

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

### **Decision Notice**

**Date: 23 August 2010**

**Public Authority:** Water Services Regulation Authority ('Ofwat')  
**Address:** Centre City Tower  
7 Hill Street  
Birmingham  
B5 4UA

### **Summary**

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The complainant made a number of requests for information about how the public authority had adapted in consequence to a specific set of Competition Appeal Tribunal hearings concerning a competition inquiry about common carriage and bulk supply charges for water. The public authority confirmed that it held some relevant information within the scope of the request, but that it believed it could withhold the information by virtue of section 42(1) [legal professional privilege]. It upheld its position in its internal review.

The Commissioner has considered this case in detail. He has decided that the information was not environmental information and was therefore subject to the Act. He has considered each of the items that were withheld by the public authority and has decided that section 42(1) was engaged and that the public interest in maintaining the exemption outweighs that in its disclosure.

He has also found a procedural breach of section 10(1) and section 17(1) as the public authority failed to respond to one of the requests within twenty working days but requires no remedial steps to be taken.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

2. 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. In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 are imported into the EIR.

## Background

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3. The background to this case is complex. The Commissioner believes that an outline of the main events is useful to place this case into context.
4. Albion Water complained to the public authority (as competition regulator) that Dŵr Cymru<sup>1</sup> had abused its dominant position in respect to the common carriage of water to Shotton paper mill.
5. Shotton paper mill is a large paper producer and consumes the equivalent water to 35 - 40,000 domestic customers, which makes it the second biggest consumer in Wales. The water is supplied via the Ashgrove system that is owned by Dŵr Cymru. Albion Water wanted to buy the water from another supplier and pay a reasonable price to Dŵr Cymru for carriage through the Ashgrove system. The price quoted by Dŵr Cymru was argued by Albion Water to lead to a margin squeeze which constituted an abuse of its dominant position.
6. The public authority issued a 121 page judgment about this matter and found that the complaint was not upheld<sup>2</sup>.
7. Albion Water then took this case to the Competition Appeal Tribunal and there were four separate cases which led to four judgments. This whole process has become known as the 'Shotton Case'<sup>3</sup>.

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<sup>1</sup> Dŵr Cymru is Welsh Water in the Welsh language.

<sup>2</sup> The judgment can be found at the following link:

[http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/shotton\\_decision260504.pdf/\\$FILE/shotton\\_decision260504.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/shotton_decision260504.pdf/$FILE/shotton_decision260504.pdf)

<sup>3</sup> The four judgments can be found at the following links:

- (1) <http://www.catribunal.org.uk/files/Judge1046Albion061006.pdf> (upholding the original complaint - 322 pages).
- (2) <http://www.catribunal.org.uk/files/Jdg1046Albion181206.pdf> (providing further details - 125 pages).
- (3) <http://www.catribunal.org.uk/files/Jdg1034-46Albion080107.pdf> (costs - 14 pages).
- (4) [http://www.catribunal.org.uk/files/Judgment\\_on\\_unfair\\_pricing\\_1046\\_Albian\\_071108.pdf](http://www.catribunal.org.uk/files/Judgment_on_unfair_pricing_1046_Albian_071108.pdf) (this was the final judgment in respect to unfair pricing - 90 pages).

8. The Competition Appeal Tribunal found in Albion Water's favour. It found that it was incorrect to find that Dŵr Cymru had not abused its dominant position in respect to the common carriage of water to Shotton paper mill. It also commented on the tests that were used by the public authority and suggested variation was required.
9. On 26 July 2007 Dŵr Cymru was allowed permission to appeal to the Court of Appeal about the test about margin squeeze and whether the Tribunal had jurisdiction. On 22 May 2008 this appeal failed.
10. The requests for information in this case concern the reaction by the public authority to the four judgments of the Competition Appeal Tribunal.

## The Requests

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### *Request one*

11. On 5 May 2009 the complainant requested the following information in accordance with section 1(1) of the Act [the formatting has been changed for clarity]:

*'Would you please notify me of the occasions when the Board did meet (post January 2007) to consider the implications of the Competition Appeal Tribunal hearings and judgments?*

*The value of any such discussion would depend on the accuracy and objectivity of the briefing papers prepared for the purpose. Would you please disclose any such briefing papers under the Act so we can assess the advice given to the Board?*

*I am in receipt of your letter of 1 May.... In relation to a letter of complaint dated 9 February 2009, you will 'aim to write again by 29 May'. Given these worrying delays coupled with the fact that many of these concerns were aired over two years ago, would you please advise me if you have uncovered evidence to suggest whether these matter were ever taken seriously as a result of earlier complaints? If so, could we all see any such evidence under FOIA. If there was no discernable action taken in light of earlier complaints, would you please explain why in your final report?*

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*There is a very strong public interest argument that regulation needs to be seen to be both fair and effective for it to earn public and industry confidence.'*

12. On 5 June 2009 the public authority issued a response. It acknowledged all elements of the request. It explained that the only Board Meeting from January 2007 at which the case was a specific agenda point was dated 19 January 2007. It explained that it held the briefing papers but that it believed that the information was exempt. It explained that the papers were covered by legal professional privilege and that in its view the exemption found in section 42(1) of the Act applied to them. It confirmed that it considered that the public interest in maintaining the exemption outweighed that in disclosure. It explained that in its view the public interest in protecting legal advice outweighed the public interest in transparency in regulatory process in this case. In respect to the request about his complaint it explained that it was not wishing to prejudice the investigation at this stage.

#### *Request two*

13. On 18 May 2009 the complainant stated the following:

*'In light of your most recently published Board minutes, I believe that confidence in the regulatory system would be immeasurably improved by disclosure of that part of your report to the 9 April 2009 Board concerning the Shotton case, together with the detailed review of the 'lessons to be learnt' that I understand you to have conducted and that must have formed the basis of your report to the Board. In the light of your Board's decision on releasing relevant papers to IWNL, I do not believe a formal FOIA request to be necessary but please consider this to be a formal request under the Act if it is necessary.'*

14. On 16 June 2009 the complainant sent a reminder. He explained that he had received assurances that the judgments would be taken into account and wished to understand how the public authority believed it would impact on its regulatory powers.
15. On 3 July 2009 the public authority communicated its response to the complainant. It explained that it did hold some information embraced by the request and apologised for the delay. It explained that the Shotton case was not included in the Chief Executive's report, although the remedies judgment was covered in a slide used by [lawyer redacted] to provide an oral update to the Board. It explained that briefings from 19 January 2007 were provided orally and not in recorded form. It explained that the board members did receive a copy

- of the remedies judgment. It explained that it did not hold recorded information about a review of lessons learnt, but that it appreciated that this request was clarified in the reminder to cover its review of the impact of the judgments on its Regulatory powers. It held relevant information in respect to this.
16. The public authority explained that the recorded information it held was all covered by legal professional privilege and that it was withholding it under section 42(1) of the Act. It explained that in its view the public interest in maintaining the exemption outweighed that of disclosure. It said that the disclosure of this information had a significant potential to prejudice its ability to defend its legal interests and to ensure the integrity of its position. It explained that the judgments are in the public domain and that it acknowledged that there was a public interest in transparency, but explained that in its view this did not outweigh the public interest in maintaining the exemption. Finally, it explained that confidence in the system was important and that changes in its policies will be subject to discussion and consultation in the normal way.
  17. On 6 July 2009 the complainant wrote to the public authority and requested an internal review in respect of both requests. He expressed particular disappointment in the delay in handling the request. He also explained that in his view the public interest test was conducted incorrectly as the proceedings were finished, in his view the public authority had spent millions of pounds on its unsuccessful defence of the wrong decision, and particularly in light of the undertakings given to the Competition Appeal Tribunal (CAT).
  18. On 9 September 2009 the public authority communicated the results of its internal review. It explained that the Act is applicant and motive blind. For the first request, it explained that it was written by its Head of Legal service and included advice from legal counsel. It explained that it believed that section 42 was engaged. Further, it explained that the IWIL papers referred to by the complainant were not comparable as they were not privileged. For the second request, it explained that the slide was prepared by a lawyer, was privileged and that the section 42 exemption was engaged. It explained that the remaining withheld information was advice from external legal counsel and that section 42 was also engaged in respect to it.
  19. It then conducted its public interest test. It explained that the concept of legal professional privilege deserves protection and this means that there is an inherent public interest in it. It stated that this presents a fairly high hurdle and that in its view that those factors that favour disclosure (transparency and accountability) do not overcome that

hurdle. For this reason it argued that the public interest favoured maintaining the exemption in this case.

20. On 28 September 2009 the complainant wrote to the public authority to ask whether it had received legal advice about how to deal with his request for internal review.
21. On 12 October 2009 the public authority responded that it had not. However, it considered the reasons from both sides and the guidance from the Ministry of Justice and the Information Commissioner's Office. It explained that the decision was that the public interest in maintaining the exemption outweighed the interest in disclosure.

## The Investigation

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### Scope of the case

22. On 14 October 2009 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 points:
  - *He was not satisfied with the public authority's reliance on section 42(1).*
  - *That no litigation was underway or contemplated.*
  - *That no real consideration was placed into the considerable public interest in disclosure.*
23. On 9 December 2009 the complainant agreed with the Commissioner that the scope of his investigation would consider only the following five things:

For request 1:

  - *Whether section 42(1) was applied correctly to the paper written by the Head of Legal Services about the Shotton case considered on 19 January 2007, or whether this information should have been disclosed to the public.*
  - *The issue about delays.*

For request 2:

- *Whether section 42(1) was applied correctly to the slide, or whether this information should have been disclosed to the public.*
  - *Whether section 42(1) was applied correctly to Ofwat's review of the impact of the Competition Appeal Tribunal's judgments on its regulatory powers, or whether this information should have been disclosed to the public.*
  - *The issue about delays.*
24. For clarity, the Commissioner can only adjudicate on how the public authority has handled requests for information. He can only consider the recorded information that was held at the time of the requests that is relevant to it. He is unable to comment on the adequacy of that information, apart from considering whether exemptions have been applied correctly.

### **Chronology**

25. On 16 November 2009 the Commissioner wrote to the public authority to explain that he had received an eligible complaint. He asked to be provided with a copy of the withheld information and further arguments about why the information was being withheld.
26. On 9 December 2009 the Commissioner wrote a detailed letter to the complainant. He explained the correspondence that he had received, explained what he proposed the scope of the investigation to be and asked the complainant to confirm that he agrees with the scope.
27. On the same day, the complainant responded to explain that he was content with the scope of this case. He said that in his view the public interest in disclosure was supported by the following:
1. *The highly critical nature of the Competition Appeal Tribunal's judgments, with regard to the public authority's conduct;*
  2. *The profoundly negative impact on eligible customers over a period of 8 years, resulting from the conduct;*
  3. *Concerns as to whether the public authority's board was adequately briefed;*

4. *Concerns about the very significant sums of public money that were spent on the public authority's failed defence of its actions and which are not recorded in its accounts; and*
  5. *The apparent failure of the public authority to observe its commitment to have regard to that Competition Appeal Tribunal's findings.*
28. The Commissioner's response from the public authority explained the background of this case and provided the withheld information for the purposes of the Commissioner's investigation.
  29. On 26 March 2010 the Commissioner wrote to the public authority. He made detailed enquiries about whether the withheld information was environmental and also wrote to obtain further information about the arguments that were relied on to withhold the information.
  30. On 23 April 2010 the Commissioner received those arguments. The content of these arguments will be considered in detail in the analysis section below.

## Analysis

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### Substantive Procedural Matters

*What relevant recorded information is being withheld in this case?*

31. To ensure that this notice is clear from the outset, the Commissioner can confirm that there are three items of recorded information that are being considered in this case. They are:
  - (i) The papers considered by the public authority's board meeting dated 19 January 2007. This was the paper written by the Head of Legal Services about the Shotton case [item 1 for the remainder of this notice].
  - (ii) A slide about the judgment presented to the public authority's board meeting dated 8 April 2009 [Item 2].
  - (iii) A piece of external legal advice about the public authority's review of the impact of the Competition Appeal Tribunal's judgments on its regulatory powers [Item 3] dated 2 April 2009.

*Is any of the requested information environmental information?*

32. This question is important as information that is environmental information must be considered under the EIR and not the Act.
33. Regulation 2(1) of the EIR defines 'environmental information' as any information in any 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).'*

34. The public authority explained to the Commissioner that this particular case concerned the same water being abstracted by the same company and travelling through the same pipes to the same customer. In addition it explained that common carriage arrangements as proposed were prohibited under section 661 of the Water Industry Act 1991 unless consent from Welsh Ministers had been provided (which at the date of the request it had not). There was no likely impact on the

environment in respect to this case or the information held in respect to it.

35. The Commissioner has had sight of all of the withheld information. He has determined that after receiving the arguments that none of the information constitutes environmental information. It is therefore correct that the information is considered under the Freedom of Information Act.
36. He does note that this issue is fairly academic in this case as the exceptions 12(4)(e) and 12(5)(b) are relevant when one is considering legally privileged material and their combined value means that there is a similar amount of protection is provided.

## Exemption

### *Section 42(1)*

37. The public authority has explained that it believes it can appropriately apply section 42(1) to each item of withheld information. Section 42(1) of the Act is worded as follows:

*"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"*

38. The application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry* [EA/2005/0023]<sup>4</sup> ('Bellamy') where legal professional privilege was described 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."* (Paragraph 9)

39. The principle of legal professional privilege was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* [2004] UKHL 48 ('the Three Rivers case'), where Lord

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<sup>4</sup> This decision can be located at:

[http://www.informationtribunal.gov.uk/Documents/decisions/bellamy\\_v\\_information\\_commissioner1.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/bellamy_v_information_commissioner1.pdf)

Rodger explained the policy reasons for the principle in respect to legal advice:

*'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available. As Lord Reid succinctly remarked in Duke of Argyll v Duchess of Argyll 1962 SC (HL) 88, 93, "the effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential." (at Paragraph 54)*

*Is the exemption engaged?*

40. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
41. Legal professional privilege extends to in house legal advice. This issue was considered by the Information Tribunal in paragraphs 29 to 35 of *Calland v Financial Services Authority* [EA/2007/0136]<sup>5</sup>. It explained that it believed that in-house lawyers deserved the same protection as external ones. The Commissioner endorses this view. The Tribunal stated that:

*'Such a result accords with the general policy giving rise to LPP. Just the same requirements for confidentiality and candour exist where an employed lawyer gives advice as when it comes from a member of the independent professions' (at paragraph 35).*

42. The category of privilege which the public authority is relying on to withhold each of the three items information is advice privilege. This privilege is attached to communications between a client and its legal

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<sup>5</sup> This decision can be found at the following link:  
[http://www.informationtribunal.gov.uk/Documents/decisions/J\\_Calland\\_vs\\_ICO\\_Aug08.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/J_Calland_vs_ICO_Aug08.pdf)

advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. It was considered in detail in the *Three Rivers* case above and it explained that there were three requirements for material to engage legal professional advice privilege. They are:

1. It must be between a qualified lawyer in their professional capacity and a client.
  2. It must be created with the sole or dominant purpose of obtaining or providing legal advice.
  3. It must be confidential.
43. The Commissioner will consider each item in turn:

*Item 1*

44. As explained above, item 1 constitutes the papers considered by the public authority's board on 19 January 2007. The paper was drafted by the Head of its Legal Services and is 'marked restricted – legal'. It contains a detailed commentary on the judgments at that time and what action it suggested that the board takes in respect to them. It also has two pieces of external legal advice attached to it.
45. Having considered the information the Commissioner believes that it was communicated in the legal advisor's professional capacity and was formal legal advice. The requirement is therefore satisfied.
46. The determination of the dominant purpose can usually be found by inspecting the document itself. The Commissioner has examined the withheld information and is satisfied that the sole purpose of the board paper was to provide appropriate legal advice. The requirement is therefore also satisfied.
47. The Commissioner believes that the information can be correctly seen as confidential. It has the necessary quality of confidence as it is neither trivial nor in the public domain. The Commissioner believes that the circumstance of imparting the advice through detailing it to the public authority's board is one that imports an obligation of confidence. The Commissioner is satisfied that there is a reasonable expectation that this information would be confidential unless the board as an entity makes the decision to waive the confidentiality. He is therefore satisfied that item 1 is confidential.
48. It follows that the section 42(1) exemption is engaged for item 1 in this

case as all steps in the test are satisfied.

### *Item 2*

49. Item 2 comprises of a slide used by the Chief Executive to provide an update to the board about a judgment in the Shotton case. The public authority provided the Commissioner with evidence that this slide had been prepared by its legal department and was structured on the legal advice provided about the public authority's position at that time. The Commissioner has considered the underlying advice and notes that the contents of the slide are copied straight from it. He also notes that the underlying advice is marked 'legally privileged and confidential'.
50. The Commissioner is satisfied that this information satisfies the three tests outlined above for the same reasons as item one. He is satisfied that the information being translated into slide form makes no difference to the underlying analysis. It follows that the section 42(1) exemption is also engaged for item 2 in this case.

### *Item 3*

51. Item 3 comprises of a piece of external legal advice the public authority has received from counsel about the public authority's review of the impact of the Competition Appeal Tribunal's judgments on its regulatory powers. The Commissioner believes that this is a clear example of legally privileged material that satisfies the three tests outlined in paragraph 42 above. It was made by a professional legal adviser, for the dominant purpose of providing legal advice and the advice was and remains confidential. It follows that the section 42(1) exemption is also engaged for item 3 in this case.
52. In some cases the confidentiality can be lost and the information would not remain legally privileged. In this case there is no question for any of the three items that the confidentiality has been lost and legal professional privilege therefore remains.

### **Public interest test**

53. Section 42(1) is a qualified exemption and therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) (full copy in the legal annex) specifies that for an exemption to apply one should look at all the circumstances of the case and find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner is only able to consider factors that arise from the nature of the exemption when considering the maintenance of the exemption but can consider all

public interest factors when considering arguments in favour of disclosure.

54. It is important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. It is also important to note that, just because a large section of the public may be interested in the information, it does not necessarily mean that the release of the information would be in the public interest.<sup>6</sup> As an extension to this point, it is also important to note that the fact the information is of particular interest to the complainant cannot be taken into account as the Commissioner is considering whether the information can be disclosed to the public<sup>7</sup>.
55. The Commissioner believes that the same public interest considerations apply for all three items in this case. He will therefore undertake a single public interest test.

### **Public interest arguments in favour of maintaining the exemption**

56. The public authority explained that in its view there was a strong public interest in protecting the established principle of legal professional privilege and in allowing public authorities to be able to seek and obtain legal advice. This is particularly the case where there are ongoing disputes that may lead to further litigation. It explained that in its view it is important to understand the importance of the principle. It cited Lord Hoffman's judgment in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax & another* [2003] 1 AC 563 at 606H – 607B where he stated:

*'[...] LPP [legal professional privilege] is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law.'*

57. It explained that it sought to rely on a series of Information Tribunal Decisions that have established that there is a strong public interest in withholding legally privileged material. It cited the Information Tribunal decision in *Bellamy* as an example which noted that:

*'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be*

<sup>6</sup> *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

<sup>7</sup> *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) at paragraph 52.

*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.' (at paragraph 35)*

58. It stated that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice may well set out the perceived weaknesses of the authority's position. Without such comprehensive advice, the public authority's decision making process would be impaired because it would not be fully informed and this is contrary to the public interest. In addition it was important that the confidentiality between a lawyer and his client is maintained as otherwise disclosure could undermine the relationship between them and would potentially lead to an ineffective decision making process.
59. It also explained that disclosure of legal advice would be likely to cause detriment to its ability to defend its legal interests in two ways. Firstly, it would directly harm its ability by unfairly exposing its legal position to challenge. Secondly, it would indirectly harm its ability by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
60. The public authority concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material, it is likely to only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. It explained that the advice was 'live' at the date of the request as it was connected to its position in relation to the ongoing dispute between Albion Water and Dŵr Cymru. It has explained that at the time of the request and as of today it is determining the terms and conditions on which Dŵr Cymru should provide a larger supply of non-potable water to Albion Water for the same site. This is under different legislation but as part of this process Albion Water has made representations about the relevance of the CAT judgments and these need to be taken into account. In addition this process could lead to either party asking for a judicial review in which case the legal advice in respect to the public

authority's position in respect to the CAT judgments would undergo further judicial scrutiny.

61. The Commissioner having considered the withheld information is satisfied that it is connected to an ongoing matter and was 'live' at the time of the request. He acknowledges the strength of the arguments advanced by the public authority. Indeed, as noted above, there is a significant body of case law to support the view that there is a strong element of withholding the public interest built into section 42(1). He notes that the public authority has regulatory responsibilities and the statutory responsibility to adjudicate on competition in this area and that legal advice enabling it to do this is necessary.
62. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in withholding the information:
  - the inbuilt weight of the concept of legal professional privilege;
  - the importance of the principle of legal professional privilege on the facts of this case;
  - the likelihood and severity of harm arising by disclosure to that concept and the decision making process; and
  - the fact that the advice is live which intensifies the inbuilt weight above.

### **Public interest arguments in favour of disclosing the requested information**

63. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the information; Parliament did not intend the exemption contained at section 42 of the Act to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel* [EA/2007/0052] underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration which affected a substantial number of people.
64. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities, or in this case the reasoning behind the public authority's position in respect to how the detailed judgments affected their powers in investigating competition matters. Disclosure of this information may assist the public's understanding of how the public authority may make decisions in the future in this area.

65. As an extension to this point, the complainant has argued that the Commissioner should take into account the highly critical nature of the CAT judgments, with regard to the public authority's conduct. The Commissioner has carefully reviewed the judgments to understand whether he believes the CAT were highly critical of the public authority's interpretation of a complex area of law or whether there was criticism about how the public authority conducted itself. In the Commissioner's view, only criticisms that would fall into the second category could add to the public interest in disclosing the relevant pieces of legal advice. The case is genuinely complex and this has led to over 500 pages of CAT judgments<sup>8</sup>.
66. The Commissioner notes that those judgments are available online for anyone who is interested in the water industry. He also notes that the public authority was found to have inadequately investigated the distinction between potable and non-potable water sources, that the 'distribution cost' of the non-potable water source was inadequately investigated, that the factors taken into account on its decision in respect to margin squeeze was inadequate [and was contrary to international and its own guidance – as it did not identify separately the costs of the transportation service requests, and did not put the incumbent (Dŵr Cymru) and the entrant (Albion Water) on equal footing], that the concept of 'avoidable costs' could not be relied upon and that it was wrong to criticise the efficacy of Albion Water as a business. However, it noted that the case was unusual as it related to a large non-potable customer, that the identification of the variables that were needed to identify the relevant costs to Dŵr Cymru was a difficult exercise and there was no question that the public authority had acted in bad faith.
67. The Commissioner, having considered carefully the CAT decision, believes that the defects identified mean that there is a public interest in accountability but that its weight, having considered the content of the withheld information, is not overwhelming in this case.
68. The Commissioner also notes that disclosure of the information may reassure the public that decisions had been made on the basis of good information and thus increase public confidence in how the public authority will deal with its Regulatory responsibilities in the future.
69. As an extension to this point, the Commissioner notes that the complainant has expressed particular concern that the public

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<sup>8</sup> Indeed the CAT explained that 'the issues and facts involved are far from simple'. The Court of Appeal also explained 'the subject-matter is highly complex' - *Dŵr Cymru Cyfyngedig v Albion Water Limited* [2008] EWCA Civ 536 at paragraph 130.

authority's board did not receive adequate briefing about this case. The public authority has denied that this was so. It explained that its structure meant that the day to day running of the public authority was delegated to the Chief Executive in accordance with its rule of procedure. However, factual information was frequently provided as the cases proceeded and the remedies judgment was sent to each. In addition it has taken appropriate advice which is the subject of this request and the knowledge that it has also informs the public that it was giving the case appropriate consideration. In addition, where a board member wants more information to undertake their responsibilities, they can indeed ask for it. The Commissioner is satisfied having considered the governance structure of the public authority and the withheld information that he does not have a concern that there was inadequate briefing to the extent that it would provide a compelling public interest for the information to be disclosed.

70. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people".
71. Accordingly the Commissioner has considered the number of people that would be likely to be affected by the public authority's regulatory actions and whether further weight should be given to the public interest factors that favour disclosure on that basis as was the case in '*Mersey Travel*' and '*Pugh*'. He notes that the legal advice itself while focussed on this single case may lead to changes in approach that would legitimately concern a large number of individuals and this factor does add additional weight in this instance. However, this must be mitigated by the public authority's assurances that any major changes will go through discussion and public consultation.
72. The complainant also wanted the Commissioner to take into account the profoundly negative effect this case had on customers over eight years. The public authority objected to there being such an effect. It acknowledged that competition for large users of water has been slow to develop. It explained that from 1 December 2005 a specific water licensing regime [under the Water Act 2003] now governs the terms and prices on which third parties can supply water to large users using the existing public water supply system. This Act also moved to prohibit the original carriage arrangement that was the subject of the litigation (in the absence of an appropriate exemption). It explained that the new legislation developed on the 'retail minus approach' that was criticised by the CAT. The 'retail minus approach' means that operators are only required to provide a discount to a competitor where it can avoid, reduce or recover it in some way. This approach

- has also been supported by independent reports such as the final report commissioned by DEFRA by Professor Martin Cave<sup>9</sup>. The Commissioner has considered the withheld information, the background as above and believes that this factor does not have real weight in considering whether the withheld information should be disclosed. He notes that the encouragement of competition is a developing area and the public authority should be allowed to develop its position in good faith to enable the best procedure to be obtained.
73. He has also analysed those other factors that the complainant asked him to pay particular attention to when considering the public interest in the disclosure of the particular information that is being withheld.
74. The first is one of resources and providing additional accountability for the money spent in defending these cases unsuccessfully. The amount was estimated by the CAT to be between 2 and 3 million pounds and it was also ordered to pay an apportioned amount of Albion Water's costs that would amount to about £273,000. This is a considerable amount of money. He notes that the CAT discussed the potential difficulties of a public authority being liable for costs where they have reasonably but unsuccessfully defended proceedings and that there was no determination that the public authority had acted unreasonably in defending itself. The Commissioner having considered this argument and the withheld information believes that this argument should have limited value in the context of this case. The reason for this is that the legal advice it received about the *outcome* should not lose protection as in such circumstances it is crucial that a public authority should take advice to protect it going forward.
75. As an extension to this point, the complainant argued that the figures were not contained in the public authority's accounts and were hidden from view. Having considered the accounts the Commissioner notes that there is not a breakdown of how the public authority spent its money on legal expenditure, but there is an exceptional item in the 2006-7 accounts reflecting the money that it was ordered to pay to

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<sup>9</sup><http://www.defra.gov.uk/environment/quality/water/industry/cavereview/documents/cavereview-finalreport.pdf> at page 117:

For supplies to retailers or large customers, replacing the costs principle with an ex-ante access pricing framework based on long-run avoidable costs. Access prices would be determined by Ofwat at a water resource zone level on a common methodology, with reference to guidance from Defra and Welsh ministers. Such an approach should ensure that:

- an efficient network operator is able to cover their costs;
- tariffs are non-discriminatory; and
- efficient sources of supply are supported.

Albion Water as the result of this case<sup>10</sup>. The Commissioner does not believe that the exact amount paid by the public authority matters in respect to this case. It is relevant that a considerable sum was paid. However in consideration of the withheld information, as explained above, he does not believe that this adds further weight to the arguments of accountability in this case.

76. The final factor concerned whether the public authority has complied with its undertaking noted above. The Commissioner does not have the legal power to decide whether undertakings have been complied with. However, obviously the provision of the withheld information would enable members of the public to decide for themselves whether the undertaking has been complied with. The Commissioner sees similarities to the arguments considered by the Information Tribunal in *Lord Baker v the Commissioner and the Dept for Communities and Local Government* [EA/2006/0043]<sup>11</sup>. The Tribunal explained that the provision of the full information would enable the public to decide for itself whether spin has been applied or not and this should be a public factor that favours disclosure. The Commissioner therefore believes that this is another factor that could be said to favour disclosure.
77. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in disclosing the information:
- The enhancement of the public's understanding about the public authority's reaction to the judgments ;
  - The number of people who are affected by any change in approach – as mitigated by potential consultation;
  - The potential improvement in accountability and the limited increase in it due to the sums expended in this case;
  - Transparency of the public authority's action, in particular the information provided to the board; and
  - The ability for the public to decide for itself whether the undertakings have been complied with.

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<sup>10</sup> [http://www.ofwat.gov.uk/aboutofwat/reports/resourceaccounts/rpt\\_rac\\_2006-07.pdf](http://www.ofwat.gov.uk/aboutofwat/reports/resourceaccounts/rpt_rac_2006-07.pdf) at page 5.

<sup>11</sup><http://www.informationtribunal.gov.uk/Documents/decisions/lordbakerVinfoCommanddeptOfCommandlocgov1jun07.pdf>

## Balance of the public interest arguments

78. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* (EA/2007/1036)<sup>12</sup> explained the Tribunal's approach when considering the balance of public interest in this exemption (at paragraph 37):

*'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'*

79. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071)<sup>13</sup>, the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;
2. there needs to be equally strong countervailing factors for the public interest to favour disclosure;
3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there

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<sup>12</sup>This decision can be found at:

[http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO\\_0136\\_webdecision\\_080808.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf)

<sup>13</sup> At paragraph 15.

are clear indications that it has ignored unequivocal advice which it has obtained.

80. In this case the Commissioner believes that the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege is important. He notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of protection that is to be expected. He believes that this case represents the circumstances that were envisaged to be covered by the exemption in section 42(1).
81. The Commissioner has had the opportunity of seeing the withheld information. Clearly he cannot reveal its contents. In his view, however, it does not reveal that the public authority may have misrepresented the advice which it has received, or that it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained. Indeed he believes that the advice has been acquired in good faith and has been done to anticipate potential problems.
82. The Commissioner has considered the weight of the public interest factors in disclosure but is not convinced that they come close to being equally strong countervailing factors that would override the public interest factors in maintaining the exemption in the circumstances of this case.
83. For the reasons above, the Commissioner is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure for all three items.
84. He therefore determines that the exemption found in section 42(1) has been applied correctly to the three items of withheld information.

## **Procedural Requirements**

### *Section 10(1) and section 17(1)*

85. Section 10(1) provides that the public authority should comply with both sections 1(1)(a) and 1(1)(b) within twenty working days of receiving the request. In this case the public authority took well over twenty working days to answer the request dated 18 May 2009. It should have complied with section 1(1)(a) within the statutory timescales and therefore breached section 10(1). The public authority also breached section 17(1) for not issuing its refusal notice within 20 working days of that request.

## The Decision

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86. The Commissioner's decision is that the public authority dealt with the following elements of the request for information in accordance with the Act:

- *It was entitled to withhold the three items of information in the scope of this case by virtue of section 42(1) of the Act.*

87. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- *The failure to issue a response within twenty working days breached section 10(1) and section 17(1).*

## Steps Required

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88. The Commissioner requires no steps to be taken.

## Right of Appeal

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89. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 23<sup>rd</sup> day of August 2010**

**Signed .....**

**Alexander Ganotis  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

Section 1 provides that:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

..

#### Section 2 - Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21,

(b) section 23,

(c) section 32,

(d) section 34,

- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
- (f) in section 40—
- (i) subsection (1), and
- (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41, and
- (h) section 44.

### **Section 10 - Time for compliance with request**

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

- “the date of receipt” means—

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom

### **Section 17 - Refusal of Request**

Section 17(1) provides that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

...

### **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.

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