

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 27 November 2006

**Public Authority:** Broadland District Council  
**Address:** Thorpe Lodge  
1 Yarmouth Road  
Thorpe St Andrew, Norwich  
Norfolk  
NR7 0DU

#### Summary Decision

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1. The complainant requested information about a complaint concerning a potential breach of planning regulations and subsequent documentation created following receipt of that complaint. The public authority released some of the information but refused to release the remainder on the basis it was exempt under sections 30, 31, 40 and 42 of the Act. The Commissioner found that these exemptions had been properly applied to the information that has been withheld and has not upheld that part of the complaint.

#### The Commissioner's Role

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2. The Commissioner's role 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

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3. The complainant has advised that on 4 January 2005 the following information was requested from Broadland District Council ("BDC") in accordance with section 1 of the Act:

*"copies of all the information, unedited, uncensored correspondence both paper and electronic held by Broadland District Council, from all parties involved in and relating to the complaint and following investigation conducted by Broadland*

*District Council, that we David and Lindsey Beaumont were not complying with the occupancy condition imposed by Broadland District Council when planning permission was granted for the above address”*

4. The information relates to a complaint that the complainant and his wife were not complying with the occupancy condition imposed by BDC when planning permission was granted for the property known as Upper Paddocks, Great Witchingham, Norfolk.
5. In its letter to the complainant dated 10 February, BDC identified the information to be in the following categories (as agreed by the complainant) :
  1. Correspondence between:-
    - (1) BDC and those who provided supporting evidence on the complainant's behalf (“correspondence1.1”),
    - (2) BDC and the informant (being the person who notified BDC of the potential breach) (“correspondence 1.2”), and
    - (3) BDC and its solicitors Steeles, (“correspondence1.3”)
  2. All reports, notes or letters, paper or electronic communications pertaining to site visits by BDC's enforcement officers, minutes of any meetings discussing the complaint, the way in which BDC should proceed, and or about the evidence supplied, any recommendations by BDC's employees, the decision to seek external advice and the advice obtained (“the investigation information”).
  3. A copy of the legal advice obtained on receipt of the complainant's request for the release of the information contained in the file of the complaint (added pursuant to the initial request and accepted by BDC as part of the complaint) (“the legal advice information”).
6. In its letter of 10 February 2005, BDC disclosed the entire contents of correspondence 1.1 and some of the contents of the investigation information. The investigation information that has been withheld consists of internal minutes/notes, memos and letters regarding visits, meetings and advice.
7. BDC has claimed that all of the remaining information is exempt and seeks to rely upon the following exemptions under the Act :
  - 30(2) – investigations and proceedings conducted by public authorities as applied to Correspondence 1.2.
  - 31(1)(g) & 31(2)(c) – law enforcement as applied to the investigation information.
  - 40(2) & 40(3) – personal information as applied to Correspondence 1.2.

- 42(1) – legal professional privilege as applied to Correspondence 1.3 and the legal advice
8. In compliance with section 17 of the Act, BDC explained its reasoning for believing the exemptions were engaged and where appropriate in relation to the qualified exemptions, also explained the basis upon which the public interest test had been applied by it.
  9. On the 7 March 2005, the complainant requested an internal review of the decision. In its letter dated 24 May 2005, BDC confirmed it had reviewed and upheld the original decision.

## The Investigation

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10. On 25 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been dealt with by BDC. The complainant specifically asked the Commissioner to consider the release of information requested under the Act and the Data Protection Act 1998 (the “DPA”).
11. Although for the purposes of this decision notice, the Commissioner need not consider whether BDC have properly applied the provisions of section 7 of the DPA in relation to the complainant’s personal information. For the convenience of the complainant, the Commissioner has considered whether the complainant is entitled to all of his personal information that is caught by the request. Having carefully considered the relevant documents the Commissioner is satisfied that he has now received all his personal information and is satisfied therefore that BDC has complied with its obligations under section 7 of the DPA.
12. In the course of his investigation, the Commissioner has considered both the context and the nature of the information requested by the complainant. The Commissioner has also considered the relevant provisions of the Environmental Information Regulations 2004 (the EIR), in particular regulation 2(1). 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 EIR because it does not relate to the state of the elements of the environment such as the physical state of the land or the construction of a building affecting the land nor does it relate to factors affecting the elements of the land energy or noise. Rather, the information requested by the complainant concerns the profession of a person living on the land which is consequently not environmental information.
13. The Commissioner has had sight of the withheld information, and has been in further contact with BDC in order to clarify certain issues that had arisen as a result of his initial review of this information.
14. As a result of the intervention of the Commissioner, BDC disclosed further information to the complainant on 3 and again on 25 April 2005. This disclosure comprised some of correspondence 1.2 (that is, the correspondence from BDC to

the informant with that individual's name and address redacted) and more documents from the investigation information.

## Analysis

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15. The Commissioner has considered the public authority's response to the complainant's request for information and has now considered the application of the exemptions solely to the information that has not been disclosed to the complainant (the withheld information).

## Exemptions

### Section 40 (2)

16. BDC contends that the undisclosed balance of correspondence 1.2 is exempt under this section as the information comprises personal data, the disclosure of which would contravene the first data protection principle.
17. Personal data relating to a third party is exempt from disclosure under the Act where the conditions referred to in section 40(3) are satisfied.
18. The condition in Section 40(3) is satisfied where disclosure of the information requested would result in breaches of any of the 'data protection principles' set out in Schedule 1 Part I of the DPA.
19. The first data protection principle requires that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
20. When considering compliance with the first data protection principle it is necessary to consider what the reasonable expectations of a person would be in relation to how the information they provided would be used and to whom it may be disclosed.
21. The Commissioner accepts that where a person informs a public authority about their concerns regarding a potential breach of planning regulations they would not normally expect the contents of their correspondence to be disclosed to the individual allegedly committing the breach. Having reviewed the information contained in the correspondence 1.2, the Commissioner is satisfied that the information identifies the informant and that the information was provided with an expectation of confidence. Further, the information cannot be anonymised and then released to the complainant without rendering the content meaningless.
22. Consequently, to release the personal information of the Council's informant would in the opinion of the Commissioner contravene the first data protection principle on the basis that it would be both unfair and unlawful as no condition set

out in Schedule 2 of the DPA is satisfied. It could also potentially be unlawful on the basis that it would constitute a breach of confidence.

23. The Commissioner considers therefore that the exemption at section 40(2) is engaged in relation to the information withheld in correspondence 1.2.

### **Public Interest Test**

24. Section 40 of the Act provides an absolute exemption where disclosure of personal data about someone other than the complainant would contravene any of the data protection principles provided by the DPA. There is therefore no need to consider the public interest test in respect of correspondence 1.2. The information has correctly been withheld as the exemption is engaged.

### **Section 30(2)**

25. As the Commissioner accepts that information in correspondence 1.2 is exempt under section 40(2), he will not consider further the application of this exemption to that information.

### **Section 31 (1)g and section 31(2)(c)**

26. Section 31 potentially exempts information where its release would or would be likely to prejudice a public authorities law enforcement function. BDC contends that the investigation information which has been withheld is exempt under sections 31(1)(g) and 31(2)(c) as in their view disclosure would prejudice BDC's functions in the conducting of investigations. The Commissioner has considered the application of the exemptions contained in section 31(1)(g) and section 31(2)(c) and is satisfied that given the nature of the investigation information that it is properly exempt under these provisions.
27. That is because the Commissioner accepts that to disclose the information would prejudice the exercise of BDC's functions for the purpose of ascertaining whether circumstances, which would justify regulatory action under the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991) (the 'TCPA') exist or may arise. Having reviewed the investigation information, he accepts that disclosure would prejudice the conduct of investigations generally and in particular any similar investigations in the future that may be necessary by BDC. The Commissioner is satisfied that to disclose the background information on how such matters are investigated may undermine investigations of potential breaches of the TCPA in future as it would alert potential offenders to the practice and procedures used by BDC in investigatory procedures. That in turn may provide information which would assist individuals in evading detection of possible breaches, under this legislation.

### **Public Interest Test**

28. Section 31 is a qualified exemption and is therefore subject to the public interest test.

29. The Commissioner has considered the public interest in disclosing the investigation information and also considered the public interest in openness and transparency by public authorities generally. The Commissioner considers that there is also a public interest in the accountability and transparency in actions and decisions being taken by BCD in particular in relation to regulatory action which may significant impact on individuals, as in this case.
30. In addition the Commissioner also considers that disclosure of the investigation information could further the public's understanding of issues arising out of planning legislation and an authorities role in dealing with such matters.
31. The Commissioner notes the public interest in disclosing such investigation information in order to provide the public with confidence and understanding in the actions of public authorities in relation to regulatory functions. However, he is of the view that in all the circumstances of this case that the public interest in disclosure is outweighed by the need for public authorities to be able to carry out their regulatory functions effectively and to ensure the satisfactory operation of a statutory regime.
32. The Commissioner considers that if the investigation information was to be disclosed, BDC's functions may be adversely affected as in these circumstances, it may be necessary in the future to reinvestigate the breach of the condition which has been the issue around which the complaint revolves. If BDC has to reinvestigate in the future, it is in the public interest for it to do so without being fettered by the release of the withheld information.
33. Therefore, the Commissioner considers that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the investigation information and is satisfied that such information is exempt under section 31.

#### **Section 42**

34. BDC asserts that correspondence 1.3 and the legal advice information is exempt as the former consists of communications with its lawyers and the latter consists of advice obtained by BDC from its lawyers both of which are subject to legal professional privilege.
35. Correspondence 1.3 comprises internal minutes, emails, memos and letters containing advice from BDC's lawyers in relation to planning legislation and enforcement. It relates to BDC's powers to consider the allegations made against the complainant's wife. The Commissioner is satisfied that the information is exempt by virtue of section 42 as it falls within the category known as "litigation privilege" as it was created during the course of investigations and in the contemplation of litigation.

36. The Commissioner has inspected the legal advice and notes that it consists of an opinion from BDC's lawyers in relation to the complainant's complaint to the Commissioner. The Commissioner is satisfied that this information falls within the category known as "advice privilege" as it consists of confidential legal advice from a solicitor to his client. The Commissioner has also considered whether privilege has been waived in respect of that legal advice and is satisfied that such is not the case.

### **Public Interest Test**

37. Section 42 is a qualified exemption. The Commissioner believes the public interest in disclosing correspondence 1.3 and the legal advice ( the legal information) lies in creating accountability and transparency in actions and decisions being taken by BCD. There is public interest in making material available which would provide information about issues affecting people's lives.
38. In addition, the Commissioner considers that disclosure of the legal information may further the public's understanding of freedom of information issues and a public authority's role in dealing with such matters.
39. However, the Commissioner recognises the strong public interest in maintaining the confidentiality of information subject to legal professional privilege. The concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisors after having full and frank discussions. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
40. The Information Tribunal in its decision in *Bellamy v Information Commissioner* (appeal no. EA/2005/0023, FS0066313) stated in paragraph 35 that
- "...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...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"*.
41. In considering correspondence 1.3, the Commissioner is mindful that in the event of enforcement litigation, BDC would clearly wish to rely upon this information. The planning legislation creates ongoing obligations. The Commissioner's investigation (and the background context) of this complaint indicates that the issues raised in correspondence 1.3 are not 'stale' and may have relevance in the event of future litigation. The Commissioner therefore believes that it is not in the public interest to disclose the information contained in that correspondence.
42. In relation to the legal advice relating to the complainants' request for information and applicable exemptions under the Act, the Commissioner is satisfied that the balance of the public interest lies in maintaining the section 42 exemption. The

complainant has received the information to which he is entitled under section 1 of the Act.

43. Therefore the Commissioner is satisfied that in all the particular circumstances of this case, the public interest in maintaining the section 42 exemption is not outweighed by any public interest in disclosure.

## **The Decision**

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44. The Commissioner's decision is that in relation to the withheld information the public authority has dealt with the request for information in accordance with the Act.

## **Steps Required**

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45. The complainant having received some of the information requested and the Commissioner being satisfied that the withheld information is exempt, the Commissioner requires no steps to be taken.



## Right of Appeal

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46. 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            day of November 2006

Signed .....

Graham Smith  
Deputy Commissioner

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

## **Legal Annex**

**Section 30** provides that:

“(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
  - (i) whether a person should be charged with an offence, or
  - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if-

(a) it was obtained or recorded by the authority for the purposes of its functions relating to-

- (i) investigations falling within subsection (1)(a) or (b),...

**Section 31(1)(g) and 31(2)(c)** provide that:

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).....

(2) The purposes referred to in subsection (1)(g) to (i) are-

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.....”

**Section 40(2)** provides that:

“(2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and  
(b) either the first or second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or  
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 42** provides that:

“(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.”