

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 January 2007

Public Authority: West Devon Borough Council
Address: Kilworthy Park
Drake Raod
Tavistock
Devon
PL19 0BZ

Summary

The complainant made a request for information for any instructions and advice the public authority held in relation to the fees it was charging for commercial research of planning histories. The public authority confirmed that it held the requested information but withheld it under section 42 of the Freedom of Information Act 2000 (section 42) claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner has considered the instructions and legal advice in question and is satisfied that the public authority has applied section 42 correctly. However the Commissioner does find that the public authority is in breach of section 17 of the Act.

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 Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 9 August 2005 the complaint requested the public authority to provide under the Act: *"instructions and advice forwarded from and received by the Council"* in connection with fees charged by the public authority for planning information.
3. On 22 August 2005 the public authority responded declining to release the information relying upon the section 42 exemption.

4. On 31 August 2005 the complainant requested an internal review and also made two further requests for information, which do not fall to be considered in this Notice.
5. On 22 September 2005 the complainant wrote to the public authority asking it to respond to its letter of 31 August 2005. The public authority did not respond and the complainant wrote again on the 4 November 2005.
6. On 23 December 2005 the complainant contacted the Commissioner complaining that the public authority had refused its request for information, failed to notify the complainant of its review procedure or of its right to appeal to this office.
7. On 16 January 2006 the Commissioner contacted the public authority and informed it that it should carry out an internal review, as requested by the complainant.
8. On 26 January 2006 the complainant contacted the Commissioner to complain that the public authority had not carried out the internal review. He specifically asked the Commissioner to consider the fact that the original refusal notice had not referred to his right for an internal review and his right to complain to this office.
9. On 30 January 2006 the public authority confirmed the internal review had taken place and that the original refusal had been upheld on the same ground.

The Investigation

Scope of the case

10. In the course of his investigation, the Commissioner considered 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).
11. On 20 February 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. However the Commissioner has also taken into account the complainant's request of the 26 January to consider the fact that the original refusal notice did not refer to his right to an internal review and his right to complain to this office.

Chronology

12. On 19 October 2006 the Commissioner asked the public authority for a copy of the requested information and to provide an explanation of the application of the exemption under section 42.
13. The public authority responded with the information on 19 October 2006.
14. The Commissioner has considered all of the documentation and contentions submitted by both parties, including copies of the instructions and legal advice.

Analysis

15. The Commissioner will now deal with this case by firstly considering the matter of a procedural breach and secondly, considering the public authority's use of the section 42 exemption, including its application of the public interest test. A full text of the relevant statutes referred to is contained in the legal annex.
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Procedural matters

16. Section 17 of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain what exemption or exemptions have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. Although the public authority did state which exemption it sought to rely upon the Commissioner is of the view that it did not state with sufficient clarity why the withheld information fell under the terms of the exemption under section 42.
17. The public authority was required by virtue of sections 17(3)(b) of the Act to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The public authority did not demonstrate in its refusal notice any consideration of the public interest arguments in favour of disclosure or non-disclosure.
18. Further the public authority was required by virtue of sections 17(7)(a) to provide particulars of any procedure it provided for dealing with complaints about the handling of requests for information and sections 17(7)(b) to contain particulars of the right to appeal under section 50 of the Act.
19. Accordingly the Commissioner finds that public authority has failed to meet the obligations imposed upon it by section 17 of the Act.

Exemption

20. The section 42 exemption applied by the public authority relates to information in respect to which a claim to legal professional privilege could be maintained. Such information is exempt information.

21. 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 his/her or its lawyers, as well as 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.
22. There are two separate categories within this privilege known as legal advice privilege and litigation privilege.
23. Legal 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.
24. Litigation privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of providing legal advice in relation to any litigation which is already in existence or which might be in contemplation.
25. The Commissioner has considered the instructions and legal advice and it is clear that the requested information relates to advice privilege. He is satisfied that it was provided to West Devon Borough Council by legal counsel, the advice itself is on the standard format used to provide Counsel's opinion including the name of the barrister and the chambers he practices from.
26. The legal professional privilege exemption is a class based exemption which means it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser/client relationship if information is disclosed. Instead it is already assumed that the disclosure of information might undermine the relationship of the lawyer and client.
27. As this exemption is also a qualified exemption, section 2 of the Act requires the Commissioner to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
28. Whilst the public authority has referred to the public interest test it never explained its application of it in any detail.
29. The Commissioner considers factors in favour of disclosure include the transparency of a public authority's decision making process and the benefit to individuals of the provision of information of particular reference, to them.
30. However the Commissioner also accepts that confidentiality between lawyer and client promotes respect for the rule of law by encouraging clients to seek legal advice. It also allows for full and frank exchanges between clients and their lawyers. Without confidentiality clients might fear that anything they said to their lawyers, however sensitive or potentially damaging, could be revealed. They

might be deterred from seeking legal advice at all or from disclosing all the relevant material their lawyers. In turn this could lead to advice being given that might not be as full and frank as it ought to be.

31. 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-veiling considerations would need to be adduced to override that inbuilt public interest ... It may well be that ... where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight ... Nonetheless, 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 finds that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

33. 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:

The application of the section 42 exemption.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

34. The public authority failed to comply with section 17 of the Act in that in its refusal notice it did not: set out its consideration of the public interest test; its review procedure; and the right to complain to this office.

Other matters

35. Although it does not form part of this Decision Notice as it falls outside the scope of the Commissioner's role as set out at paragraph 1, the Commissioner has considered as requested the aspect of the complaint namely the fact that the public authority did not carry out an internal review initially.
36. The Act is silent as regards a time scale for internal reviews. However the Secretary of State has issued a code of practice under section 45 of the Act which does provide guidance on the point and in particular indicates that public authorities should set their own target times for dealing with such procedures. Such target times should be reasonable and subject to regular review.

37. The public authority dealt with the initial request for information, issuing a refusal notice on 22 August 2005.
38. On 31 August 2005 an internal review was requested but the public authority did not respond. The complainant wrote to the public authority on two further occasions requesting an internal review but the public authority did not respond.
39. The complainant wrote to the Commissioner on 22 December 2005 to complain. The Commissioner contacted the public authority on 16 January 2006 about this breach.
40. On 30 January the public authority confirmed an internal review had been carried out. The review was carried out by the same person who had dealt with the initial request for information.
41. The Commissioner feels in the circumstances that although the internal review was undertaken after this office intervened, the length of time it has taken is unreasonable. Further the Commissioner noted that the person who dealt with the request for information initially also conducted the internal review. In part VI of the section 45 code of practice paragraph 40 states: "*the review should be undertaken by someone senior to the person who took the original decision, where this is reasonable practicable*".

Failure to comply

42. 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

43. 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 22 day of January 2006

Signed

**Graham Smith
Deputy Commissioner**

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