant: Gillingham]

The complainants alleged that, contrary to section 34(1) of the Road Traffic Act 1988, motor vehicles were driving on a public footpath, and requested that those responsible should be prosecuted. The Crown Prosecution Service (CPS), acting under the Code for Crown Prosecutors, declined to prosecute on the ground that, in its view, and in accordance with advice received from Counsel, there did not, on the evidence submitted, exist a sufficient likelihood of a prosecution being successful. The complainants, wishing to be assured that Counsel had been supplied with all relevant information, requested a copy of the instructions given to Counsel and of Counsel's Opinion. The CPS declined the request on the ground that the information was exempt under section 42(1) of the Act (legal professional opinion).

In the course of giving his decision, the Commissioner decided

(a) that since the information sought related to contemplated legal proceedings (not the land over which the offence was alleged to have been committed) the matter was properly dealt with under the Freedom of Information Act 2000 (not under the Environmental Information Regulations 2004).

(b) that the information requested did not constitute the complainants' person data and so the complaint was not to be dealt with under the Data Protection Act 1968;

(c) that the information sought was exempt information under section 42(1) of the 2000 Act (legal professional privilege);

The Commissioner, while recognising that 'if members of the public are provided with information that shows the basis on which decisions have been taken this will enable them to understand the reasons behind those decisions and to have greater confidence in them', concluded that, in the light of the public interest in the CPS being able to obtain full and frank advice, the public interest lay in maintaining the exemption in section 42.

The complaint was therefore rejected.

The complainants appealed to the Information Tribunal

Information Tribunal

Tribunal Appeal Number: EA/2007/0028

26 October 2007

Gillingham v Information Commissioner

The Tribunal found that the sole question was whether the Commissioner was right to conclude, in all the circumstances of the case, that the public interest considerations in maintaining the exemption for counsel's advice and formal instructions were stronger than those which supported disclosure. The Tribunal concluded that they were, - 'In our judgment they are much stronger'.

Information Commissioner

Reference FER0125285

8 October 2007

Public authority: Gloucestershire CC

The Council and the National Trust were in dispute over the status of land that constituted a roadside verge, the Council holding that the land was part of the public highway, the Trust holding that the land formed part of the waste land of the manor. In order to assist in resolving the issue, a joint committee (the Joint Liaison Committee, 'JLC') was set up. At the time of the hearing, meetings of the committee had been held, the first on 15 May 2006. The commissioner understood that others were due to be held. He understood, further, that it was the intention that following discussions to reconcile the differing views, the JLC would issue a number of 'decision letters' setting out the agreed position on the issues involved.

The complainant requested the council for copies of the meetings of the JLC. The council refused the request, maintaining that the information was excepted information under regulation 12(5)(f) (information held by a public authority the disclosure of which would adversely affect the interests of the person who provided the information, where that person was not under any legal obligation to supply it to that or any other public authority, and had not consented to its disclosure) and that the public interest in maintaining the exception outweighed the public interest in disclosing it.

The Commissioner found that in the case of information in the minutes that related to matters had not at the time of the complainant's requests been resolved, release of this would have adversely affected the interest of the Trust and, as excepted information under regulation 12(5)(f), had not been required to be disclosed. Information relating to issues that had already been resolved at the time of the requests did not fall within regulation and such information the council was required to disclose to the complainant.

Information Tribunal

Tribunal Appeal Number: EA.2007/0020

10 September 2007

Dainton v Information Commissioner and Lincolnshire CC

An application was made to the county council for an order adding to the definitive map a footpath that ran across the complainant's land. To assist it in deciding whether to make the order, the council requested various individuals to complete public rights of way evidence forms. The complainant requested the council to provide her with copies of forms that had been supplied. The council treated the request as being made under the Freedom of Information Act 2000. It pointed out to the complainant that should an order be made, the evidence forms would be made public and she could see them then. It did not, it contended, have power to release the forms prior to an order being made unless the deponents had given their consent. The council sought permission from those who had submitted forms for it to provide the complainant with copies. Thirteen of these consented and their forms were supplied to her. Five refused consent and one failed to reply. The forms completed by these six the council declined to disclose, relying in so doing on the Section 40 of the 2000 Act [i.e., section 40(3)(a)(ii) which adopts as a ground for refusing to disclose information the provision of section 10 of Data Protection Act 1998 (right of a data subject to prevent processing of data that would cause or be likely to cause substantial and unwarranted damage or distress)].

The complainant, after having exhausted the council's complaints procedure, appealed to the Information Commissioner. The Commissioner held that the information requested was environmental information. The council had therefore been in error in proceeding under the Freedom of Information Act 2000. The matter fell to be dealt with under the Environmental Information Regulations 2004. Under regulation 12(5)(f) a public authority may refuse to disclose information where the disclosure would adversely affect the interest of the person who provided the information where that person (i) was not under any legal obligation to supply it ... and (iii) had not consented to its disclosure. Since those who had supplied the information had been under no legal obligation to do so, and had not consented to its release, and since (taking into account the possibility of recriminations and bearing in mind the absence of any good reason for circumventing the procedure laid down in the Wildlife and Countryside Act 1981), the public interest in maintaining the exception to the duty to disclose outweighed the public interest in disclosure, the information had been properly withheld.

The complainant appealed to the Information Tribunal on the grounds, *inter alia*, that the refusal to disclose constituted a breach of natural justice; and that the statements had, so she contended, been provided in the knowledge that the information in them would be disclosed.

The Tribunal, acting under the jurisdiction conferred by regulation 18 (which applies the provisions of section 58 of the 2000 Act to appeals under the regulations), found as follows.

1. Did the matter fall within the Environmental Information Regulations ?

Since (a) Article 2(1) of the (European) Council Directive 90/313/EEC defined environmental information as ‘any information in written or other material form on – (a) the state of the elements of the environment, such as ... landscape’; and (b) Regulation 2(1)(a) of the regulations provided that ‘environmental information’ should have the same meaning as in Article 2 of the Directive; and (c) the information sought, i.e. the route of the path and information about its use, concerned the landscape,
- the information sought came within the definition of environmental information in the Environmental Information Regulations and the matter was thus (here confirming the Commissioner’s decision) properly to be dealt with under those regulations

2. Was the information ‘personal data’ and as such subject to regulation 13?

Since ‘personal data’ was defined in the regulations (regulation 2(4)(d)) as having the meaning given in the Data Protection Act 1988; and, section 1(1) of that Act defined personal data as ‘data which relates to a living individual who can be identified (a) from those data’; and the identity of the person completing the six forms was capable of being identified from the forms, the forms, as regards Part A of each, was personal data.

3. Since the persons who completed the six forms had been entitled to expect that the information would be treated according to the procedure provided by the Wildlife and Countryside Act 1981, and under this there was no provision for the information on the forms to be made public prior to the making of an order, it would be unfair on the deponents to disclose the content of Part A (that containing personal data). (“We do not consider it would be fair to disclose the information before the statutory right under the Wildlife and Countryside Act 1981 arises.” Page 18.)

Since the first Data Protection Principle (in Schedule 1 of the 1988 Act) required that personal data should be processed ‘fairly’, release of the data would conflict with this principle; with the result that, the condition required to be satisfied by regulation 13(2)(i) (compliance with the Data Protection Principles) not being met, disclosure of the information was prohibited (regulation 13(1)). The information in Part A of the forms had therefore been correctly withheld.

5. The information in Part B of the forms (details of the route, etc) was not personal data. Disclosure was therefore not subject to regulation 13. Was disclosure subject to regulation 12(5)(f) (q.v., see above)? The Tribunal held that since it did not see how the information in Part B of the forms (the route of the path, etc) ‘could amount to something that would affect those individuals’ interests’, regulation 12(5)(f) was not engaged and the council was ordered to release the information in Part B to the complainant (any concern over an individual’s handwriting being identified being capable of being resolved by the council providing transcripts of the forms).

Information Tribunal

Tribunal appeal Number: EA/2005/0024

26 October 2007

Keston Ramblers' Association v Information Commissioner (London Borough of Bromley, additional party)

In the course of finding (thereby reversing the decision of the Information Commissioner) that an authority had failed to provide an applicant (the Keston Ramblers' Association) with certain of the information that it had requested, the Information Tribunal,

(a) held that the authority could not, as a defence, rely on the fact that the information requested had been available at the borough's central public library. To avail as a defence, the authority should have so informed the applicant;

(b) expressed the view that the requirement of regulation 6(1) that an authority should make available the information requested in the particular 'form or format' specified by the applicant referred to the means of supply, i.e. paper copies, electronically or by viewing microfiche, not to the arrangement or order in which the material was to be supplied;

(c) considered, with regard to the entitlement of the authority, under regulation 8, to charge the applicant for the cost of making the information available, that the duty under regulation 9 to provide advice and assistance to applicants and prospective applicants probably required the authority to offer the applicant the opportunity to inspect the documents it proposed to supply so that the applicant could decide whether he wanted to go ahead with paying for copies of the documents, or whether he would be satisfied by examining them.