

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 8 August 2007**

**Public Authority:** Brighton & Hove Council  
**Address:** Kings House  
Grand Avenue  
Hove  
BN3 2LS

### Summary

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The complainant requested copies of correspondence between the Council and its insurers. The Council declined relying upon the section 42 exemption and maintaining that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has considered the communications in question and is satisfied that the public authority has correctly applied the section 42 exemption and the public interest test correctly.

### The Commissioner's Role

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1. The Commissioner's role 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. On 14 July 2006 the complainant made the following request for information  
"copies of all correspondence in respect of this claim between the Council and JLT"
3. On 24 July 2006 the Council declined to look into the matter stating under its Corporate Complaints procedure, complaints involving an insurance claim cannot be investigated. The Council did not at this point recognize the request was a Freedom of Information Act request and so was not treated as such.

4. However, on 14 August 2006, realising the request was made under the Act, the Council refused the complainant's request for information. It relied upon the exemption which provides for legal professional privilege, stating the case was an ongoing investigation and could become the subject of civil proceedings.
5. On 23 August 2006 the complainant asked the Commissioner to investigate his complaint.
6. The Commissioner wrote to the complainant on 4 September 2006 to explain he would need to ask the Council to conduct an internal review of its decision before the Commissioner could investigate the case.
7. The complainant requested an internal review of the decision on 12 September.
8. On 10 October 2006 the Council responded, upholding its original decision not to disclose, citing legal professional privilege and public interest considerations.

## **The Investigation**

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### **Scope of the case**

9. On 19 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant claimed that:
  - a) the Council had refused to supply the information requested; and
  - b) the Council had not responded to his request for information within statutory time limits.
10. The complainant also raised other issues that are not addressed in this Notice because they are not relevant to the requirements of the Act and fall outside the Commissioner's powers.
11. In the course of his investigation, the Commissioner also looked at whether the request for information should have been dealt with under the Environmental Information Regulations (the Regulations). After careful consideration the Commissioner is satisfied that the request for information does not fall within the definition of environmental information as set out in regulation 2(1) of the Regulations because it does not relate to (a) the state of the elements of the environment such as land, or air, nor does it relate to (b) factors such as energy, noise, air waste, which affect or are likely to affect the elements of the environment referred to in (a).
12. The Commissioner is satisfied that the outcome of this case would not be different had it been considered under the Regulations.

## Chronology of the case

13. On 14 May 2007 the Commissioner contacted the complainant to request copy documents and evidence about the late reply to his request by the Council.
14. On 14 May 2007 the Commissioner contacted the Council and requested copies of the exempt information and an explanation about which section of the Act they were relying on.
15. On 25 May 2007 the Council responded and outlined in detail the section 42 exemption, stating the documents requested were subject to legal professional privilege. Further, they addressed the public interest considerations concluding that the public interest in maintaining the exemption outweighed that of disclosure.

## Analysis

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16. The Commissioner considered the Council's use of the section 42 exemption including its application of the public interest test with regard to the exemption. A full text of the relevant statute referred to is contained in the legal annex. The Commissioner has considered the exempt information and the arguments put forward by both parties.

## Section 42

17. Section 42 can exempt information that attracts legal professional privilege. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and a legal adviser, and exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
18. There are two separate categories within this privilege known as advice privilege and litigation privilege.
19. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
20. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes communications between a professional legal adviser and the client, as well as communications with third parties made for the purpose of assisting the client's case for example, providing expert opinion, which may cover a variety of documents.

21. The Commissioner notes that the exempt information is in the form of communications. He accepts they were obtained by the Council from their insurers and were prepared for the dominant purpose of anticipated litigation and therefore attract legal professional privilege.
22. The Council confirmed the legal professional privilege exemption does apply to the correspondence between the Council and its claims handlers. This covers all documents, reports, information, evidence obtained for the sole or dominant purpose of anticipated litigation and would include correspondence and internal memos. This litigation privilege begins from the time there is a reasonable prospect of litigation of the claim, even if solicitors are not involved.

### **Public Interest Test**

23. The Commissioner went on to consider in all the circumstances of the case, whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

### **Public Interest – in favour of disclosure**

24. The Commissioner recognises that the public interest in disclosing the requested information lies in creating accountability and transparency in actions and decisions being taken by the Council. The issue at stake is whether it is in the public interest to disclose communications relating to the complainants claim against the Council through their insurers, for damages arising out of an accident.

### **Public Interest – in favour of maintaining exemption**

25. Factors taken into account included protecting the principle of confidentiality of communications between insurers and their clients. The efficient running of council departments requires that officers are free to make candid comments in reports or correspondence in response to claims, non disclosure protects the public purse and it is in the interests of society as a whole that parties to litigation have the benefit of withholding disclosure of material which is subject to litigation privilege.
26. The Council were still relying upon the advice and as this was an ongoing investigation and there was a reasonable prospect that it could become the subject of civil proceedings, the advice could not be disclosed and was exempt under section 42.
27. The Commissioner considers that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, Council's would potentially be in a weakened position compared to other persons not by the Act. English law considers " privilege [ to be] equated with, if not elevated to, a fundamental right in at least insofar as the administration of justice is concerned "( EA/2005/0023 Bellamy v The Information Commissioner and the DTI, para 8). It is therefore the Commissioners view that there must be a strong public interest in ensuring legal professional privilege applies equally to all parties, so they are an equal footing.

## Balancing the competing considerations

28. The Commissioner accepts there is public interest in individuals having access to information that helps them understand the reasons why, decisions that affect them, were taken by Councils and in them having the ability to challenge those decisions.
29. The Commissioner also accepts that there is a public interest in disclosing information which will help determine whether public authorities are acting appropriately.
30. However, the Commissioner also recognises that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
31. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v Information Commissioner (Appeal No: EA/2005/0023, FS006313)* the Information Tribunal stated in paragraph 35 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 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 case*".
32. The Commissioner also accepts the issues the communications deal with are not "stale" as they are still being relied upon with regards to the claim. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exemption under section 42 of the Act because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure.

## The Decision

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33. The Commissioner's decision is that the Council dealt with the request in accordance with the Act, in that it correctly applied the exemption under section 42 of the Act to the information requested by the complainant.

## Steps Required

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34. The Commissioner requires no steps to be taken.

## Other matters

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35. Although it does not form part of the decision in this case, the Commissioner considers that it is best practice for public authorities to quote the number of the exemption it is using when refusing requests under the Act. This avoids any doubt as to which exemption a public authority is relying upon. In this case, the Commissioner notes that the Council referred to the 'legal professional privilege' exemption but did not cite the relevant section of the Act, namely section 42.

## Right of Appeal

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36. 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](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 8<sup>th</sup> day of August 2007**

**Signed .....**

**Jane Durkin  
Assistant Commissioner**

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

## Legal Annex

### Freedom of Information Act (2000)

#### Legal Professional Privilege

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

**Section 42(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”