



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2009/0058**  
**Information Commissioner's Ref: FS5018090**

**Determined on Papers Alone**

**Decision Promulgated**  
**28 October 2009**

**BEFORE**

**DEPUTY CHAIRMAN**

**David Marks QC**

**Between**

**Swanage Town Council**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Subject matter: Information Notices - Freedom of Information: Sections 50 & 51  
2000 Act - Failure to answer all requirements set out in Notice**

**Cases: Health Professionals' Council v Information Commissioner  
(EA/2007/0116)**

## **Decision**

The Tribunal dismisses the appeal by the Appellant against the Decision of the Information Commissioner in the Information Notice dated 18 June 2009 under reference FS50218090

## **Reasons for Decision**

### **General**

1. This is an appeal against the issuance by the Information Commissioner (“the Commissioner”) of an Information Notice dated 18 June 2009. The parties have agreed that the appeal be dealt with following a determination on the papers alone. Moreover, that determination is being conducted by a Deputy Chairman in the absence of any Lay Members. The relevant jurisdiction which governs this hearing and the determination of this appeal is set out in Rule 21 of the Information Tribunal (Enforcement Appeals) Rules 2005 as amended, in particular, Rule 21. That Rule makes it clear that as a general rule, a Chairman sitting alone is entitled to determine an appeal such as this. The parties are agreed that in the present case, they are content for a Deputy Chairman to determine the appeal.
  
2. Information Notices are dealt with principally in sections 50 and 51 of the Freedom of Information Act 2000 (“the 2000 Act”). Both sections open Part 4 of the 2000 Act under the general description “Enforcement”. Section 51(1) addresses the normal case in which a complainant may apply to the Commissioner for a decision whether in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of the 2000 Act. This appeal is not however concerned with the more usual form of appeal addressed by the 2000 Act which involves a reconsideration of a Decision Notice issued by the Commissioner in relation to a decision either to effect disclosure or not as made by a public authority. Section 51 which is headed “Information Notices” provides as follows, namely:
  - “(1) If the Commissioner –
    - (a) has received an application under section 50, or
    - (b) reasonably requires any information –

- (i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements Part 1, or
- (ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve on the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part 1 or to conformity with the Code of Practice as is so specified.

- (2) An information notice must contain –
  - (a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or
  - (b) in a case falling within subsection (1)(b), a statement that –
    - (i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection 1(b), and
    - (ii) of his reasons for regarding that information as relevant for that purpose.
- (3) An information notice must also contain particulars of the right of appeal conferred by section 57.
- (4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice, and if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

- (5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of –
  - (a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client in respect of its obligations, liabilities or rights under this Act, or
  - (b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceeds.
- (6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.
- (7) The Commissioner may cancel an information notice by written notice to the authority on which it is served.
- (8) In this section “information” includes unrecorded information.”

3. Although this appeal concerns issues relating to legal professional privilege, the facts and matters addressed by subsection (5) are not in issue. Section 57 grants the right to a complainant and to a public authority to appeal to this Tribunal.

4. In short, it is clear that if the Commissioner requires any information for the purposes of determining whether a public authority has complied with, or is complying with, any of the requirements of Part 1 of the 2000 Act (or indeed with a Code of Practice), he may serve an Information Notice upon the public authority. Such a Notice can be served either in the context of a particular request for information by a particular applicant, or on the Commissioner’s own initiative. Such a Notice must specify a period within which the public authority is required to supply the information and can, as section 51 makes clear, specify the time in which the Commissioner requires the information to be provided.

5. In *Health Professionals' Council v Information Commissioner* (EA/2007/0116), the Tribunal recommended that Information Notices generally (including those served in relation to an application for a decision) should set out the matters taken into account and the reasons for the decision to serve the Notice in a similar matter to the type of reasoning which finds expression in a Decision Notice. Although by virtue of section 47(3) of the 2000 Act, the Commissioner may carry out a practical assessment in order to assess whether a public authority is following good practice (and then only, it seems, with the consent of the public authority in question) the power to serve Information Notices to determine whether a public authority is complying with the 2000 Act appears to be unfettered.

### Background

6. Before turning to the chronology in relation to the appeal in question in further detail and to the relatively narrow issues raised, it is useful to set out the general background in brief. Much, if not all, is to be gleaned from the Appellant's Grounds of Appeal.
7. The Appellant is a Town Council. In or after 1974, it had acquired land on which a large number of caravan sites are situated in addition to a leisure complex. The Appellant thereafter managed the site until about 2004. This generated an income stream to the Appellant. The Audit Commission apparently raised what the Grounds of Appeal call "legality issues" in relation to the Appellant's annual accounts. The Commission then formally threatened to seek and obtain a mandatory injunction to prevent further perpetration of the alleged unlawful activity or activities. Meetings and discussions between the parties' respective legal advisers and other representatives then ensued. Such correspondence as was engendered was not surprisingly, in large part at least, headed "Confidential" and made subject to legal professional privilege. The owners of the caravan sites have at all material times it seems acted by or through an organisation called Bay View Caravan Owners' Association (BVCOA). In the Appellant's Grounds of Appeal, the Appellant claimed that 2007:

“... saw the emergence of the BVCOA by way of comprehensive challenges from a Mr A Scudamore who consistently sought to “*champion the cause*” [in original] of other mobile home owners on this Local Authority owned site.”

The actions by the BVCOA were an apparent attempt to “prise out” of the Appellant “documents relating to the proposed disposal of the Swanage Bay View site ...”.

8. In that connection, the Appellant has contended that in its dealings with other bodies, e.g. the Audit Commission itself, the bodies in question have “accepted the overriding necessity for legal professional privilege to be maintained”.
9. Overall, and in consequence, the Appellant has been reluctant to allow any third party, including the BVCOA, to inspect or be granted disclosure of any information relating to its dealings and activities, and in particular, to permit any attempt to be made in any way in relation to such steps as it took or may have been party to, to dispose of the entire site. “To do so” it is alleged, “would lead to the inevitable position that the nucleus of caravan owners would effectively control the way in which the Council carried out its statutory duties and obligations to its council tax payers ...”. These issues will be revisited below.
10. During the course of these activities by or on behalf of the Appellant, the Appellant had reason to consult with and/or retain various appointed professional consultants. It was in relation to such consultations and/or appointments that BVCOA made a request under the 2000 Act.

#### The request leading to the Information Notice

11. By letter dated 13 July 2008, the BVCOA made a request in writing to the Appellant’s Town Clerk, a Mr Leeson, in which it asked for a copy of the Terms of Reference (“TOR”) under which certain consultants called Charles F Jones were appointed. The Tribunal has only seen a copy of this letter in which the TOR were requested “by return”. The Grounds of Appeal and indeed the subsequent Information Notice dated 18 June 2009 refer expressly to an earlier request in writing dated 2 July 2008 in which the BVCOA apparently requested “a copy of the TOR for Charles F Jones financial options appraisal”. However, in the bundle provided to the Tribunal in

relation to this appeal, no such letter was included. Any such omission, however, is not material.

12. The Appellant then refused to provide or disclose the information requested on the grounds that section 42 of the 2000 Act was engaged. This section, as is perhaps now well known, contains a qualified exemption based on legal professional privilege. In October 2008, the BVCOA as the complainant, then complained to the Commissioner. Previously, by letter dated 19 August 2008, the BVCOA had informed the Appellant that it had not asked for disclosure of the Appellant's legal advice and indeed had "no interest" in obtaining it. It confirmed that it had asked only for disclosure of the terms of reference. An internal review had been requested in September 2008. This review upheld the initial review.
13. By letter dated 22 January 2009, the Commissioner's office asked a number of specific questions with regard to the BVCOA's original request, together with a related request which it had made. Matters came to a head with the subsequent issuance of an Information Notice dated 18 June 2009.

#### The Information Notice

14. The Information Notice is a very short document. In the section headed "Information Required", the Commissioner formally gave notice that in exercise of his powers under section 51 of the 2000 Act, he required the Appellant:
  - (a) to furnish the Commissioner with a response to the questions put in his letter of 20 April 2009; and
  - (b) to provide all proof or produce a copy of the Terms of Reference for the Charles F Jones financial options appraisal.

It was expressly pointed out that failure to do so could result in certification of that fact to the High Court under section 54 of the 2000 Act with the attendant risk of a contempt of court finding being made against the Appellant.

15. The enumerated queries in the letter of 20 April 2009 were five in total. The required details and information which was sought consisted of the following facts and matters, namely:



- (1) which “branch” of legal professional privilege was or is being claimed, i.e. legal advice privilege or litigation privilege;
- (2) whether, to the extent it was being relied upon, the necessary ingredients and the requirements of legal advice privilege were satisfied;
- (3) the same matters as are set out in (2) above in relation to the litigation privilege;
- (4) whether, if waiver was in issue, the TOR had been shared with any third party, and if so, all information relating thereto; and
- (5) any and all arguments relied on, or to be relied upon, (especially as to the competing public interests, if any) by the Appellant as a public authority in maintaining exemption set out in section 42 if such reliance was being pursued.

#### The Grounds of Appeal

16. The Grounds of Appeal are dated 16 July 2009. The Tribunal regrets to say it has not been helped by the diffuse and somewhat excessive manner in which the Grounds have been drafted.
17. As indicated above, the Appellant’s Grounds of Appeal contend in effect that the BVCOA’s request was motivated by a desire to obtain information in order to “fuel” its quest for inclusion in the entire disposal process. It added:

“In so doing, the seemingly innocuous letter of 13<sup>th</sup> July 2008 ... seeks the Terms of Reference given by the [Appellant] to its former national land consultants ...”
18. Thus, the essence of the Appellant’s case, it seems on the advice of its lawyers, was therefore to view disclosure as a “waiver” of legal professional privilege which it was claimed:

“... would expose the [Appellant] to a complete waiver of all subsequent confidential data to the present time where any extensive due diligence exercise is in progress which is expected to be completed by the end of July 2009.”

19. The Grounds of Appeal further make reference to contemplated litigation, either by the Audit Commission and/or by the BVCOA and therefore contend that disclosure of the information sought “would provide the [BVCOA] with an unfair advantage over the other tenderers [no doubt a reference to all those who had expressed, or might express an interest, in acquiring the site or sites] if that procedure was implemented.”
20. The disposal process is said to have commenced in July 2008. Part of that process was the consideration of the confidential report produced by Messrs Charles F Jones as appointed land agents. The Grounds of Appeal in paragraphs 1 to 6 point out that the BVCOA had itself submitted a bid in the tender process, there being twelve bids in all. The Appellant, in effect, resisted what it saw as an attempt by BVCOA to control the bidding process.
21. Although various contentions are contained and/or reflected in paragraphs 1 to 6 of the Grounds of Appeal including it seems an overall reliance both on litigation privilege as well as legal advice privilege, it is clear to the Tribunal that on any view, recourse is here being had to a blanket reliance on the qualified exemptions set out in section 42 of the 2000 Act in circumstances where the Commissioner had not seen or been shown or examined the very material in relation to which reliance was being directed.
22. In the section headed “MAIN GROUNDS OF APPEAL”, the following paragraphs appear:
  - “1) The matters raised in paras. 1-6 above are repeated as such details has been given pursuant to the Tribunal’s requirement that Appellants must explain clearly the dispute with the Information Commissioner’s Notice giving as much details as possible.
  - 2) In compliance with the Tribunal’s Practice Notes, it is the Tribunal that in the circumstances set out above should consider the nature of the request of information and to decide having been privy to an overview as to disclosure. Otherwise, if regardless of any representations to the ICO which under the threat to [the Appellant’s] solicitors of an application for contempt, if arbitrarily

disclosed to the BVCOA then it would undermine the very object of confidentiality which would give the complainant a commercial advantage of having access to information denied to the other competitive tenderers. It would also afford the BVCOA the opportunity to halt the disposal process and significant cost to the town of Swanage and/or with blatant disregard for the benefits of such a disposal in favour of the BVCOA'S Case for self-preservation."

The Grounds of Appeal end with a "requirement" that any determination that what was described as "commercially sensitive and containing confidential information" as sought by the Information Notice should be "exempt from production", and secondly, a determination that the issues "at stake" in the present appeal were "of significance beyond the facts of the case and that a determination by the Tribunal will help to ensure that no confidential information is released through the Tribunal's decision".

### The Reply

23. The Commissioner filed a written Reply dated 11 August 2007, no doubt a mistake for 2009. In brief, the Commissioner contend that:
- (1) by virtue of the Appellant's failure to comply with the Information Notice, he cannot decide on the question of whether reliance on section 42 of the 2000 Act (nor indeed on any other section such as section 43 which deals with commercial interest) is or is not justified;
  - (2) in the circumstances, the Grounds of Appeal do not contain any reasonable grounds with regard to the issues arising out of or in connection with the Information Notice;
  - (3) such grounds as are set out may relate to the disclosure of the information to the Commissioner, with onward disclosure to BVCOA; however, in the Commissioner's contention, such grounds relate to the disclosure of information to BVCOA under the 2000 Act, and not to the Commissioner seeking further information for the purposes of his statutory function;

- (4) with regard to the facts and matters set out in (3) above, the Commissioner pointed to the provisions and effect of section 59 of the Data Protection Act 1998 (“DPA”) as amended which place an overall statutory embargo upon disclosure of information obtained by the Commissioner by himself or by his staff unless the same is made “with lawful authority” (see again, *Health Professionals Council v Information Commissioner* supra, especially at paragraphs 46 and 52).

### The disputed information

24. The Tribunal has been shown for the purposes of this appeal only what can be called the disputed information, i.e. the subject matter of the complainant’s original request. The same was provided in a Closed Bundle in the normal way.
25. The Tribunal respectfully agrees with the Commissioner’s contentions as set out in his Reply and as summarised above at paragraph 23. This appeal is concerned solely with the existence of any valid grounds which exist in order to justify a finding that the Information Notice is in some way invalid or unlawful. That Notice seeks disclosure of certain information relating to the original request. That determination does not necessitate any further determination as to the merits or demerits of any alleged reliance on any of the exemptions set out in the Act, included but not limited to section 42.
26. The Commissioner has now had sight of part of the information sought to be elicited by the Information Notice. However, on any view, there has not been compliance with the entirety of the terms of the Notice, in particular, there has not been provided a full and complete response to the five enumerated questions set out in the Commissioner’s letter of 20 April 2009 which are summarised above. In particular, the Commissioner has not cancelled the Notice under section 51(7) of the 2000 Act. As the Commissioner has recently put it in written submission his investigation is “effectively stalled” while compliance with the Notice is outstanding.

### Conclusion

27. With all due respect to the way in which the Grounds of Appeal have been set out on the part of the Appellant, the Tribunal does not feel, in accordance with the

Commissioner's contentions, that they disclose any proper grounds of appeal with regard to justifying any upsetting or setting aside of the Information Notice. The appeal is therefore, in all the circumstances, dismissed.

David Marks QC  
Deputy Chairman

Date 28 October 2009