

Decision Notice



Decision 069/2008 Robin Thompson and the Scottish Environment Protection Agency

Copy of legal advice

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Summary

Mr Thompson requested a copy of legal advice received by the Scottish Environment Protection Agency (SEPA) on its use of the powers conferred by The Water Environment (Controlled Activities)(Scotland) Regulations 2005 (CAR). SEPA responded by stating that the information requested was excepted under the terms of regulation 10(5)(d) of the EIRs. Mr Thompson was not satisfied with this response and asked SEPA to review its decision. Following a review, as a result of which SEPA upheld its initial refusal, Mr Thompson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SEPA had dealt with Mr Thompson's request for information in accordance with the EIRs.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs), regulations 2 (Interpretation) (definition of "environmental information"); 5(1) (Duty to make available environmental information on request) and 10(1), (2) and (5)(d) (Exceptions from duty to make environmental information available).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. Mr Thompson has been in regular correspondence with SEPA over the installation and operation of the drainage serving his home. This resulted in Mr Thompson raising a complaint with SEPA and within the context of that complaint Mr Thompson asked SEPA to consider action in terms of the powers conferred on it by CAR.
2. On 2 July 2007, SEPA wrote to Mr Thompson informing him that the interpretation of this legislation and its reasonable and appropriate application in any particular circumstance was guided by SEPA's legal advice, and governed by its enforcement policy.



3. On 25 July 2007, Mr Thompson wrote to SEPA regarding his ongoing complaint and within the letter requested a copy of the legal advice SEPA had received relating to the case.
4. On 20 August 2007, SEPA responded to Mr Thompson and reiterated that its enforcement position in relation to CAR had previously been explained and that it was following its stated policy in this regard. SEPA did not, however, address the request for the legal advice.
5. On 20 September 2007, Mr Thompson wrote to SEPA requesting a review of its decision. In particular, Mr Thompson drew SEPA's attention to the fact that his letter of 25 July 2007 had contained a request for information.
6. On 22 October 2007 SEPA wrote to notify Mr Thompson of the outcome of its review. SEPA informed Mr Thompson that the information requested was excepted in terms of regulation 10(5)(d) in that it consisted of a communication between SEPA and its solicitors, within a professional context. SEPA further recognised it they had not identified the request within the letter of 25 July 2007 and offered an unreserved apology for the mishandling of the request.
7. On 7 November 2007, Mr Thompson wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of SEPA's review and applying to him for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002, which also deals with applications under the EIRs.
8. The application was validated by establishing that Mr Thompson had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

9. On 15 November 2007, SEPA was notified in writing that an application had been received from Mr Thompson and asked to provide the Commissioner's Office with copies of any information withheld from Mr Thompson. SEPA responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted SEPA, asking it to provide comments on the application and in particular on its application of the regulation 10(5)(d) exception. These were duly provided and will be considered further in the Commissioner's analysis and findings below.
11. Mr Thompson confirmed during the investigation that while he sought the release of the legal advice as requested, he did not require the name of the person who provided the advice.



Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the information and submissions that have been presented to him by both Mr Thompson and SEPA and he is satisfied that no matter of relevance has been overlooked.
13. Environmental information is defined in regulation 2 of the EIRs (reproduced in full in the Appendix to this decision) and environmental information that has been requested must be disclosed as required by regulation 5 unless the information falls within one or more of the exceptions set out in regulations 10 and 11 of the EIRs.
14. The information withheld by SEPA relates to legal advice provided by SEPA's legal advisors in relation to options which SEPA might consider within the powers conferred by CAR. The advice relates to the drainage discharge arrangements at the home of the applicant. Taken in the context that the document refers to waste control and in particular the suitability and environmental impact of the current arrangements, the Commissioner is satisfied that the information withheld is environmental information as defined in regulation 2 of the EIRs.
15. All of the exceptions set out in regulations 10(4) and (5) of the EIRs are subject to the public interest test set out in regulation 10(1)(b). Regulation 10(1) provides that a public authority may refuse a request to make environmental information available if it falls within the scope of an exception in regulations 10(4) or (5) and, in all the circumstances of the case, the public interest in making information available is outweighed by that in maintaining the exception. Further, regulation 10(2) specifies that in considering the application of the exceptions contained in regulations 10(4) and (5), the public authority shall interpret those exceptions in a restrictive way and apply a presumption in favour of disclosure.

Regulation 10(5)(d) – Confidentiality

16. Regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available if its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. In its publication *The Aarhus Convention: an implementation guide*, the Economic Commission for Europe (the United Nations agency responsible for the Convention, which the EIRs are designed to implement) notes at page 59 that the Convention does not define "proceedings of public authorities", but suggests that one potential interpretation is that these might be "proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence".



17. The information withheld is a communication between legal advisor and client, in this case within SEPA. It was written by one of SEPA's solicitors and provides legal advice in relation to SEPA's powers under CAR and options for dealing with a particular situation. In the circumstances, the Commissioner accepts that the communication falls within the suggested definition of "proceedings of public authorities" set out in paragraph 16 above. For the exception in regulation 10(5)(d) to apply, however, the Commissioner must be satisfied that disclosure of the information would, or would be likely to, prejudice the confidentiality of those proceedings. Firstly, he must be satisfied that the proceedings are confidential, on the basis of such confidentiality being provided for by law.
18. In most cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings. An aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles relating to legal professional privilege.
19. In its submissions to the Commissioner, SEPA referred to the Commissioner's *Decision 110/2007 Mr James Wright and the Scottish Executive and Her Majesty's Inspectorate of Education*, which (in common with a number of other decisions of the Commissioner) considered the application of that element of legal professional privilege known as legal advice privilege to a communication between legal advisor and client. As that decision indicates, certain conditions must be fulfilled before legal advice privilege can apply to such a communication: for example, the information being withheld must relate to communications with a legal advisor, the legal advisor must be acting in a professional capacity and the communications must occur in the context of a professional relationship with the client. SEPA argued that these tests were met in this particular case. While that decision related to the application of the exemption in section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) (which relates directly to confidentiality of communications), SEPA submitted that the principles were of relevance to the application of regulation 10(5)(d).
20. Having reviewed the information withheld by the SEPA in this case, the Commissioner is satisfied that the information comprises information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings in that it is a communication between a professional legal advisor (a solicitor) acting as such and their client within the context of a professional relationship. The Commissioner must now consider whether disclosure of the information would substantially prejudice that confidentiality.
21. In support of its claim that the confidentiality of the relevant proceedings would be substantially prejudiced by disclosure, SEPA referred to the dangers in disclosing legal advice, including unreasonably exposing legal positions to challenge and thereby diminishing the range and quality of that advice and in turn damaging the quality of SEPA's decision making.



22. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. That said, given the content of the information and its continuing privileged nature, the Commissioner accepts that disclosure would cause substantial prejudice to the confidentiality of the proceedings in question and therefore that the exception in regulation 10(5)(d) applies. He must, however, go on to consider whether the public interest in making the information available is outweighed by the public interest in maintaining the exemption.
23. SEPA maintained that the public interest in withholding legal advice was high and that only in particularly compelling cases should release be considered. In support of this position, it referred to its arguments on the dangers of disclosing legal advice, pointing in particular to the perceived public interest in a public authority receiving from its legal advisors the most comprehensive legal advice on its proposed actions. It accepted that it might sometimes be in the public interest to order disclosure where it made a significant contribution to debate on a matter of public interest, but submitted that this did not apply in the present case.
24. In his previous decisions on section 36(1) of FOISA, including *Decision 110/2007* referred to above, the Commissioner has concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, bearing in mind that the courts have long recognised the strong public interest in maintaining this right on administration of justice grounds. Consequently, while he will consider each case individually, he is likely only to order the release of such communications in highly compelling cases. In *Decision 096/2006 Mr George Waddell and South Lanarkshire Council*, he noted that he would apply the same reasoning in general to the EIRs.
25. The Commissioner accepts the public interest arguments put forward by SEPA in support of the information being withheld. It is in the public interest that an authority can communicate with its legal advisers freely and frankly in confidence, in order that it can obtain the most comprehensive legal advice about its proposed actions and defend its position adequately as required. He does not consider that this public interest is diminished significantly by the fact that in this particular case the advice in question may be of less immediate relevance than it was when it was provided. On the other hand, the Commissioner can identify no public interest arguments of substance in support of the information being disclosed. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available, and therefore is satisfied that the information was properly withheld under regulation 10(5)(d).



DECISION

The Commissioner finds that the Scottish Environment Protection Agency acted in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Thompson.

Appeal

Should either Mr Thompson or SEPA wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
24 June 2008



Appendix

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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 paragraph (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (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 the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)...



5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

10 Exceptions from duty to make environmental information available

- (1) A Scottish public authority may refuse a request to make environmental information available if-
- (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...