

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 28 March 2007

Public Authority: Bexley Council
Address: Bexley Civic Offices
Broadway
Bexleyheath
Kent
DA6 7LB

Summary

1. The complainant requested information held by the public authority (the "Council") about his client's applications for planning permission. In particular, the complainant asked for details of doubts raised about abandonment of the use of his client's land, and about advice obtained and taken into account on that issue. The Council stated that it had provided all relevant information except for one letter to which it applied the exemption contained in section 41 of the Freedom of Information Act 2000 (the "Act"). The complainant believes that the Council holds further relevant information which has been withheld from him. The Commissioner is satisfied that the Council holds no recorded information which has not already been provided to the complainant and has therefore decided that the request has been dealt with in accordance with part 1 of the Act. The Commissioner has further decided that the withheld letter does not fall within the ambit of the information request.

The Commissioner's Role

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

3. On 11 April 2006 the Commissioner issued a Decision Notice in respect of an earlier complaint against the Council by the complainant (Ref: FAC0070855). The complaint related to a request for access to legal advice received by the Council in connection with a planning application made by the complainant on behalf of a client. The complainant subsequently appealed against the Commissioner's

decision to the Information Tribunal. However, in his skeleton argument prior to a Hearing of the Tribunal set for 2 November 2006, it became evident that the complainant no longer sought access to the legal advice which was the subject matter of his Notice of Appeal. As a result, with the agreement of all parties, the Tribunal Deputy Chairman made an Order that the hearing of the appeal be adjourned with liberty to the parties to restore the appeal; that the Council respond to the complainant's revised request for information as set out in a schedule to the Order; and that in the event of the complainant appealing to the Information Commissioner for a decision on whether the Council's response to his request had been dealt with in accordance with the Act, the Commissioner would issue a new Decision Notice.

4. The schedule to the Order stated that the complainant sought the following:

'(a) Information provided to Bexley Council raising allegations about the abandonment of the lawful use of the land; and

'(b) Information relating to the clarification of the issue of abandonment of the land, other than the legal advice referred to in the recital of this order; and

'(c) Information taken into account by planning officers in formulating their recommendations to Bexley Council's Planning Committee relating to the application for planning permission made by [the complainant's] client in relation to the land, save insofar as the information appears in the planning file.'

5. On 16 November 2006 the Council wrote to the complainant in response to his information request as recited in the Order. In respect of (a) the Council provided to the complainant copies of a number of letters received from members of the public and a Resident's Association in relation to the question of the abandonment of the use of his client's land, together with other related letters. The Council pointed out that these letters were included in the planning file, which was open to public inspection and which the complainant had seen. The Council stated that it had withheld one letter by virtue of the exemption provided by section 41 of the Act, as it considered that release of that document would constitute an actionable breach of confidence. For that reason the letter had been omitted from the planning file. The Council said that no information was held in relation to paragraph (b) of the Order as the legal advice which the complainant did not now seek access to was the only information held by the Council relating to clarification of the abandonment issue.

6. With reference to paragraph (c) the Council said that it had been difficult to identify the requested information as any information taken into account in formulating recommendations to the Planning Committee would have been included in the report to that Committee which was included in the planning file. The officer who had dealt with the case at the time had since left the Authority, but the Head of Planning had reviewed all of the relevant files and had located some photographs which might have been taken into account in addition to the information in the report. The photographs were copied to the complainant. The

Council also provided a computer printout of the full history of the site in question, and told the complainant that, with the possibility of some exemptions, the files referred to in the printout were available for him to inspect.

The Investigation

Scope of the case

7. On 17 January 2007 the complainant wrote to the Tribunal to complain that he was dissatisfied with the response from the Council under the schedule to the Order. The complainant considered that the Council had not provided him with all of the documentation which he sought in relation to the decision-making process. In the circumstances the Tribunal wrote to the Commissioner on 25 January 2007 asking him to commence his investigation. The Commissioner's investigation therefore involved assessing whether the Council had provided to the complainant all of the information listed in the schedule to the Order, and whether it had correctly applied the exemption in section 41 of the Act to the letter in question.
8. As with the previous investigation, the Commissioner recognises that this could have been regarded as a request for environmental information and could have been considered under the Environmental Information Regulations 2004. However, the Commissioner considers that the outcome would have been the same whether it was dealt with under the Freedom of Information Act or the Environmental Information Regulations and, bearing in mind that the previous linked investigation was conducted under the Freedom of Information Act, the Commissioner has also determined this complaint by reference to that Act.

Chronology

9. On 1 February 2007 the Commissioner wrote to the Council and asked for copies of all correspondence which had passed between the Council and the complainant since the issue of the Order, together with copies of all information provided to the complainant since that date. The Commissioner also wrote to the complainant asking him to clarify why he was dissatisfied with the Council's response and to specify the information to which he considered that he was entitled under the Act, but which the Council had not made available to him.
10. In his response the complainant referred to his letter to the Tribunal of 17 January 2007. In that letter he said that he needed to see documentation which he considered to be missing from the planning file in relation to doubts raised about the lawful use of his client's land. He believed that letters written by the Council on 1 December 2004 and 24 February 2005 indicated that further information existed. The complainant drew attention to a sentence in the first letter which reads 'it is considered essential to receive advice on the abandonment issues before a fair and complete assessment of the proposals can be achieved'. He also pointed to a sentence in the second letter which reads '... all other information provided by the Planning Department has been taken into account in

the assessment of the legal position and subsequent advice to the Planning Department'. He further stated that the second letter wrongly suggested that he had been provided with all the information raising doubts about the lawful use of the land which had contributed to the decision to request legal advice. Following a further request by the Commissioner for clarification, the complainant repeated that he believed information on the issue of the abandonment of the use of his client's land to be missing from the planning file, and that the two letters referred to supported his view.

11. The Council provided copies of all relevant documentation following which the Commissioner found it necessary to contact the Council on two further occasions for clarification. The Council confirmed that it held no information in relation to the Order which had not already been provided to the complainant, other than the letter to which the section 41 exemption had been applied. With regard to paragraph (c) of the Order, the Council said that it had been difficult, at this remove, to locate all information taken into account by planning officers, but all such information would have been included in the report to the Planning Committee which was in the planning file, and which the complainant had seen. It said that, although the complainant was convinced that further information existed, the relevant planning files had been diligently and carefully searched and no information in addition to that already provided to the complainant or inspected by him could be located. The Council did not agree that the two letters referred to by the complainant demonstrated that further information existed.
12. The Council said that it had offered to arrange for the complainant to inspect other files giving a full history of the site (except for some which may be exempt because they contained personal information), but the complainant had not taken up the offer. The Council added that, in any event, the complainant's planning applications had been refused on the issue of green belt development not, as the complainant appeared to believe, on the abandonment of the use of the land.
13. As far as the withheld letter was concerned, the Council said that the letter had been marked 'in confidence' and the author had clearly indicated that he wished the contents to be so treated. The Council considered that, given the expectation that the letter would be treated in confidence, together with the nature of the contents, it was concerned that it would be open to legal action should the letter be made public. However, the Council considered that, in retrospect, the letter did not in any event fall within the scope of the Order.

Analysis

14. The Commissioner has considered carefully the complainant's representations and the Council's response to the Tribunal's Order. The full text of the relevant sections of the Act is set out in the Legal Annex attached.
15. The complainant's primary concern is that he has not been given access to all available information relevant to his client's applications for planning permission, and in particular to information in relation to the question of the abandonment of

- the use of his client's land, which he believes to be missing from the planning file. The complainant bases his case almost entirely on the contents of two letters sent to him by the Council on 1 December 2004 and 24 February 2005, which he considers demonstrate that further information exists. Although invited to do so, he has provided no further evidence to support his argument.
16. The Council has said that the complainant has now been provided with all relevant information with the exception of one letter, and that no other information is held. It has stated that exhaustive searches of the relevant files have taken place and that no further documents of the type specified in the Order have been located. The Council has explained that, although the letters referred to by the complainant include references to legal advice on the abandonment issue, in the event the decisions on the planning applications were made on green belt issues, not on abandonment of the use of the land.
 17. In considering the arguments put forward, the Commissioner has had regard to whether it is likely that the information which is sought by the complainant is, or was at any point, held by the Council in its determination of the planning applications; and whether it would have been necessary for the Council to have held the information. The letters to which the complainant has drawn attention refer to advice sought by the Council in relation to the abandonment issue. The previous investigation referred to in paragraph 3 revealed that the only recorded legal advice was an email, which is not relevant to this investigation; additional legal advice had been obtained orally, but had not been recorded. The Council has stated that no other recorded advice was sought or obtained on the abandonment issue other than the email.
 18. The Council has stated that, despite the impression that might have been gained by the complainant from the two letters, it had not been necessary to seek further written advice on the abandonment of the use of the land and that, in the event, abandonment was not a key issue. Having inspected the Planning Committee reports, it is clear to the Commissioner that the decisions were made on green belt issues and the reports do not suggest that the abandonment question played a major part in the decisions. While the letters of 1 December 2004 and 24 February 2005 could be interpreted to suggest that further advice was sought on the abandonment question, there is no evidence that that was the case: if abandonment ceased to be an issue, further advice would not have been necessary. Furthermore, the Commissioner sees no reason why the Council should seek to conceal any information related to the planning decisions. Therefore, in the absence of any substantive evidence to the contrary, the Commissioner is satisfied that no further information as detailed in the schedule to the Order is held by the Council.

The letter withheld under section 41

19. The Council withheld one letter identified when retrieving information relevant to part (a) of the schedule to the Order, citing section 41 of the Act (information provided in confidence). In retrospect, following contact by the Commissioner, the Council considered that the letter was not covered by the Order. The Commissioner has examined the letter and, although it makes reference to the

planning applications, it does not raise allegations about abandonment or provide clarification of the issue. The Commissioner therefore agrees that the letter is not subject to the information request. The Commissioner also notes that the complainant has not complained about the withholding of the letter. Therefore the Commissioner does not propose to consider the applicability of section 41 to the contents of the letter.

The Decision

20. The Commissioner is satisfied that all information held by the Council has been provided to the complainant and the Council is consequently not in breach of section 1(1) of the Act.

Steps Required

21. The Commissioner requires no steps to be taken.

Right of Appeal

22. 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

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 28th day of March 2007

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.