

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 22 November 2006

**Public Authority:** Warwick District Council  
**Address:** P.O.Box 1710  
Riverside House  
Milverton Hill  
Royal Leamington Spa  
Warwickshire  
CV32 5RQ

#### Summary Decision

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1. The complainant asked the public authority ('the Council') for information which it held about the purchase of land owned by the Council and the complainant. The Council provided to the complainant some of the requested information but withheld other information, citing the exemptions contained in sections 41 and 42 of the Freedom of Information Act 2000 ('the Act'). The Commissioner has decided that sections 41 and 42 are engaged in this case and that the public interest in maintaining the exemptions outweighs the public interest in disclosure. The Commissioner finds that the Council failed to comply with section 17 of the Act as it did not inform the complainant of his right to seek a review of the Council's decision or to refer the matter to the Information Commissioner. However, in other respects, the Commissioner finds that the Council dealt with the request in accordance with Part 1 of the Act and does not require the Council to take any further action.

#### The Commissioner's Role

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2. 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 Act. This Notice sets out his decision.

#### The Request

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3. On 11 February 2005 the complainant wrote to the Council asking to see "relevant letters, [and] minutes of meetings allowed under the Freedom of Information Act" in relation to the purchase by a development company – A.C.

Lloyd (Builders) Ltd ('A.C. Lloyd') – of land and property owned by the Council and an adjacent site owned by the complainant.

4. On 1 March 2005 the Council replied to the complainant confirming that it held the information requested and enclosing copies of relevant papers. However, the Council said that it was withholding some information as certain documents were exempt from disclosure by virtue of sections 41 (information provided in confidence) and 42 (legal professional privilege) of the Act. The Council considered that, in the case of section 42, the public interest favoured withholding the information on the basis that a public authority needs access to confidential legal advice in order to determine its legal position in property transactions.
5. On 8 March 2005 the complainant asked the Council to review its decision to withhold certain information. The Council responded to the complainant on 31 March and 12 April 2005. The Council said that the information withheld under section 41 related to correspondence from A.C. Lloyd. The Council said that it had consulted A.C. Lloyd which had confirmed that it wished the letters to remain confidential. The Council explained that breach of such confidentiality could result in action through the Courts. The Council reiterated that the remaining information related to legal advice which attracted legal professional privilege under section 42 of the Act.

## The Investigation

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### Scope of the case

6. On 14 April 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant said that he did not believe that the Council should be sheltering behind the Act in refusing to disclose all of the information he had requested. The Commissioner's investigation therefore involved assessing whether the Council had correctly applied the exemptions in sections 41 and 42 of the Act in withholding the information.
7. The Commissioner recognises that the request for information in relation to the sale of property could have been regarded as environmental information and could therefore have been considered under the Environmental Information Regulations 2004 ('EIR'). The relevant, and very similar, exceptions under the EIR would have been regulation 12(5) (b) in relation to section 42 and regulation 12(5)(f) in relation to section 41. However, the Commissioner considers that the outcome of this particular complaint would have been the same whether it was dealt with under the Act or the EIR, particularly as all exceptions under the EIR require the application of the public interest test: furthermore, neither party raised this as an issue. In the light of this the Commissioner did not see any merit in pursuing the matter and has determined the complaint by reference to the Act.

### Chronology

8. After an initial acknowledgement the Commissioner asked the Council for copies of its papers relating to the request together with copies of the information withheld from the complainant. The Council provided copies of all relevant papers and correspondence, after which the Commissioner sought further clarification.
9. The Council stated that, when the complainant's request for information was received, it wrote to A.C. Lloyd as the company had, at the time of providing the information, requested that it be treated as private and confidential. A.C. Lloyd had replied that it wished the information contained in certain letters to remain confidential. The Council had not recorded the reasons why the company wished to maintain the confidentiality, but thought that it was due to a long-running dispute between A.C. Lloyd and the complainant. The Council considered that it would be vulnerable to legal action should the information be disclosed.
10. In relation to the internal emails which had been withheld, the Council said that the emails were communications between the Council's property services and its legal department which attracted legal professional privilege. It believed that it was in the public interest that public authorities should be able to obtain confidential legal advice in order to determine their legal position in property transactions. The Council added that the complainant had been provided with a considerable amount of information about the sale of the site over several years and that the withheld information was very minor in comparison.

## Analysis

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11. The Commissioner has considered carefully the complainant's representations and the Council's response to the complainant's request for information. The full text of the exemptions cited by the Council in refusing to release all of the requested information is set out in the Legal Annex attached.

## Exemptions

### Section 41

12. Section 41 of the Act provides an exemption from the right to know if the information in question was provided to the public authority in confidence. There are two components to the exemption:
  - The information must have been obtained by the public authority from another person.
  - Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court.
13. The Commissioner has examined the information in question, which comprises three letters from A.C. Lloyd, the construction company involved in purchasing property from the Council and from the complainant. The letters were written in

- 2001 and 2002. With regard to the first component to the exemption it is clear that the Council obtained the information from another person, that person being A.C. Lloyd. The information therefore satisfies the first component.
14. As regards the second component, there are a number of elements which need to be in place for an actionable breach of confidence to occur. The first is that the party confiding the information has a reasonable expectation that the information will only be used or disclosed in accordance with its wishes. The letters explicitly state that the information contained in them should be treated as confidential. In one of the letters A.C. Lloyd wrote 'I would ask you to treat all discussions and correspondence between us as strictly confidential in order not to prejudice our interests as such an event could have serious implications for both ourselves and the Warwick District Council'. For that reason, following the complainant's request for information, the Council contacted A.C. Lloyd for its views. The company replied that it wished the information to remain confidential. The Commissioner is therefore satisfied that the information was obtained in circumstances which give rise to a duty of confidentiality.
  15. The second element is that the information has to have the necessary quality of confidence; in other words, is the information worthy of protection? The information in question relates to negotiations with the Council and with the complainant in connection with the purchase of land and property. It also contains details of legal advice obtained by A.C. Lloyd. The Commissioner has borne in mind that information which is marked 'confidential' does not always demonstrate that it has the necessary quality of confidence, and that a document marked as such when produced might in the passage of time no longer retain the same level of confidentiality.
  16. The information contained in the communications is clearly sensitive information which, although several years old, A.C. Lloyd still consider to be confidential. Having seen the information in question the Commissioner is persuaded that it retains the quality of confidence required to satisfy the second element.
  17. The third element of an actionable breach of confidence is that disclosure would have a detrimental impact on the provider of the information or a third party. In this case three parties have interests in the information: the Council, A.C. Lloyd and the complainant. As the information was created in 2001/2002, the impact of the release of the information is likely to be less now than at the time of its creation. However, negotiations continued for some time after then and it has been established that an acrimonious relationship still exists between the complainant and A.C. Lloyd. That company is clearly concerned that release of the information would be advantageous to the complainant should further action, including litigation, be pursued. In such circumstances the Commissioner is of the view that disclosure would have a detrimental impact on A.C. Lloyd. The Commissioner has therefore decided that the third element is satisfied in this case and that the exemption under section 41 is engaged.
  18. Section 41 is an absolute exemption, and is not in itself subject to the public interest test. However, the Commissioner recognises that, in certain circumstances, the public interest may override any duty of confidence. Where

there is an overriding public interest in any particular case in disclosing the information, the courts have accepted that no duty of confidence is owed. The Commissioner must therefore consider whether there was an overriding public interest at the time of the complainant's request which favoured disclosure of the information.

19. The Commissioner recognises that public authorities should be open about financial transactions involving public money, and that the public have a right to know how the money is being used. However, in this case the information in question relates to correspondence from a private company which has expressly stated that financial harm could be caused to it and to the Council should the information be disclosed. The information mainly relates to interim negotiations between A.C.Lloyd and the Council which the Commissioner considers would be of very limited public interest given that the details of the eventual sale are now in the public domain. Therefore, the Commissioner is satisfied that there is no overriding public interest in disclosure of the information.

## **Section 42**

20. The section 42 exemption was applied by the Council to two emails. Legal professional privilege is a common law principle which protects from disclosure communications between a professional legal adviser and his or her client. There are two separate categories within this privilege, those being legal advice privilege and litigation privilege. Advice privilege relates to communications between a person and his lawyer provided that they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations. In this case it is clear that the information in question relates to advice privilege. Having reviewed the emails in question, and established that their principal purpose was the provision of advice by professional legal advisers, the Commissioner is satisfied that the information clearly falls within the exemption set out in section 42.

## **Public Interest Test**

21. As section 42 is a qualified exemption it is necessary to consider the public interest arguments for and against maintaining the exemption. As stated in paragraph 19 above, the Commissioner acknowledges the public interest in actions taken by public bodies and that, where possible, they should be open, transparent and accountable for matters involving public finances. However, the Commissioner accepts that disclosure needs to be balanced against the need for public authorities to obtain frank legal advice in order to carry out their functions.
22. The Commissioner believes that there is a strong generic public interest in maintaining the section 42 exemption. The concept of legal professional privilege has developed to ensure that clients are able to communicate with their legal advisers in confidence. This is a central plank in the legal system and there is a strong public interest in protecting that confidentiality. In considering the public interest in this case the Commissioner has had regard to the view of the Information Tribunal as expressed in the matter of Bellamy v The Information

Commissioner (Appeal Number EA/2005/0023). At paragraph 35 of that judgment the Tribunal commented as follows:

“As can be seen from the citation of the legal authorities regarding legal professional privilege, 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”.

23. The Commissioner is not satisfied that in this case the countervailing considerations outlined above are of sufficient weight to override the inbuilt public interest in protecting privileged communications between legal adviser and client. In reaching that view the Commissioner has taken into account the fact that most of the information about the purchase of the land in question, including the details of tenders and the sums paid by A.C. Lloyd, have been provided to the complainant.

### **Procedural Matters**

24. Section 17 (7) of the Act requires a public authority to include in a refusal notice, particulars of any procedure for dealing with complaints about the handling of the request for information, or to state that it does not provide such a procedure. The section also requires any refusal notice to contain details of the complainant's right to apply to the Information Commissioner for a decision on whether the authority has dealt with his or her request in accordance with the Act. None of the Council's letters to the complainant in respect of his information request contained such information, and the Commissioner therefore finds that it failed to comply with the obligations imposed on it by section 17(7).

### **The Decision**

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25. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the Act:

- The application of sections 41 and 42 of the Act

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

- The Council did not provide information to the complainant as required by section 17 of the Act

### **Steps Required**

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26. The Commissioner requires no steps to be taken.

### Right of Appeal

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27. 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 22<sup>nd</sup> day of November 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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



## Legal Materials Annex

### Relevant sections of the Freedom of Information Act 2000

#### Section 1(1) states 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 2(2) states that:

In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### Section 41(1) states that:

Information is exempt information if –

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

#### Section 42(1) states 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.