



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 11 April 2006

Name of Public Authority: Bexley Council

Address of Public Authority: Bexley Civic Offices
Broadway
Bexleyheath
Kent
DA6 7LB

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint from the above person (the "complainant") which states that on 2 February 2005 the following information was requested from Bexley Council (the "Council") under section 1 of the Freedom of Information Act 2000 (the "Act"):

"... the documentation which raised doubts about the lawful use of my client's land at Parsonage Lane, and for a copy of your response to the planning department on the obscure issue of **abandonment**".

It is alleged that:

The Council failed to provide the complainant with the information requested in accordance with their obligations under section 1(1) of the Act because they applied the exemption in section 42(1) (legal professional privilege) of the Act inappropriately.

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

This complaint centres on two planning applications made to the Council's Planning Department by the complainant on behalf of his client. The Commissioner recognises that the request for information about legal advice in relation to these applications could have been regarded as environmental information and could have been considered under the Environmental Information Regulations 2004. However, the Commissioner considers that the outcome of this particular complaint would have been the same whether it was dealt with under the Freedom of Information Act or the Environmental Information Regulations: furthermore, neither party raised this as an issue. In light of this the Commissioner did not see any merit in pursuing the matter and has determined the complaint by reference to the Freedom of Information Act.

Section 1(1) of the Act states:

"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 1(4) of the Act states:

"The information –
(a) in respect of which the applicant is to be informed under subsection (1)(a), or
(b) which is to be communicated under subsection (1)(b),
is the information in question held at the time when the request is received ..."

Section 16(1) of the Act states:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

Section 42 (1) of the Act states:

"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".

It has been established that the information in question is limited to an email dated 18 March 2005 from a legal adviser to the Council's Planning Department. The complainant first requested information about legal advice on 2 February 2005, which was before written advice had been provided (although the Council have said that the subject had been discussed orally with their lawyers). The Council's response was to state to the complainant that any advice from the Legal Services Department to the Planning Department was confidential legal advice and exempt from disclosure.

The Complainant wrote to the Council on 1 March 2005 asking, under the Act, for his request for information to be reviewed. The Council replied on 24

March 2005 stating that there was an exemption in relation to disclosure of legal advice under the Act; and that they considered it to be in the public interest to maintain the provision of free and frank advice between the Planning and Legal Services Departments by keeping the details of the advice confidential. No specific exemption was cited, but it is clear that the Council were relying on the section 42(1) exemption.

The Commissioner's decision is as follows:

The recorded legal advice was received by the Council after the complainant's request for information and after his subsequent request for a review. Therefore, as the information did not exist at the time of the request, the provisions of section 1(1)(a) of the Act did not apply, and the Council were under no obligation to provide it. However, the Commissioner is not satisfied that the Council complied with section 1(1)(b) of the Act as they failed to inform the complainant whether or not they held the information. On receiving the request, rather than denying that they held any recorded information, the Council answered in a way that implied it did exist, though at that time the information was only in the personal knowledge of those who had been a party to oral discussions with Legal Services, and not in recorded form.

It is also the Commissioner's decision that the Council failed to comply with section 16(1) as they did not provide assistance to the complainant in making his request. Knowing that the complainant was making a request for information about legal advice, it would have been appropriate for the Council to assist him by explaining in their letter of 24 March 2005 that there was now one relevant email in existence, but that they considered the information to be covered by legal professional privilege and exempt from disclosure. This would have allowed the complainant to make a further request for information had he so wished.

The Commissioner has now given the Council advice as to what section 16 of the Act requires them to provide in the way of advice and assistance to people making requests for information.

As the Commissioner is satisfied that the recorded information did not exist at the time that it was requested, it is not appropriate for him formally to consider whether it is exempt from disclosure by virtue of section 42(1).

Action Required

In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he does not require any formal remedial steps to be taken by Bexley Council.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Reference: FAC0070855

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 11th day of April 2006

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF