



**Information Commissioner's Office**  
Promoting public access to official information  
and protecting your personal information

## **FREEDOM OF INFORMATION ACT 2000 (SECTION 50)**

### **DECISION NOTICE**

**Dated 14 June 2006**

**Name of Public Authority: Derby City Council**

**Address of Public Authority: PO Box 6291  
The Council House  
Corporation Street  
Derby  
DE1 2YL**

#### **Summary Decision and Action Required**

**The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with Part I of the FOI Act.**

- 1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner**
- 1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'FOI Act').
- 1.2 Where a complainant has made an application for a decision, unless:
  - a complainant has failed to exhaust a local complaints procedure, or
  - the application is frivolous or vexatious, or
  - the application has been subject to undue delay, or

- the application has been withdrawn or abandoned,  
the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the Complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the Complainant and the public authority.

## 2. The Complaint

The Complainant states that on 4 January 2005 the following information was requested from Derby City Council under s.1 of the Act:

1. *Advice you received from your barrister prior to the Crown Court (Family Division) proceeding which you initiated.*
2. *Any minutes from the various Conferences where my family was subject of discussion.*
3. *Social Service Workers' diaries from the past 6 years which pertain to my family.*
4. *Emails or faxes sent from the directorate (Director or Assistant Director) to the Social Service Managers or Workers which touch on my family.*
5. *Various written applications written by me in which I apply for reimbursements of expenses when such applications contain endorsements from Social Services Staff.*
6. *The whole file which was raised in connection to my complaint about breach of confidentiality which centred around \*\*\*\*\* and her association with a Social Services Worker which was found to be not proven."*

It is alleged that:

The information was refused by the Council on the grounds that s. 40 of the FOI Act applied in that the information was partly personal data relating to the Complainant and also personal data relating to members of the Complainant's family. The Council replied to the Complainant that the majority of the information in question would be available if he were to make a subject access request under s. 7 of the Data Protection Act 1998. The Complainant then made a complaint to the Commissioner that his rights under the FOI Act had been breached.

With the Commissioner's intervention it was agreed between the two parties that the information falling within point's 2 – 6 above would be supplied to the Complainant under the Data Protection Act 1998. The Council supplied the information requested (including the information relating to the third parties), after obtaining the consent of the third parties whose personal data would also be disclosed. In agreeing to receive the information under the data protection access rights, the Complainant effectively agreed to withdraw the application for a decision on points 2-6 under s. 50 (2)(d) of the FOI Act.

However the Council continued to refuse to disclose a copy of the barrister's advice, (point 1 above), on the grounds that it was exempt from subject access by reason of it being subject to legal professional privilege under Schedule 7, paragraph 10 of the Data Protection Act and therefore exempt under s. 40 of the FOI Act, and also that it was exempt under s. 42 of the FOI Act.

The Complainant believes that the application of the exemptions was wrong and that the information should have been disclosed to him under s. 1 of the FOI Act.

### **3. Relevant Statutory Obligations**

#### **Section 1(1)**

S. 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.”*

#### **Legal Professional Privilege**

S. 42 of the FOI Act states:

*42. - (1) 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.*

*(2) 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.*

### **4. Review of the case**

#### **Section 42**

The Complainant requested a copy of a barrister's advice to the Council relating to potential litigation between the Complainant and Social Services Department of the Council. The Council claimed that the information is exempt from disclosure as it is subject to legal professional privilege. The Commissioner viewed the information and is satisfied that the information is subject to legal professional privilege for the following reasons;

- it was provided to the Council by Legal Counsel,

- the advice is in the standard format used to provide Counsel's Opinion, including the name of the barrister who provided the advice and the name of the Chambers where he practices from.
- Further, the Commissioner is satisfied that, as a practising barrister, the Legal Adviser was competent to provide the opinion.

As such, in the Commissioner's view this advice is subject to legal professional privilege.

Under s. 42, information which is subject to legal professional privilege is exempt from disclosure unless the public interest in disclosing it outweighs the public interest in maintaining the exemption. The Commissioner has therefore considered the public interest in disclosing the information compared to the public interest in maintaining the above exemptions.

### **The public interest test**

The public interest in favour of disclosing the advice lies in creating accountability and transparency in the actions and decisions being taken by the Council.

The Social Services Department of the Council sought clarification of its legal options in its interactions with the Complainant and his family. This advice was then used to inform upon a wider policy decision which the Council made, which was then implemented into social services policies and is still being used. The advice therefore informed a policy decision which is being operated by the Council, and is being applied to current cases.

An underlying purpose of the FOI Act is to ensure that, in general, information that explains an authority's reasons for decisions or actions should be available to the public. There is therefore a strong argument that a policy which is currently being operated should be divulged by the Council in order that its decisions may be scrutinised and that it may be held accountable for its actions. The reasoning employed to inform such a policy should also, in general, be made public. Knowing the reasoning behind a decision would allow the public to scrutinise the Council's actions and decisions from a point of understanding, which will in turn build public confidence in the Council's decision making.

However balanced against the arguments for disclosure is the public interest in maintaining the exemption for information subject to legal professional privilege.

The concept of legal professional privilege has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is a central concept in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the doctrine of legal professional privilege could therefore damage the ability of

parties to provide or receive legal advice on a full and frank basis, thereby damaging the parties' ability to effectively determine their legal options, or to defend, or seek legal restitution against other parties in accordance with their rights.

The Information Tribunal, in its decision in the appeal between Christopher Bellamy and The Information Commissioner and the Secretary of State for Trade and Industry, (appeal No. EA/2005/0023, FS 0066313), provided advice, at paragraph 35, that "*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.*" It goes on to state 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 case.*"

The public interest in disclosing the information must therefore, at the least, match the public interest in maintaining the exemption before privilege will be overturned, and it is recognised by the Tribunal that the public interest in protecting the doctrine of legal professional privilege is strong.

In this case the advice sought by the Council specifically relates to its legal options in a situation to which the Complainant was a significant party. The Council argues that the advice is applicable more widely than in the Complainant's case alone, and that it was used to inform upon an operational policy decision which is still being applied in social services cases. The Council argues therefore, that the advice was used to settle a general policy which is still in force, and that the policy is still therefore open to review and legal challenge. The public interest in withholding the information has not therefore diminished or gone stale over time.

The Council has also stated that the statutory limitation period for legal action being taken against the Council by parties to this case has not expired. It argues that the information to which legal professional privilege attaches is therefore still "live", albeit that the Complainant states that he intends to take no further action against the Council. Given that this is the case, the reason for the Council seeking the advice remains extant and the public interest in the information retaining privileged status is therefore still high.

A public authority must be able to seek legal guidance on the options it has when making decisions. In this way it can assure itself that the decision it makes is both robust and legally defensible. Such guidance, although informing the final decision, should not generally be open to disclosure, as to do so could weaken or compromise the Council's legal position should the decision later be questioned.

To reiterate the Tribunal's arguments, such advice should be free from the threat of interference except in the most clear of circumstances. The strong arguments supporting the maintenance of privilege should only therefore be

overruled where the public interest arguments in favour of disclosing the information are equally as strong or override these arguments. The Commissioner is not satisfied that this is the case in this instance.

The Commissioner therefore considers that the status of legal professional privilege is retained by the information in this instance, and that it is not, at this time overridden by the public interest in disclosure.

#### Section 40

Although the Council also claimed that the information is exempt from disclosure under section 40 of the Act, in light of the fact that the Commissioner accepts that the application of the exemption for legal professional privilege is correct it is not necessary to go on to consider this further within this Decision Notice.

### **5. The Commissioner's Decision**

- 5.1 The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with the requirements of Part I of the FOI Act.
- 5.2 The Council was able to withhold the legal advice sought by the Complainant under the exemption from disclosure in s. 42 of the FOI Act.
- 5.3 The public interest in disclosing the information does not override the public interest in maintaining the exemptions applied in this instance.

### **Action Required**

In view of these matters the Commissioner hereby gives notice that in exercise of his powers under s. 50 of the FOI Act he does not require any remedial steps to be taken by The Council.

### **Right of Appeal**

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: <a href="mailto:informationtribunal@dca.gsi.gov.uk">informationtribunal@dca.gsi.gov.uk</a>
Leicester	
LE1 6ZX	

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

Dated the 14th day of June 2006

Signed: .....

Phil Boyd  
Assistant Commissioner  
Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF