



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 7 June 2006

Public Authority: Norfolk County Council

Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Public Authority has dealt with the complainant's request in accordance with Part I of the Act. Therefore the Public Authority is not required to take any action under the Freedom of Information Act in this matter.

However although the Commissioner is satisfied that the information withheld by the Public Authority was exempt information under the Freedom of Information Act 2000 and that, where appropriate, the exemptions could be maintained in the public interest, the Council had not applied the appropriate exemptions. Principally this is because the Public Authority failed to recognise that much of the information requested was personal data about the applicant, access to which should have been considered under the Data Protection Act 1998 (the 'DPA').

1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or

- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the Public Authority.

2. The Complaint

- 2.1 The complainant has advised that on 1 January 2005 the following information was requested from the Public Authority in accordance with section 1 of the Act.

- 2.2 "...all information that pertains to [the property] and the letting thereof to [the complainant] also any other information appertaining to [the property] or [the complainant] during the period of March 1 2001 to the present day."

- 2.3 The complainant specifically referred to the Freedom of Information Act in her request and asked for the right to inspect the records containing the information and to have copies of those records.

- 2.4 The Council received the request on the 4 January 2005 and wrote to the complainant on the 11th January 2005 in order to clarify the scope of the request. Clarification was provided during a telephone call on the 25 January 2005. It was agreed that;

- The only information the complainant wished to access about herself was that held by those departments involved in the management of the property.
- She did not want copies of correspondence between herself and the Council as she already had copies of these documents.
- She only wanted information about the property in the context of her connection with it and did not want information about the property in general.
- In particular the complainant was interested in the information contained in internal communications including emails, minutes of meetings etc.

- 2.5 On the 10 February 2005 the complainant inspected a large amount of information and was given the opportunity to take copies of any of that information she wished. However she was also given a refusal notice in the form of a letter explaining that some of the information identified as falling within the scope of her request had been withheld on the following grounds;

Section 40 – Some of the information was exempt on the basis that it was personal data about third parties which could not be disclosed without breaching the principles of the DPA.

Section 41 – To disclose two documents would constitute a breach of confidence actionable by a third party.

Section 36 – The disclosure of other information would, in the opinion of the qualified person, prejudice the conduct of public affairs by inhibiting the free and frank exchange of views for the purpose of deliberation.

Section 42 – Further information was withheld because it was subject to legal professional privilege.

Sections 36 and 42 are subject to the public interest test and the Council found that, in the circumstances, the public interest in favour of maintaining these exemptions outweighed the public interest in disclosing the information.

- 2.6 The Council also withheld a small amount of information contained in the notes from a meeting of a Charitable Trust on the basis that the information did not fall within the scope of the request.
- 2.7 The complainant complained to Commissioner on the 16 February 2005 expressing her concern over the application of these exemptions. During the course of the investigation the complainant withdrew her complaint in respect of the application of section 40, partly to help expedite matters. Therefore this Decision Notice does not consider how the Council applied this exemption in relation to third party personal data.
- 2.8 The Council waived its opportunity to review how it had handled the request as the matter had already been considered by senior officers, including the Council's Monitoring Officer in order to claim the exemption provided by section 36 – prejudice to the conduct of public affairs. In light of this the Council considered that any review was unlikely to overturn the original decision to withhold the information in question.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides that –

“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.

3.1 Section 36 – Information likely to prejudice the effective conduct of public affairs.

36. - (1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

3.2 Section 40 – personal data of which the applicant is the data subject.

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

3.3 Section 41 – Information provided in Confidence.

41. - (1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

3.4 Section 42 – Legal Professional Privilege

42. - (1) 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.

4. Review of the case

- 4.1 The information requested relates to the complainant's occupation of an historical industrial building (the 'property'). The property is owned by the Council but managed on its behalf by a Charitable Trust (the 'Trust'). Close to the property is a cottage and another building which the Trust leased from another trust. The proximity of the cottage and other building to the property provided the opportunity for who ever lived in the cottage to open the property to the public. There was also the potential for the other building to be developed as a visitor centre. In March 2001 the complainant initially accepted a residential tenancy for the cottage from the Trust and showed visitors around the property under a service contract with the Council. The Council did not consider the complainant to be an employee but rather a self employed sole trader. In the long term it was envisaged that the property could be operated as a working industrial building. To this end the Council and the Trust began to negotiate the lease of the property to the complainant, while at the same time the potential to develop the other building as a visitor centre was explored.
- 4.2 Unfortunately these negotiations ran into difficulties and there was a deterioration in the relationships between the complainant and the other parties. It did not prove possible to agree terms at this stage and in December 2002, the complainant made a complaint to the Council about its conduct over these negotiations which was dealt with through the Council's complaints procedure. This consisted of three stages with the third and final stage involving consideration of the complaint at the Chief Executive level and culminated in a Stage 3 Report being produced in May 2003, following which negotiations recommenced. Ultimately however the project did not come to fruition and the complainant is no longer associated with either the property or the cottage and other building.
- 4.3 At the start of the investigation the Council provided the Commissioner with a copy of the information that had been withheld, clearly marked to identify which exemptions had been relied on to withhold particular pieces of information, together with an explanation of why the exemption was engaged and, where appropriate, how the Council had weighed up the public interest test. Where the Council had applied section 36 it provided a signed statement by the qualified person that, in his opinion, the disclosure of the information would prejudice the conduct of public affairs, this was supported by the submission that was made to him explaining how that prejudice would occur.

- 4.4 A lot of the information consisted of internal communications, mainly between the Planning and Transportation Department and Legal Services. Other information related to correspondence with third parties including the trusts involved. Some of the information discussed the Council's legal position in relation to its dispute with the complainant whilst other information considered her suitability as a tenant.
- 4.5 The complainant had originally made her request citing the Act and it had clearly been dealt with by the Council under the Act. In light of this the Commissioner started to consider the complainant's right of access to this information under the Act. To this end the Commissioner wrote to the Council on the 25 May 2005 setting out his initial views on the application of sections 36 – prejudice to the conduct of public affairs, 41 – information provided in confidence and 42 – legal professional privilege, in relation to each piece of information that had been withheld. In very broad terms, although the Commissioner accepted that sections 36 and 42 were engaged he sought additional explanations of how the Council had weighed up the public interest arguments for maintaining these exemptions, particularly in relation to the information that had been withheld under section 36. In relation to the information that had been withheld under section 41 – information provided in confidence, the Commissioner's initial view was that the exemption was engaged.
- 4.6 Following these representations the Council agreed to disclose some additional information, however due to later developments in the case, further information was not released until around the 12 December 2005.
- 4.7 As the Commissioner continued to investigate the complaint he began to consider whether the majority of the information was in fact personal data about the complainant. The Commissioner recognises that it is not always easy to identify what is personal data. In this particular case determining what or who is the focus of the information can depend on how broad a view the decision maker takes when trying to place individual pieces of information in context, particularly where personal data is interspersed with non-personal information in the same document. In this case the Commissioner considered that the most practical approach was to take a broad view and to consider the information in the context of the dispute that the complainant was involved in with the other parties over her occupation of the property. He also took account of the fact that the information related to the complainant's activities as a sole trader and that to a considerable extent it dealt with her suitability as a tenant. Having taken this view, the Commissioner decided that the majority, but not all, the information requested was personal data about the complainant.
- 4.8 Where information is personal data about the complainant, then for the purposes of the Act, the information is exempt under section 40 (1). The Commissioner advised the Council on the 25 October 2005 that he considered much of the information in question was personal data about the complainant and that

therefore it would be necessary to consider her right of access to this information under the DPA.

- 4.9 The Council responded on the 15 December 2005. It did not dispute that much of the information was personal data about the complainant except in relation to one particular email dated 11 July 2002. It argued that the information withheld from this email was not personal data and continued to claim that the two sentences redacted from this document were exempt under section 36.
- 4.10 In considering the application of the DPA to the rest of the request, the Council decided that a lot, but not all, of the information which it had previously withheld under section 36 of the Act, also attracted legal professional privilege and therefore could be withheld under the exemption relating to legal professional privilege contained in the DPA. In relation to the other information originally withheld under section 36 the Council accepted that the information was personal data about the complainant and subsequently released or agreed to release information from a further seven documents.
- 4.11 When the Council originally provided the Commissioner with copies of the information that it had withheld it organised it into sets according to the exemptions that had been relied on. So there was a set of papers labelled as being withheld under section 40, a set for section 41 and one for section 42. For clarity the information withheld under section 36 was organised into four separate annexes A to D:

Annex A – comprised of emails and memoranda from 3 October 2003 to 22 December 2003 which had been withheld in their entirety. The Council now claimed that all this information attracted legal professional privilege

Annex B – comprised of correspondence from 2002. In most cases only a portion of the information contained in this correspondence had been withheld. The correspondence did not constitute communications between a legal adviser and his client and so the Council did not claim this information attracted legal professional privilege. The Council released five pieces of information under the access provisions of the DPA. However the Council did continue to withhold information from the email of the 11 July 2002 as discussed above.

Annex C – comprised of three emails. The Council accepted that the information it had withheld from two of these emails was personal data and stated that it had released one piece of information and that it was prepared to release the information from the other. In relation to the third email the Council had also originally claimed this information also attracted legal professional privilege and so was exempt under section 42. The Council explained that it wished to maintain its claim to legal professional privilege in respect of this information.

Annex D – comprised of notes to a consultation of a draft of the stage 3 report. The Council extended its claim to legal professional privilege to this information.

5. The Commissioner’s Decision

5.1 Section 40 – personal data of which the applicant is the data subject.

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

5.1.1 The information that falls within the scope of the complainant’s request comprises of both personal data and non-personal data. Personal data about the complainant is exempt for the purposes of the Act under section 40(1). This exemption is not subject to the public interest test. However access to this information should be considered under the provisions of the DPA

5.1.2 Although the Council did not initially claim this exemption, it should have considered whether the information was personal data about the complainant, giving the complainant a right of access under the DPA. Section 40(1) did in fact apply to a large part of the information requested and when the Council applied the exemption after the intervention of the Commissioner, additional information was released to the complainant in accordance with her rights under the DPA.

5.1.3 Although the majority of the information may be personal data about the complainant it is still necessary to consider whether any, residual, non-personal information should be disclosed under the Act. In this case the Commissioner has adopted a pragmatic, approach when considering the complainant’s rights of access to information. Where it would not make any difference to the complainant’s right of access to the information, the Commissioner has not considered it necessary to separate the personal data from the non-personal information. This is explained in more detail later.

5.2 Section 41 – Information provided in Confidence.

41. - (1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

5.2.1 The Council withheld the information from two pieces of correspondence on the basis that disclosing the information would constitute an actionable breach of

confidence. Much of the information withheld from one of the documents does not relate to either the complainant or the property and so the Commissioner does not consider this information to fall within the scope of the request. The remaining information from the two documents was either clearly provided in confidence or could not be released without betraying that confidence.

5.2.2 The law of confidence has its own inbuilt public interest test. In this case the Commissioner is satisfied that in any event there is no overriding public interest in disclosing the information. His decision is that the exemption provided by section 41 is engaged in respect of this information.

5.2.3 There is also a very strong argument that the information from the documents falling within the scope of the complainant's request is personal data about her. This being so the information would also be exempt under section 40(1).

5.3 **Section 42 – Legal Professional Privilege**

42. - (1) 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.

5.3.1 Initially the Council only cited this exemption in relation to information contained in eight documents. However when the Council considered the complainant's right of access under the DPA, it extended its claim of legal professional privilege to much of the information which had previously been withheld under section 36 of the Act. The Commissioner decided that it was not necessary to confine the claim of legal professional privilege solely to the personal data contained in the body of this information but that it was appropriate to also consider whether any of the non-personal data was exempt under section 42 of the Act.

5.3.2 Although some of the information to which this exemption was applied may constitute personal data about the complainant, the Commissioner does not consider it necessary to go through the exercise of separating the personal data from the non- personal information. This is because under the Act a claim to legal professional privilege is subject to the public interest test and so provides a higher test than the legal professional privilege exemption available under the DPA. Hence, where the Commissioner is satisfied that the information can be withheld under section 42 of the Act, then any personal data forming part of that information would also be exempt from the DPA's access provisions. In these particular circumstances the fact that information was personal data would not affect the complainant's right of access. However if section 42 cannot be maintained in the public interest it would become necessary to determine whether the piece of information in question is personal data or not.

5.3.3 This Notice will first address whether the information to which section 42 was originally applied does attract legal professional privilege, then consider the

information to which a claim for legal professional privilege was only made later, before looking at the public interest arguments.

5.3.4 When considering the complainant's right of access to the information which was originally withheld under section 42 of the Act the Commissioner's decision, for the reasons explained below, is that the exemption is engaged.

5.3.5 The information in question includes communications between legal advisers and their clients, or in one case, the client's agent, together with internal discussions within the Council's Legal Services Department. There is also advice provided to the Trust by its legal advisers and the subsequent discussion of that advice. Although the Trust has shared this information with the Council, the Commissioner takes the view that the Trust has not waived its right to claim legal professional privilege. This is because there is a very close relationship between the Trust and the Council, especially in connection with the Trust's management of the property and associated buildings, and the Trust would therefore have expected the Council to respect the sensitivity of the advice it had shared. The legal advice was provided during a period commencing in November 2002, at which time negotiations had already run into difficulty and relations between the parties were starting to deteriorate. The advice was clearly provided at a time when the Council and the Trust judged they needed the input of their legal advisers to safeguard their interests.

5.3.6 This Notice will now consider the information that was originally withheld under section 36 but to which the Council later extended its claim of legal professional privilege. The Commissioner's decision in respect of this information is set out below.

5.3.7 The information in question is a combination of both personal data and non-personal information. It consists of ongoing communications between the Council's Legal Services Department and other officers and elected members. There is also a communication between Legal Services and an agent of the Council.

5.3.8 In its letter of the 15 December 2005 the Council set out the context in which the advice was given as follows:

The complainant's "initial complaint which was the subject of the Stage 3 Report raises amongst other things: the proper terms of a business lease of the [cottage and the other building, the Trust's legal obligations as a tenant (*of the cottage and the other building*)], the fitness of the Council in carrying out its legal duties as custodian of a public asset, the competence including legal competence of its managing agent, the legal status of promises made in negotiations, a compensation claim and a new contract as custodian of the [property]."

5.3.9 In light of this the Council argued that it needed advice on the law, advice on how to prudently and sensibly act in relation to the complainant and the issues she raised, together with presentational advice on its actions and responses.

5.3.10 The Commissioner is satisfied that within this context the information does attract legal professional privilege.

Public Interest Test.

5.3.11 In weighing the public interest in favour of disclosure against the public interest in maintaining the exemption the Commissioner has considered how the events surrounding the property have affected the complainant. It is very clear that the Council's decisions in relation to the management of the property have had a major impact on the complainant. They directly affected her business plans which in turn were linked to her residential occupation of the cottage. The Commissioner has also had regard to the fact that the complainant pursued her concerns regarding the Council's treatment of her through its internal complaints procedure. He has therefore considered the effect greater transparency of how this complaint was investigated and the Council's actions following the recommendations of the Stage 3 Report, would have on building the public's confidence in the Council's internal complaints procedure. Finally the Commissioner has also considered the public interest in providing information that reveals how the Council, or its agent, has managed one of its assets, the property, for the benefit of the public.

5.3.12 However the Commissioner recognises that there is also a strong public interest in protecting the confidentiality of the communications between a public authority and its legal adviser. Without some degree of certainty that legal advice will remain confidential, public authorities may be reluctant to seek advice when appropriate, or that the advice provided may lack the necessary frankness. It is important that public authorities are able to base their decisions on robust legal advice which may identify both strengths and weaknesses in an argument. Without this ability there is a risk that a public authority may not have proper regard for its legal obligations or fail to properly safeguard its position. Ultimately this would be detrimental to the public it serves. This approach accords with the view taken by the Information Tribunal in the case of Christopher Bellamy v The Information Commissioner, appeal number EA/2005/0023, in which the Tribunal found that there was a strong element of public interest inbuilt to the principle of legal professional privilege.

5.3.13 There may be occasions where there are concerns that a public authority has recklessly disregarded the legal advice it has received. In such circumstances there may be a strong public interest argument in favour of disclosing that advice. This is not the case in this instance.

5.3.14 The Commissioner's decision is that on balance the public interest in maintaining the exemption provided by section 42 does outweigh the public interest in disclosure.

5.4 Section 36 – Information likely to prejudice the effective conduct of public affairs.

36 - (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (b) would, or would be likely to, inhibit
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation.

5.4.1 The Council initially claimed that some information was exempt under sections 36(2)(b)(i) and (ii) which provide information is exempt if its disclosure would, or would be likely, to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.

5.4.2 The information to which section 36 was applied consists of a combination of both personal and non-personal information. As discussed at 5.3.1, when the Council later considered the request under the DPA it extended its claim to legal professional privilege to much of this information but released, or agreed to release, other information which it accepted was personal data about the complainant and which was not privileged.

5.4.3 However as discussed at 4.9, the Council maintained that information withheld from an email dated 11 July 2002 was not personal data. Since the information contained in this document cannot attract legal professional privilege, the only ground available to the Council for withholding it is that the information is that disclosure of the information would prejudice the free and frank exchange of views and advice and therefore is exempt under section 36 of the Act. No similar exemption exists under the DPA. Therefore it is important to determine whether or not this information constitutes personal data in order to determine the complainant's right of access to it.

5.4.5 The Commissioner is satisfied that within the context of the developing dispute over her occupation of the property, the complainant is the focus of the information.

The information implicitly expresses an opinion about the complainant and indicates intentions towards her. Therefore the Commissioner's decision is that this information is personal data about the complainant and is therefore exempt from the Act under section 40(1). Whether the complainant has a right of access to this information under the DPA is not considered in this Decision Notice, but is addressed separately.

- 5.4.6 Some non-personal information is also caught by the extended claim to legal professional privilege. The Commissioner considers that where information does attract legal professional privilege and a public authority wishes to protect the candour of that legal advice, section 42 is the most appropriate exemption to claim and the exemption provided by section 36 is less appropriate.

5.5 Other Matters

The Council withheld a limited amount of information contained in notes from a meeting of the Trust that was held on 18 October 2001 on the basis that the information did not relate to the property or the complainant and so did not fall within the scope of the request. During the course of the investigation the Council drew the Commissioner's attention to the fact that the complainant had objected to this redaction as she was not satisfied that the information was in fact outside the scope of her request. Having viewed this piece of information the Commissioner agrees with the Council that the information is a general comment on the operational matters of the Trust which do not relate to the complainant or the property.

5.6 In summary

- 5.6.1 The Commissioner's decision is that the information which the Council withheld from the complainant was exempt information under the Act and that where the information engaged an exemption subject to the public interest test, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Therefore the Council did not breach its duty to communicate this information to the complainant in accordance with section 1 of the Act.
- 5.6.2 However the Council did not recognise that much of the information was personal data about the complainant and, although exempt under the Act, access this information should have been considered under the provisions of the DPA. The exemption in relation to personal data about an applicant is not subject to the public interest test.
- 5.6.3 The Council stated that information in two pieces of correspondence was exempt under section 41 on the grounds that its disclosure would constitute an actionable breach of confidence. The Commissioner's view is that some of the information to which this exemption had been applied did not fall within the scope of the request. The Commissioner was satisfied that the remaining information was covered by the exemption. Section 41 is not subject to the public interest test. There is also a

strong argument that this confidential information is also personal data about the complainant and so was also exempt under section 40(1).

5.6.4 The Council relied on section 36 to withhold much of the non-personal information. The Commissioner does not consider it appropriate to apply this exemption where an alternative, more specific exemption exists. In this particular case the Commissioner considers it would be more appropriate for the Council to consider the exemption in relation to legal professional privilege provided by section 42.

5.6.5 The Council originally applied section 42 to a limited amount of information. However it later considered the complainant's request under the DPA at which time it extended its claim of legal professional privilege to additional information. The Commissioner's decision is that all the non- personal information which the Council eventually claimed was subject to legal professional privilege did engage the exemption provided by section 42 and that the exemption could be maintained in the public interest.

6. Action Required

In light of the above the Commissioner does not require the Council to take any action.

7. Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Reference : FS50064464

Dated the 7th day of June 2006

Signed

**Graham Smith
Deputy Commissioner's Office
Information Commissioner
Wycliffe House
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SK9 5AF**