



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 13 June 2006

Public Authority: Huntingdon Town Council

**Address: 1 Trinity Place
Hartford Road
Huntingdon
Cambridgeshire
PE29 3QA**

Summary Decision and Action Required

The Complainant requested “*the Solicitor’s letter-legal opinion dated February 2000 relating to Spring Common*”. The Public Authority refused to provide this information citing Section 42 (Legal Professional Privilege Exemption) as the basis for its refusal.

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 Act. No further action is required.

- 1. Freedom of Information Act 2000 (the ‘Act’) – Applications 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 ‘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 - the application has been withdrawn or abandoned,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

- 2.1 The Complainant has advised that on 4 January 2005 the following information was requested from the Public Authority in accordance with Section 1 of the Act:

“The Solicitor’s letter-legal opinion dated February 2000 relating to Spring Common [in Huntingdon].”

- 2.2 The Public Authority responded on 13 January 2005 and refused to provide this information citing Section 42 (Legal Professional Privilege exemption) as the basis for its refusal. It explained that disclosure might prejudice its rights or future Councils’ rights to obtain access to justice. The Complainant requested a review of this response on 18 February 2005. This followed receipt of written advice from the Commissioner explaining that, in most circumstances, it is necessary to apply to a public authority for an internal review of their refusal before submitting a formal complaint to the Commissioner about that refusal.
- 2.3 The Town Clerk prepared a report about the Complainant’s request for a meeting of Huntingdon Town Council on 3 March 2005. The report outlined the legislative framework of the request and explained that the legal opinion in question related to *“the provision of the Law of Property Act 1925 and the possibility that Spring Common became subject to public rights of air and exercise under that statute from 1 January 1926.”* The report also stated that Section 42 of the Act was qualified by a public interest test and asserted that disclosure of the document *“could undermine the prospects of either this Council or any future Council taking out litigation.”* The report recommended that the Council should consider the matter further. The report also requested instructions from the Council.
- 2.4 This report was introduced to the 3 March 2005 Council meeting by the Mayor who then invited comment from Council Members. A motion was moved by one of the Councillors to uphold the initial refusal to provide the requested information and this was seconded by another Councillor. There was no further debate and the Mayor invited Members to vote by a show of hands. Following the vote, the motion was then declared to be carried.
- 2.5 The Complainant was advised of this outcome on 7 March 2005 and was also provided with the Commissioner’s contact details. The Complainant made a complaint to the Commissioner on 10 March 2005.

3. Relevant Statutory Obligations under the Act

Section 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.”

4. Review of the case

4.1 The Commissioner has examined the information and notes that it is Counsel’s opinion obtained by the Public Authority in 2000.

4.2 The Commissioner considered first whether the requested information was environmental information caught by the requirements of the Environmental Information Regulations 2004 (“EIR”). He gave the Public Authority the opportunity to address the application of EIR to the Complainant’s request in the event that the Commissioner concluded that the information was environmental information. The Public Authority stated that the EIR exception from the duty to disclose provided by Regulation 12 (5)(b) would apply in this case. This exception applies where disclosure “*would adversely affect the course of justice*” (EIR Regulation 12 (5)(b)). The Public Authority argued the public interest in avoiding this adverse effect would outweigh the public interest in disclosing the requested information.

4.3 There are six subsections in the definition of environmental information in EIR Regulation 2(1). These are listed (a) – (f). In the Commissioner’s view, the subsection of most likely relevance in this case is part (c). This states that “*environmental information [means] information ... on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b)*¹ as well as measures or activities designed to protect those elements”. The Commissioner notes that “*legislation*” is included as an example of a “*measure*”. As mentioned in 2.3 the requested information includes reference to the provisions of the Law of Property Act 1925. The Commissioner therefore examined whether the information in this case satisfied the definition of environmental information found in Regulation 2(1)(c).

¹ The elements and factors referred to in (a) and (b) include “*the state of the elements of the environment, such as air and atmosphere, water, soil, land*” and “*factors affecting or likely to affect the elements of the environment referred to in (a) such as substances, energy, noise, radiation or waste ... and other releases into the environment*” (EIR Regulation 2(1)(a) & (b). <http://www.opsi.gov.uk/si/si2004/20043391.htm#2>

4.4 The Commissioner has read the requested information and is satisfied that it is not environmental information caught by the requirements of the EIR. This is because information falling within 2(1)(c) must be information about a measure of a specified kind. The specification is that it must be a measure affecting or likely to affect the elements and factors included in Regulation 2(1)(a) & (b). In the Commissioner's view, the information in this case is an expression of professional opinion about how the provisions of a particular piece of legislation could apply to the use of land. The Commissioner believes that this is not sufficient to satisfy the definition found in Regulation 2(1)(c). If, on receipt of that advice, a public authority decides to take action and that action affects or is likely to affect the elements and factors referred to in 2(1)(a) & (b) then information about what it has decided to do may well satisfy the definition of 2(1)(c) and constitute environmental information. However, that is not the situation in this case.

4.5 Having concluded that the information was caught by the requirements of the Act rather than the requirements of the EIR, the Commissioner examined the Public Authority's basis under the Act for refusing to provide that information. As indicated in 2.2 above, the Public Authority cited Section 42 of the Act as the basis for its refusal.

4.6 Section 42 states:

“(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”.

4.7 The Commissioner notes in his published guidance that there are two categories of legal professional privilege:

- Advice privilege – where no litigation is contemplated or pending
- Litigation privilege – where litigation is contemplated or pending”

http://www.ico.gov.uk/cms/DocumentUploads/AG_No_4_Legal_Professional_Privilege.pdf (Awareness Guidance 4 - Legal Professional Privilege)

4.8 The Commissioner is satisfied that the requested information falls within the class of information which is exempt from disclosure under Section 42(1), subject to a public interest test. He notes that it was prepared by Counsel for the dominant purpose of providing legal advice to the Public Authority. This being the case, the Commissioner believes that the requested information attracts advice privilege rather than litigation privilege.

- 4.9 The Commissioner then considered public interest arguments in favour of maintaining this exemption and in favour of disclosing the requested information.
- 4.10 The Commissioner recognises that there is a strong argument in favour of protecting legal professional privilege as a general principle. The Information Tribunal (the “Tribunal”) has given particular weight to the importance of upholding lawyer-client confidentiality in its recent judgement in Christopher Bellamy -vs- The Information Commissioner and the Secretary of State for Trade and Industry (Appeal No: EA/2005/0023). The judgement also comments on the public interest inherent in maintaining legal professional privilege and states:
- “there is a strong 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 may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.” (Paragraph 35)
- 4.11 The Commissioner agrees that privileged material should only be disclosed in exceptional cases. He has, therefore, considered whether the circumstances of this particular case include factors in favour of disclosure which are of equivalent weight to the “*inbuilt public interest*” in maintaining legal professional privilege.
- 4.12 The Commissioner believes that the wider public in Huntingdon has a legitimate interest in understanding rights relating to land within their area and that there is a public interest in releasing this information to enhance that understanding. The term “common land” is itself open to interpretation and is often misunderstood. It may be that the definitive analysis about land rights in individual cases can only be reached the courts. Nonetheless, the Commissioner recognises that there is a public interest in analysing rights over so-called “common land” and seeking to reach a consensus by means other than costly judicial process. The Commissioner notes that there has already been considerable public debate in Huntingdon around this subject over a number of years. Arguably, the disclosure of the Opinion could assist in informing and, perhaps, bringing a conclusion to that public debate.
- 4.13 The Commissioner noted the Tribunal’s comment that advice which was “*stale*” may more readily be disclosed. The Commissioner therefore also considered whether the information in this case was stale.
- 4.14 The Commissioner had contacted the Public Authority to check whether there was any ongoing litigation relating to the use of Spring Common or whether any litigation was envisaged. The Public Authority had advised that none was ongoing and none was envisaged.

- 4.15 While the matter of Spring Common is not a current and “live” issue, the Commissioner does not consider that this matter is a “stale”. The Commissioner notes that there is pressure, particularly in the South and South East of England, for land to be released or redeveloped for housing. It is widely recognised that affordable housing for key workers such as nurses or teachers, for young families or for the increasing number of single person households is in extremely short supply.
- 4.16 According to Huntingdon District Council’s website, Huntingdon railway station is “an outer ‘commuter’ station for many who work in London” <http://www.huntsdc.gov.uk/Community+and+People/Neighbourhood-village/Towns+and+Villages/Huntingdon.htm>
Given Huntingdon’s relatively convenient location for commuters, the Commissioner believes it is likely that further development of Spring Common may very well become a “live” issue in the near future.
- 4.17 In such circumstances, the Public Authority would be likely to revisit the advice it received in 2000. As such, the Commissioner believes, it is unlikely that the advice could be considered sufficiently “stale” to satisfy the test implicit in paragraph 35 of the Information Tribunal’s judgement on the Bellamy case (see 4.10 above).
- 4.18 The Commissioner also considered the Public Authority’s role in planning matters and what its role might be in any potential litigation. The Public Authority’s website comments as follows:

“Comment on Local Planning

The District Council is the planning authority but the Town Council is consulted on planning applications within the town of Huntingdon. The Town Council considers all applications referred to them and recommends to the District Council whether they should be approved, refused or approved subject to conditions. The District Council is not bound to agree with the views of the Town Council - and quite often chooses not to. Representations can be made to the Town Council who will take those comments into account before making its formal recommendations to the District Council. The Town Council also has the opportunity to comment on Local Plans and County Structure Plans and on proposals within adjoining parishes which are likely to have a significant impact on Huntingdon as a town.”

<http://www.huntingdowntown.gov.uk/TownCouncil/services.htm>

- 4.19 The Public Authority is therefore not the planning authority for the local area and any involvement it may have in litigation about the use of Spring Common would be as an interested party rather than as a regulatory body. In other words, it would only be involved if it chose to be involved or felt compelled to be involved as an interested party. It

would not, strictly speaking, be obliged to be involved in order to comply with its statutory obligation as a regulator acting on behalf of the public. It could be argued that this lessens the potential impact of disclosure because it would not disadvantage the Public Authority's position as a regulator.

- 4.20 Even though the Public Authority would not be involved in potential litigation as a regulator, the Commissioner nevertheless recognises that the Public Authority has a right to receive confidential legal advice. As indicated above, the Commissioner's view is that this right will only be abrogated by a public authority's duty to disclose requested information in exceptional circumstances.

5. The Commissioner's Decision

- 5.1 The Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. He recognises that there are public interest arguments in favour of disclosure in this particular case, however, guided by indications from the Information Tribunal, he considers that those arguments are outweighed by the public interest in maintaining the confidentiality of communications between lawyer and client enshrined in the principle of legal professional privilege.

- 5.2 The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with the following requirements of Part I of the Act:

6. Action Required

- 6.1 The Commissioner does not require the Public Authority to take any further action in relation to the Complainant's request.

7. Right of Appeal

- 7.1 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

- 7.2 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 13th day of June 2006

Signed

**Graham Smith
Deputy Commissioner**

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