

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 7 February 2007

**Public Authority:** Canterbury City Council  
**Address:** Military Road  
Canterbury  
Kent  
CT1 1YW

### Summary

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The complainant made a request for all the information held by specific departments of the public authority that contained a reference to his companies. The public authority supplied some information; however the complainant believed that the public authority held further information. The Commissioner's decision is that the public authority has complied with section 1(1)(b) and section 12 as it acted reasonably in conducting proper searches and the cost of retrieving electronic information would exceed the appropriate limit. However, the public authority has breached section 10; time for compliance and section 1(1)(a) in relation to specific financial details. It has also misapplied section 42; legal professional privilege to some information.

### 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.

### The Request

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2. The complainant made a request for information under the Act on 14 July 2005 for:

- “All the information contained within the public authority’s Legal Department, Housing and Community Development (including The Safer Community Partnership, Public Safety Unit and Tenant Participation Team), Finance (including the Audit Section) that contains a reference to Oast House Media Ltd or Stevenson Design.”
3. The complainant then added a request to search the public authority’s Media Departments for information that makes reference to his companies in an e-mail dated 21<sup>st</sup> July 2005.
  4. The complainant made a further request for all Crime and Disorder Reduction Partnership (CDRP) minutes on 8 September 2005 and correspondence is still on going between the complainant and public authority.

## The Investigation

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### Scope of the case

5. On 27 October 2005 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:
  - The complainant believes that the public authority has failed to provide all the information he has requested.
  - The public authority failed to meet the statutory time for compliance.
6. The complainant also raised other issues in relation to a subject access request under the Data Protection Act; these are not addressed in this Notice because they are not requirements of Part 1 of the Act.
7. The public authority released to the complainant an annex to an audit report but withheld the actual report because it did not contain a reference to Oast House Media or Stevenson Design. The public authority also advised the complainant that the report would be exempt under section 31(1)(g). As the complainant did not object to this report being withheld this exemption has not been considered further in this notice. The public authority also advised the complainant that it was withholding information relating to potential court action under the exemption set out in section 42 of the Act.

## Chronology

8. The complaint was received by the Commissioner on 27 October 2005 and was allocated to a caseworker on 20 April 2006.
9. On the 26 April 2006 the Caseworker wrote to the complainant to clarify his complaint and outline the issues he was going to investigate. Specifically section 1 and section 10.
10. The Caseworker has confirmed that the complainant made his request to the public authority on the 14 July 2005, which the public authority did not receive until the 20 July 2005. The Council did not respond until 30 August when it sent the first bundle of information.
11. The Caseworker wrote to the public authority on 26 April 2006 outlining the issues raised by the complainant and asking the following questions in relation to section 1:
  - What information is held?
  - What information has been provided to the complainant?
  - What information, if any, is being withheld?
  - Was there more information in relation to the complainant and his companies ever held by the public authority?
  - If so, what was the date of its deletion and can the public authority provide a record of deletion?
  - What is the public authority's records management and retention policy?
  - If there is no relevant records management policy (for instance there is no policy at all or the policy was introduced after the alleged date of destruction of the record), can the public authority describe the way in which it has handled comparable records of a similar age?
  - Are there any legal requirements that would relate to the retention of the information requested? For instance, there are requirements relating to some financial records?
  - What is the business purpose for which the information was or might have been held?
  - Is information similar to that requested held and, if so, has the public authority advised the applicant, giving appropriate advice and assistance?
12. The public authority responded on 25 May 2006 outlining the types of information it held and why it was held, however the public authority could not provide confirmation of the information it had provided to the complainant as it failed to record what had been supplied. The public authority also outlined its retention policy in relation to e-mails; this is a

- rolling programme of deletion to “trash” after 30 days and permanent deletion after a further 7 days unless saved. No record of e-mails deleted in this way is kept. An officer that had had significant dealings with the complainant had left the employment of the public authority leading to the deletion of his e-mail account and computer records. The officer’s records were deleted on 1 April 2005. The public authority’s policy is that it is up to the individual officer to pass on information that may be required in the future.
13. The Commissioner wrote again to the public authority asking it to consider the permanency of the deletion of the electronic records particularly the options outlined in Harper v the Information Commissioner EA/2005/001 (the “Harper decision”):
    - Using the “restore” facility in windows
    - The use of “backup tapes”
    - The use of specialist software to “un-delete” or “recover” data.
  14. The public authority provided documentation dated 12 January 2006 showing that it had considered retrieving e-mails but that the Computer Services Manager had estimated that the cost of doing so (i.e., the fee payable for specialist services) would have been in excess of £3000.
  15. The Commissioner then invited the complainant to withdraw his complaint or provide further evidence that the public authority had failed to supply information. The complainant provided the Commissioner with a selection of documents already in his possession which he believed the public authority had failed to supply him with.
  16. The Commissioner asked the public authority why it had not supplied this information or issued a refusal notice applying an exemption. The public authority conducted a further search and supplied more financial records to the complainant.
  17. On receiving this information the complainant remained dissatisfied so the Commissioner asked the public authority the following questions in a letter dated 15 August 2006:
    - What information has been supplied to the complainant?
    - What searches have been carried out by the public authority?
    - An explanation of why the public authority is satisfied that it has provided all the relevant information
    - A copy of any information the public authority is withholding
    - The exemption it is applying to the withheld information
    - The reasons for applying the exemption
  18. The public authority responded on 12 September 2006 with a list of documents it has supplied to the complainant and an accompanying letter

- stating that it has now provided the complainant with all the information it holds in relation to the request.
19. On the 25 September 2006 the Caseworker asked the following questions in relation to the public authority's records management and its decision to refuse access to some of the information under section 42 of the Act:
- When were the GroupWise backup tapes wiped or deleted?
  - Is there or has there ever been further information (other than the CDRP minute already supplied) in relation to the public authority's decision to no longer use the complainant's company for the two websites:
    - a) PSEU website for educational packages to schools
    - b) Safer Community Partnership website highlighting the community safety plan 2002-05.
  - Please could you provide me with a copy of the exempt information and your public interest arguments for withholding the information?
20. The public authority responded in a letter dated 6 October 2006. It explained that:
- The GroupWise backup tapes were only retained for a five week period and were destroyed on a rolling programme. The backup tapes were finally destroyed and replaced in August 2005, when all the tapes were replaced by a different kind of backup tape.
  - The public authority can find no evidence that further information in relation to the public authority's decision to no longer use the complainant's company existed save for an e-mail record that has been destroyed and the information already supplied.
  - It also provided the documents withheld under section 42 and its public interest arguments for doing so.
21. The complainant remained dissatisfied after he had received the further information discovered in the public authority's most recent search and telephoned the Commissioner on 2 November 2006 to outline that he believed the public authority should have supplied his company's financial details specifically a BACs payment form.

### **Findings of fact**

22. The public authority has conducted three separate searches for information and discovered further information in each search. It has also stated that it has supplied the complainant with all the requested information on two occasions, after one of these statements further information was later released.
23. The complainant has copies of correspondence and documents from the public authority that the public authority states it does not hold.

24. The public authority no longer holds some information that may make reference to Oast House Media or Stevenson Design as it was lost when it changed the software in use for e-mail from GroupWise to Outlook, and when officers have left the employment of the public authority. Also, the public authority has a rolling 30 day deletion policy on e-mail accounts. This policy will have contributed to this situation as the importance and retention of each e-mail is a decision made by the receiving officer.
25. The Commissioner's advice on deletion of records in accordance with retention and destruction policies is that; the public authority is under no duty to cease its destruction policy and release information that is due to be destroyed within 20 working days. Although best practice would suggest that the authority should delay deletion until the request is dealt with, not doing so would not be a breach of the Act. The Tribunal ruling in the Harper decision clarifies that, if information is deleted in the ordinary course of business following receipt of a request but before the time for compliance expires, a public authority may be able to state that it is not held.
26. The GroupWise e-mail system crashed and recovery of the system would lead to costs being incurred by the public authority.
27. The public authority received the complainant's original request on the 14 July 2005 but failed to respond until the 30 August 2005.

## Analysis

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### Procedural matters

28. **Section 1**  
The public authority has some records management problems in that it has discovered further information relating to the complainant's companies on a number of occasions. The Commissioner accepts that the public authority can do no more in terms of searching for information. The public authority asserted the importance of the most recent search to its officers and has stated that it has now provided all the information it holds subject to the complainants request other than some information that has been withheld under section 42.
29. There is no evidence that the public authority has deliberately withheld information. It has conducted a number of searches and provided any information discovered to the complainant. Rather, the events record the state of the records management in place.

30. The Commissioner has considered the way the authority has handled the request, elevating it to its most senior legal officer to ensure the searches were carried out properly and offering to meet with the complainant act as strong evidence that the public authority is not withholding information.
31. The authority has now carried out three separate searches, the final search was conducted by the public authority's most senior legal officer. When combined with the fact that the complainant already holds the majority of the information he has requested, the Commissioner accepts there is little more to be gained from further investigation. However, as the authority has stated it does not hold any further information on two separate occasions but has gone on to find further information the Commissioner can not be absolutely certain.
32. The public authority has provided advice and assistance to the complainant by asking him to clarify what information he actually wants. It would appear that the complainant already has the majority of the information he has requested. The public authority also offered to meet the complainant in an attempt to provide him with the information he requested, this offer was declined by the complainant.
33. The complainant has kept a larger archive of the interaction between his companies and the public authority and as such already holds the majority of the information he has requested. Although the public authority has not relied on section 12 in respect of the request in general, we find here that the public authority has now searched to the cost limit and that, therefore, it is not required to search further.<sup>1</sup>

## Section 10

34. The public authority exceeded the twenty working day statutory time for compliance. It received the complainant's original request on the 14 July 2005 but failed to respond until the 30 August 2005.

## Section 12

35. The public authority provided evidence that it had considered retrieving e-mails, however, the Computer Services Manager had estimated the cost of doing so would exceed the appropriate limit as set down in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, which in this case is £450. This estimate was based on

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<sup>1</sup> The Information Tribunal decision promulgated in *Quinn vs Information Commissioner*, EA/2006/0010 supports the judgement that the duty under section 1(1) is conditional and ceases to apply once the cost of compliance exceeds the appropriate limit identified in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

the cost of a major crash of the GroupWise e-mail system in 2002 which amounted £6816 and gave a comparable scale against which to base the estimate. The Commissioner's own experience of IT forensic support would support these costs.

## **Exemption**

### **Section 42**

36. The public authority has applied section 42 to eleven documents. Legal professional privilege is a class based exemption with two strands; the advice strand which applies to communications between lawyer and client, and the litigation strand which is available where litigation is in progress, pending, or in contemplation and applies to information obtained for the dominant purpose of the proposed, pending or contemplated litigation.
37. The documents withheld by the public authority are "chains" of e-mails. In deciding whether this information attracts legal professional privilege the Commissioner has considered whether each e-mail in the chain would attract privilege. The e-mails fell in four categories;
  - a. Communications between the public authority's officers and in-house lawyers seeking or giving legal advice.
  - b. Communications between in-house lawyers discussing advice to give to their client.
  - c. Communications between public authority officers gathering information about the issue.
  - d. Communications between the complainant and public authority officers.
38. The Commissioner has concluded that the e-mails between the public authority's officers and its in-house lawyers would attract the advice strand of legal professional privilege as these communications are seeking or giving legal advice. The e-mails between the public authority's in-house lawyers discussing legal advice to their in-house client would also attract the advice strand of legal professional.
39. The communications between officers of the public authority do not attract legal professional privilege as these communications do not involve a professional legal adviser.
40. The communications between the complainant and the public authority are already in the complainant's possession so the Commissioner has not considered these documents. If the complainant would like copies of this information the public authority could supply them as a matter of customer service. These documents would not attract legal professional privilege as the litigation strand of the exemption applies to communications between



parties on one side of the litigation to assist in the progress of their case. This correspondence is between opposing parties so would not attract privilege.

### The Public Interest Test

41. The exemption for legal professional privilege is a qualified exemption. This means that information is only exempt from release under this section of the Act if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
42. The Commissioner considers that the following factor may favour releasing the withheld information:
43. There is an inherent public interest that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of their decision making. Placing an obligation on authorities to provide reasoned explanations for decisions made improves the quality of decisions and administration.
44. The Commissioner considers that the following factor favours upholding the exemption:
45. There is a strong public interest in protecting the established principle of confidentiality in communications between professional legal advisers and their clients. This is so that public authorities are able to obtain full and frank legal advice and so ensure effectiveness in carrying out their statutory obligations. Without a reasonable degree of certainty that communications will remain confidential clients might fail to put all the facts of a case before their adviser for fear of later disclosure. This could lead to advice being given on only partial knowledge of circumstances thus leading to poorer quality advice being given.
46. In the case of *Bellamy v the Information Commissioner and the DTI*, the Tribunal observed that “there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.” In summing up, it stated that “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest” It concluded that “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...” On this basis the Commissioner is satisfied that disclosure would prejudice legal professional privilege and the public interest test favours maintaining the exemption.

## Section 21

47. The public authority withheld some financial documents specifically a BACs form completed by the complainant to enable the public authority to pay him for services rendered. As the complainant is Director of the company the information would be available to the complainant by other means. As Director of the company he would have access to the company's account and payment details.

## The Decision

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48. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- Section 1(1)(b)
  - Section 21(1)
  - Section 12
49. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Section 1(1)(a)
  - Section 10
  - Section 42(1)
50. The public authority failed to confirm or deny whether it held financial details specifically the BACs payment form the complainant completed enabling the public authority to pay the complainant's company.
51. The complainant made his request for information in correspondence dated 14 July 2005 which was received by the public authority on the 20 July 2005. The public authority responded on the 30 August 2005 which amounts to twenty two working days. This represents a breach of section 10.
52. The public authority has misapplied section 42 to some communications as a number of communications do not attract legal professional privilege.

## Steps Required

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53. The Commissioner requires the public authority to supply the complainant with the communications that it has withheld citing section 42 which fall in the categories of communications between the officers of the public authority. The Commissioner has listed the documents for release in a separate covering letter.

## Other matters

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54. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter:

Several searches of the Council's records revealed more of the requested information on each occasion, despite the existence of a records management policy and disposal schedules. The Commissioner is aware that the Council does not have a corporate electronic records management system and must therefore rely on other methods. He has also been advised of various initiatives underway at the Council to improve its records management. Nevertheless, he believes that the Council would benefit from obtaining further advice and guidance from the Records Management Advisory Service at The National Archives (see contact details below). The Commissioner would hope that such advice will improve the Council's handling of future requests for information under the Act.

Records Management Advisory Service (RMAS)  
National Advisory Service  
The National Archives  
Kew  
Richmond  
Surrey  
TW9 4DU

[rmadvisory@nationalarchives.gov.uk](mailto:rmadvisory@nationalarchives.gov.uk)

## Failure to comply

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

## Right of Appeal

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56. 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: "mailto:informationtribunal@dca.gsi.gov.uk"  
[informationtribunal@dca.gsi.gov.uk](mailto: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 7 day of February 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

**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.”

**Section 10(1)** provides that –

“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.”

**Section 12(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

**Section 21(1)** provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

**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.”