

Freedom of Information Act 2000 (Section 50)

Decision Notice

5 March 2007

Public Authority: St Albans City and District Council
Address: District Council Offices
St Peter's Street
St Albans
Hertfordshire
AL1 3JE

Summary

The complainants had requested all documents and records held regarding planning applications submitted by a neighbour, their subsequent complaints in respect of how the planning applications were processed, and complaint to the local government ombudsman. The Council provided some of the information requested, withholding the remainder under sections 40 and 42 of the Freedom of Information Act 2000 (the "Act"). Following the intervention of the Commissioner the Council agreed to release additional information to the complainants, however, it insisted on withholding six documents citing the exemptions mentioned. The Commissioner is satisfied that the exemptions have been applied appropriately therefore; the Council are not required to take any further action.

The Commissioner's Role

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 Act. This Notice sets out his decision.

The Request

2. On 9 February 2005, the complainants submitted a request for information as follows:
 - Please release all documents, correspondence, records of communications and other material however held by you concerning planning application 5/02/1442 and 5/02/2322 and associated and related material pertaining thereto, including our formal complaints regarding the case and our subsequent complaint regarding Mr Lerner's

[Strategic Director, Enterprise and Civic Environment] handling of the complaint. Also, documents etc. relating etc. to our complaint to the Local Government Ombudsman. This request also includes all documentation and material related to the processing of our Data Protection Act requests and queries by others such as Ms Adley [Strategic Director, Corporate Services], and Mr Scully [Information Security Officer and Data Protection Officer].

3. The complainants went on to describe where they believed the information might be held, quoting identifiers such as, file references and names of particular staff members and councillors.
4. The Council sent an acknowledgement on 27 February 2005 and issued a refusal notice for part of the information requested on 7 March 2005. The refusal notice referred to section 42 of the Act, legal professional privilege and the Data Protection Act (although not mentioned explicitly in the letter this equates to section 40 of the Act). The letter was accompanied by a table that stated the name of the file containing exempt documents, the section of the Act relevant to the refusal to supply those documents and a short explanation. The table did explicitly mention section 40, but also referred to section 41 in connection with the file relating to the complainant's complaint to the Local Government Ombudsman, whereas, the explanation for this entry mentioned legal professional privilege. It is reasonable to assume this was a typographical error, especially as subsequent correspondence and communication between the Council and the complainants and the Commissioner has only been in reference to sections 42 and 40. The refusal notice also stated that the Council 'does not hold files for councillors, any relevant documents being contained in the departmental files or the complaints files.'
5. In a letter dated 24 March 2005 and addressed to the Head of Corporate Services, the complainants challenged the partial refusal to supply them with the information they had requested providing the Council with detailed argument. They claimed that the Council has misinterpreted the exemptions.
6. The complainants pointed out the following,
 - 1) In relation to legal professional privilege (section 42), the complainants referred to the Commissioner's Awareness Guidance No. 4, specifically mentioning
 - a) that the exemption is qualified,
 - b) that there is a distinction between advice privilege and litigation privilege,
 - i) that advice given to a colleague on a line management issue will not attract privilege,
 - ii) that litigation privilege appertains only where litigation is contemplated or pending, and
 - iii) that privilege resides with the client who can rescind the privilege.

- 2) The complainants then made reference to section 41, information provided in confidence, but as this exemption has not actually formed part of the refusal to supply information it will not be addressed in this notice
 - 3) In relation to section 40, personal information,
 - a) the complainants again refer to the Commissioner's Awareness Guidance (No.1), they also mention
 - b) that information about a person acting in a work or professional capacity should normally be disclosed
 - i) the fact that someone has objected to their information being disclosed is not an absolute bar to disclosure
 - ii) they question if anyone involved has actually objected to their personal information being released.
 - 4) The complainants refer to the public interest test,
 - a) they again mention the Commissioner's guidance (No.3), and point out two factors they believe to be particularly relevant, namely
 - i) 'promoting accountability and transparency by public authorities for decision taken by them', and
 - ii) 'allowing individuals...to understand decisions made by public authorities affecting their lives'.
 - 5) The complainants point to members of staff and councillors who they believe should have been in possession of information relevant to their request and mention that they had been advised by the Information Commissioner's Office that the Act 'obliges [the Council] to disclose [documents], from whatever file in which they are held...'
 - 6) The complainants also raised several other points which are either not relevant to the investigation of their Freedom of Information complaint in that these matters lie outside the Commissioner's remit, or form part of the arguments already listed.
7. The receipt of this letter was acknowledged on 1 April 2005; however, the Council failed to recognise that this letter formally represented the applicants' right to request a review of the decision and informed the complainants that their letter had been passed to the officer responsible for making the original decision. On 19 April 2005, the complainants challenged this action and in a letter dated 27 April 2005, they were informed that their request had been passed to a more senior officer for review.
8. The complainants received a very detailed letter dated 7 July 2005 stating the outcome of the internal review of their request. The Council informed the complainants that following the review procedure, more information was being made available to them, but that some information was still to be withheld under section 42 and section 40.
9. The Council responded to the points raised in the complainant's letter dated 24 March 2005 in which they requested the review.

- 1) The Council confirmed that it had considered the Commissioner's guidance and stated that it had taken into account the difference between advice privilege and litigation privilege. It also pointed out that the Council was the client and that the Council had decided not to waive its right to privilege when considering the public interest.
 - 3) The Council confirmed that in relation to the two documents it still wished to withhold under section 40, personal information, the individual concerned had indeed been asked, and had not consented to the disclosure of those documents. The Council believed that to release those documents would have breached the first data protection principle as set out in Schedule 1 of the Data Protection Act 1998.
 - 4) The Council responded to the issue of the public interest test by referring to the inherent public interest in preserving the right of the Council to obtain legal advice from its legal department on a confidential basis. The Council also stated that the legal advice did not fall within the 'category of advice to a colleague on a line management issue'. It informed the complainant that the advice withheld relates to 'the exercise of the Council's legal powers and duties in respect of planning and data protection matters.'
 - 5) The Council once again informed the complainants that they do not hold files for councillors.
10. The Council also responded to other points made by the complainants, which are not reiterated here as they are either not relevant to the Freedom of Information complaint or will be dealt with in relation to the points already mentioned.

The Investigation

Scope of the case

11. On 4 May 2005, the complainants contacted the Commissioner to complain about the way their request for information had been handled. On 22 May 2005, the complainants wrote again, specifically complaining about:
 - the refusal to supply information following the application of exemptions which the complainants believe had been misinterpreted;
 - the failure of the Council to pass the request for a review to an appropriate person until prompted by the complainants;
 - the time being taken for the review process (at this stage the complainants had not received the outcome of the review); and
 - the lack of advice and assistance that the Council had provided to them.
12. As the Council has released information to the complainants as a result of the Commissioner's intervention, his decision in this notice will be restricted to whether the authority has complied with the Act in terms of the information that the Council still seeks to withhold from the complainants.

Chronology

13. The Commissioner contacted the complainants and the Council on 10 April 2006 requesting that he be provided with a copy of the result of the internal review (and any other relevant documentation and correspondence) as this had not been supplied.
14. The complainants responded by letter dated 17 April 2006 and the Council 27 April 2006. The complainants supplied a copy of the internal review outcome. The Council provided the Commissioner with copies of correspondence, which took place between the complainants and the Council from the internal review decision of 7 July 2005 through to a letter dated 6 April 2006.
15. After examining the copy correspondence sent by the Council, it is clear that some communication relates to other matters between the complainants and the Council and are therefore, not relevant to the Freedom of Information complaint. However, several points gleaned from this correspondence are worth noting.
 - Following receipt of the internal review, the complainants wrote to the Council on 30 July 2005. In this letter, they expressed the Council's obligation in respect of information held by councillors more clearly than before, they said,
 - *'...we told you in our letter of 24th March that Mr Scully has not supplied us any material from Councillors and that the Information Commissioner had advised us that the Council is obliged to supply documents involving Councillors (concerning Council business) irrespective of whether they are held in the Council's files or in the Councillor's own files at their residences. We would be grateful therefore to receive as a matter of urgency copies of all documents involving and relating to Councillors (not including letters to and from ourselves).*
 - In a letter dated 11 August 2005, the Council supplied the complainants with further information and indicated that it has contacted councillors asking them to supply copies of any documentation they held regarding the complainant's request.
 - The Council wrote on 6 September 2005, it supplied information received by some councillors, and listed the other councillors it was still waiting to hear from.
 - On 8 September 2006, the Council sent information received from a councillor.
 - On 15 October 2005, the complainants wrote asking whether the Council had heard from the remaining councillors, and they reminded the Council that they originally made their request for information in February and the Council were under a statutory duty to supply information within 20 working days. In addition, the complainants asked that, in the interest of clarity, the Council provide them with a list of documents that the Council was still withholding from them.
 - On 19 October 2005, the Council informed the complainants that it had received a response from another councillor and that no information was

held by him. Also, the Council stated that the information not disclosed was listed in the letter dated 7 July 2005.

- The complainants wrote again and asked whether the remaining councillors had responded and complained about the delay.
- On 6 December 2005, the Council wrote enclosing documents received from one of the remaining councillors and informed the complainants that reminder letters had been sent to the two councillors from whom it had not received a response. The Council also wrote that they were seeking guidance from the Information Commissioner on the issue of documents held by councillors.
- In a letter dated 16 December 2005, the complainants once again asked for a list of the documents that were being withheld from them.

16. The complainants sent the Commissioner a copy of the Local Government Ombudsman's report into their complaint against the Council. In addition, the complainants were concerned to ensure that the Commissioner had access to all the relevant correspondence related to their Freedom of Information request. Therefore, the Commissioner sent a list of all correspondence on file accurate as of 23 June 2006. As a result of this, the complainants forwarded copies of three letters sent by them to the Council (15 June, 27 June, 4 July 2005), a letter from the Council to them (27 April 2005), and background information relating to their complaint to the Local Government Ombudsman. The complainants claimed that these documents demonstrated the difficulties they had faced in getting the Council to respond to their request and subsequent complaint, and that they would provide the Commissioner with useful contextual information.
17. It is clear that the complainants found it necessary to remind the Council of its obligations and enquire as to when they would receive the outcome of the internal review repeatedly.
18. On 1 August 2006, the Commissioner contacted the Council. The Council were asked to reconsider their decision to withhold information from the complainants bearing in mind the amount of time that had passed since the request was first made. The Council were also directed to the Information Tribunal's decision, *Mr M S Kirkaldie v Information Commissioner* (4 July 2006) EA/2006/001, which discussed the issue of legal professional privilege (albeit in relation to the Environmental Information Regulations 2004, the points made remain relevant).
19. Concerning the information withheld under section 40, the personal information of a member of staff who had refused to give consent for the information to be released, the Council were asked about redaction of the information. The Council agreed to reassess the information still being withheld and send copies of the information to allow the Commissioner to make his own assessment on the application of the two exemptions.
20. On 5 August 2006, the Commissioner received another letter from the complainants with which they enclosed further copies of correspondence with the Council. The complainants wished to demonstrate fully the perceived difficulty they had in dealing with the Council.

21. The Council responded to the Commissioner with a letter dated 4 September 2006. It included a list of the outstanding documents, copies of those documents, and confirmed and expanded upon its reasoning for withholding the remaining documents. The Council gave assurance that the Commissioner's Awareness Guidance documents of relevance had been taken into account. In relation to the two documents withheld under section 40, the Council confirmed that the third party concerned had been asked again if they would consent to release and had again refused to give permission. It believed that redaction of the documents would not provide the complainant with meaningful information and once again pointed to the junior status of the employee in question. Regarding section 42, the Council stated that it had reassessed the documents being withheld as requested. It was now prepared to release further documents to the complainants, but that it sought to maintain reliance on the exemption in relation to the remaining documents.
22. The Council were asked to provide further justification in respect of its reliance on section 40, and confirmation of its attempts to contact the councillor from which a response was never received, which it was happy to provide (by email, 6 December 2006). The complainants also submitted another letter dated 18 December 2006, reaffirming their contentions.

Analysis

23. As some of the information requested related to planning applications, the Commissioner gave consideration to whether that aspect of the request should be dealt with more properly under the Environmental Information Regulations 2004. However, after reviewing the information withheld as exempt by the Council, and bearing in mind that, in this instance, his decision would be unaffected by the legislative context, the Commissioner felt that it would be appropriate to continue to assess the complaint under the Act as the withheld information is not in its entirety environmental information as defined in the regulations.

Exemptions

24. The Council withheld information from the complainants citing sections 40 and 42, personal information and legal professional privilege respectively. The full text of these sections can be found in the Legal Annex attached to this Notice.

Section 40 – Personal information

25. Section 40 of the Act allows an authority to exempt information if that information consists of the personal information of a third party and to release it would breach one of the principles as set out in schedule 1 of the Data Protection Act 1998.
26. The Council withheld two documents from the complainants, as it believed that the information contained within those documents constituted the personal information of a council employee, release of which would breach the first data protection principle, that personal data shall be processed fairly and lawfully.

27. The Council asked the third party if they would permit their personal information to be released, they did not consent. Even if a third party refuses to give permission for disclosure it is not an absolute bar on release, but it is still an important consideration, especially when considering the fairness of the processing of that information.
28. The Commissioner took account of his published guidance on section 40, which states, '*information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned*'. The guidance also mentions that, '*The exemption should not be used, for instance, as a means of sparing officials embarrassment over poor administrative decisions*'. However, the guidance goes on to say, '*On the other hand, information such as home addresses or internal disciplinary matters would not normally be disclosed*'. Furthermore, '*It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair*.'
29. Having viewed the information in question, the Commissioner is satisfied that: the information constitutes the personal data of the Council's employee, the employee is/was a junior member of staff, the information concerns staff management issues and as such there would have been a strong expectation of confidence, and that the employee expressly refused consent for the information to be released. With this in mind, the Commissioner accepts that in this instance, the withholding of this information is not done with the intention of sparing embarrassment and that the Council is correct in its judgement to apply the exemption and withhold these two documents.
30. Both the authority and the Commissioner put much thought into the potential redaction of the documents. The possibility of removing the personal information and supplying the remainder was considered at length. However, it was felt that the personal information is inextricably linked with other information in these documents, so that the documents themselves become the personal information of the third party. Therefore, redaction is not possible.

Section 42 – Legal professional privilege

31. The Council sought to withhold several documents on the grounds that the information is exempt under section 42, legal professional privilege. This exemption acknowledges the importance of the confidentiality between legal adviser and client. It is a class-based exemption, which means that no prejudice need be demonstrated for it to apply. It is however, a qualified exemption and therefore, an assessment must be made as to whether the public interest in release of the information overrides the public interest in maintaining the exemption.
32. The Commissioner asked the Council to reassess this decision bearing in mind the length of time that had passed since the original request, refusal and review. Following this intervention, the Council agreed to release some of the documents

originally withheld, however, sought to maintain its reliance on the exemption in respect of four documents (one in part, after redaction).

33. The Council supplied the Commissioner with copies of the information in question. The Commissioner is satisfied that these documents contain communication to the client (the Council) from its legal advisor. The Council have only chosen to withhold the documents in which the advice is given and not those in which advice is requested.
34. The Council argue that the advice contained within these documents relates to *'the exercise of the council's legal powers and duties in respect of planning and data protection matters'* and as such remains valid and pertinent. The Commissioner accepts this and agrees that the exemption is engaged in relation to these documents.
35. It is the client, in this case the Council, in which privilege is vested. Any client can choose to waive privilege if they so wish. However, the Commissioner is satisfied that the Council has not waived privilege in respect of this remaining information. In the Council's letter dated 7 July 2005, which sets out the outcome of the internal review, it states, *'Legal advice is vested in the client which in this case is the Council through client departments. Mr Scully [Information Security Officer and Data Protection Officer] has made his decision on behalf of the client departments.'*
36. The complainants pointed out part of the Commissioner's guidance on legal professional privilege, which states that, *'advice to a colleague on a line management issue will not attract privilege'*. The Commissioner confirms that the advice in question is not advice given on a line management issue.

The public interest test

37. Having established that the exemption is engaged in respect of these documents, the Commissioner must make an assessment as to whether the public interest is best served through disclosure, or allowing the authority to maintain its reliance on the exemption and continue to withhold the information.
38. The complainants made particular reference to two factors in favour of disclosure taken from the Commissioner's Awareness Guidance on the subject, namely,
 - *'promoting accountability and transparency by public authorities for decisions taken by them'*, and
 - *'allowing individuals...to understand decisions made by public authorities affecting their lives'*.
39. The information requested by the complainants surrounded a decision to approve a planning application submitted by the complainants' neighbour, the complainants' challenge of that decision and their subsequent complaints about how the whole issue was handled by the Council. Over the course of their complaints to the Council, it became clear that a series of mistakes had occurred. The complainants raised this matter with the Local Government Ombudsman who

investigated and produced his report in September 2005, finding '*a catalogue of faults*' in the way the Council dealt with the application and that the complainants '*have been caused an injustice*'. However, he also stated that he '*cannot conclude that the planning decision was unlawful or that the outcome would have been any different without the maladministration*'.

40. It could be argued that the accountability and transparency of the authority's decision has been satisfied by way of the investigation undertaken by the independent ombudsman. However, it is important to remember that the Freedom of Information Act specifically promotes the accountability and transparency of authorities to the public.
41. It could also be said that the ombudsman's report gave the complainants an insight into the decision making process and the errors that were made, thereby assisting them to understand how these decisions are normally taken, and in addition, how this particular decision was taken and what went wrong with the process. However, the Act recognises that it is not sufficient to rely on existing checks and balances within the system and creates the additional right for members of the public to access the information necessary for *them* to hold authorities to account and improve *their* understanding of decision-making processes.
42. That said; the Commissioner also recognises the strong inherent public interest in protecting confidential communication between client and legal advisor. It is certainly in the public interest that authorities have the ability to consult openly with their legal representatives and that forthright views can be expressed without fear of that advice subsequently being made public.
43. In making his assessment of where the balance lies the Commissioner considered the timing of the request, whether the legal advice in question could still be described as 'live', that is, relevant and pertinent. The Commissioner was guided in this respect by the Information Tribunal's decision, Mr M S Kirkaldie v Information Commissioner (4 July 2006) Appeal Number: EA/2006/001. It is the judgement of the Commissioner that the relevance of the advice contained in the exempted documents has not been discharged.
44. The Commissioner is also mindful of the Tribunal's decision in Bellamy v the Information Commissioner and the DTI (3 April 2006) Appeal Number: EA/2005/0023 (para. 35), the Tribunal stated, '*...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest and, '...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...*'
45. Whilst it will sometimes be appropriate to overturn legal professional privilege where strong public interest exists in disclosure, it is the Commissioner's judgement that, in the circumstances of this case, the public interest in maintaining the exemption overrides the public interest in disclosure.

The Decision

46. The Commissioner's decision is that, in respect of the information the Council still wish to withhold, the public authority dealt with the request for information in accordance with the Act.

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. Although they do not form part of this Decision Notice, the Commissioner wishes to highlight the following matters of concern:
49. When reviewing a decision to refuse an information request, the section 45 Code of Practice states that the review should be '*undertaken by someone senior to the person who took the original decision, where this is reasonably practicable*'. The Council had to be prompted by the complainants before recognising their appeal and subsequently passing it to a senior officer. The Commissioner notes that this took place shortly after the Act came into force and believes that the Council have now improved their procedures although he remains concerned about the amount of time taken to complete the review process.
50. The complainants also found it necessary to tell the Council that it had an obligation to supply information held by councillors (where that information is held on behalf of the Council). The Commissioner has reminded the Council of its statutory responsibilities.
51. In addition, the complainants repeatedly asked the authority to provide a simple and discrete list of the information that was being withheld. Bearing in mind the authority's obligation to provide an applicant with advice and assistance under section 16, this was not an unreasonable request. The Commissioner feels that it would not have placed too great a burden on the authority to supply the requested list.
52. The Commissioner considers that the initial failure of the Council's procedures and the lack of good practice contributed to the complainants' sense of dissatisfaction over the handling of their request.
53. As a result of the above, the Commissioner intends to monitor closely the performance of the Council to ensure future compliance with access to information legislation as well as conformity with the associated Codes of Practice.

Failure to comply

54. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland), pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

55. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 5th day of March 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**