

Freedom of Information Act 2000 (Section 50)

Decision Notice

31st March 2008

Public Authority: Brightlingsea Town Council
Address: The Parish Hall
Victoria Place
Brightlingsea
Essex
CO7 0BP

Summary

The complainant requested the Council to release a copy of the report submitted by the chartered surveyor which undertook the rent review of the caravan park at which she resides. The Council considered the request and refused to disclose the information citing sections 42 and 43 of the Act. The requested information is made up of 17 separate documents, each labelled 1 to 17. Documents 1, 2, 5 and 11 were later released by the Council; the Commissioner has therefore reviewed the remaining information and considered the Council's application of the exemptions cited. Concerning the application of section 42, the Commissioner has concluded that this exemption applies to documents 3, 6, 8, 14 and 16 and that the public interest rests in maintaining this exemption for these documents. For the remaining documents, those labelled 4, 7, 9, 10, 12, 13, 15 and 17; the Commissioner has considered the Council's application of section 43 of the Act. He has concluded that, with the exception of some information contained in documents 10 and 12, section 43 of the Act does not apply. The Commissioner has therefore ordered the Council to disclose these documents to the complainant within 35 days of this Notice. For the small amount of information contained in documents 10 and 12, the Commissioner has concluded that section 43 of the Act is engaged and that the public interest rests in maintaining this exemption for this specific information. The Commissioner has therefore requested the Council to release redacted versions of these documents to the complainant within 35 days of this Notice.

The Commissioner's Role

1. 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.

Background

2. This Notice concerns a caravan park ('the site') which is currently leased by the Council to a leisure company ('the tenant') and a rent review that was undertaken in accordance with the provisions of the existing lease. The Commissioner understands that the tenant issues site licences to individual residents on the site and these residents operate a residents' association to protect and represent their interests as licence holders. The complainant is a member of this residents' association and has requested information relating to the rent review undertaken on the site.

The Request

3. The complainant contacted the Council on 31 October 2005 to request that the following information be released in accordance with section 1 of the Act (the full text of this section of the Act and any other sections/exemptions referred to later in this Notice can be found in the Legal Annex towards the end of this Notice):

"We request the following documents from Brightlingsea Town Council – we are entitled to view these documents as 'Up To Date Ground Rent Payers';

- 1) Copy of rent review
 - 2) Copy of Lease between Brightlingsea Town Council and [the tenant].
 - 3) According to you there has been no rent increase but according to [the tenant] there has! We therefore require a letter from you stating that there has been no rent increase."
4. The Council first responded on 1 November 2005 and advised the complainant that it was unable to make the information requested available, as there was privity of contract between the Council and its tenant, the leisure company. However, it confirmed the rent for the caravan site, which was effective from November 2004 and provided an explanation to address element 3 of the complainant's request, as listed above.
 5. The complainant wrote to the Council again on 10 November 2005 to restate that she was requesting copies of the following information:
 - 1) All or any leases between the Council and its tenant relating to this site.
 - 2) The final report submitted by the chartered surveyor which undertook the rent review of this site.

The complainant reminded the Council of its obligations under the Act and that a response was required within 20 working days of receipt.

6. The Council responded further on 17 November 2005. It stated that due to its commercial and business relationship with the leisure company, as landlord and tenant, it was of the view that it was unable to disclose a copy of the lease and any related correspondence. It confirmed that it wished to rely on section 43 of the Act.

7. The complainant wrote to the Council on 21 November 2005 to request an internal review in accordance with the Council's internal complaints procedure. The complainant stated that she required the Council to explain clearly for each document being withheld which exemption was being applied.
8. The Council issued a further response on 9 December 2005. On reflection it decided to release a copy of the lease between the Council and its tenant for the site to the complainant. However, the Council omitted to address the second element of the complainant's request, which was for a copy of the final report submitted by the chartered surveyor which undertook the rent review on the Council's behalf.
9. The complainant wrote to the Council again on 12 December 2005 to acknowledge receipt of the lease and to again request that the Council either provides a copy of the final report relating to the rent review of the site or provides further reasons as to why this information should be withheld.
10. As the complainant received no further response from the Council, she contacted the Commissioner on 10 January 2006 to request that the matter be given formal consideration.
11. As the Commissioner noted that the Council had not responded to the complainant's request for an internal review in respect of the final report received by the Council concerning the rent review of the site, he wrote to the Council on 4 July 2006 to request that it conduct an internal review for this aspect of the complainant's request.
12. The Council responded directly to the complainant on 24 August 2006 and forwarded a copy of this further response to the Commissioner. It confirmed that it does hold the information requested in the form of a report. It explained that it was of the view that disclosure would or would be likely to be prejudicial to the commercial interests of the chartered surveyor employed by the Council to carry out the rent review and the commercial interests of the Council.

The Investigation

Scope of the case

13. As there were several elements to the complainant's initial request, the Commissioner first sought to clarify with the complainant what information is currently outstanding. The complainant confirmed that she requires access to the final report of the rent review relating to the site, as referred to by the Council in its correspondence to her (referred to as part (1) of the complainant's initial request dated 31 October 2005 and referred to as part (2), in a subsequent letter of clarification dated 10 November 2005).
14. The Commissioner notes that the final report of the rent review is made up of 17 documents, each individually labelled by the Council as 1 to 17 inclusive. A list of

these documents can be found in Annex A at the end of this Notice. Throughout this Notice, the Commissioner will refer to these documents by their respective number as outlined in Annex A.

15. The Commissioner's investigation has sought to establish whether the Council complied with the requirements of section 1 of the Act and, in particular, whether it acted appropriately by withholding the requested information under section 43 of the Act. As will become apparent further on in this Notice, the Council also cited a further exemption, section 42 of the Act, during the Commissioner's investigation. He will therefore also be considering whether the requested information can be withheld under this exemption.

Chronology of the case

16. As the Council had only recently carried out an internal review in respect of the complainant's requests for a copy of the rent review report, the Commissioner wrote to the complainant on 4 September 2006 to invite her to make any further arguments she wished to be considered during the investigation.
17. The complainant responded on 25 September 2006. She stated that she remained dissatisfied with the way the Council had handled her information request and also with its decision to withhold the final report concerning the rent review under section 43 of the Act. She explained that she failed to understand how the requested information could be regarded as commercially sensitive or how disclosure would or would be likely to be prejudicial to the commercial interests of the Council or the chartered surveyor commissioned by the Council to undertake the rent review.
18. The Commissioner wrote to the Council on 4 October 2006 to request a copy of the withheld information.
19. The Council responded on 6 November 2006 providing a copy of the withheld information to assist with the Commissioner's investigation. The Council confirmed that the final report was made up of a series of correspondence between the Council, its legal adviser, and the chartered surveyor instructed by the Council to conduct the rent review. It maintained that all information held remains exempt from disclosure under section 43 of the Act for the reasons explained in previous correspondence with the complainant.
20. The Commissioner wrote to the Council on 21 November 2006 to request some further information. As it was now apparent that the requested information was not one single report but rather a series of correspondence regarding the rent review, the Commissioner asked the Council to identify each piece of information supplied, explain its contents and the relevance of each document to the complainant's request. He also requested the Council to expand on the rationale it had previously provided in relation to its application of the exemption cited.
21. The Council responded further on 11 January 2007. It provided a list and separately numbered (1 to 17) each piece of information previously supplied to the Commissioner, which collectively forms the final report on the rent review. It

- explained that all the correspondence listed, whether between the Council and the chartered surveyor or between the Council and its legal adviser, was utilised by the Council when setting the level of rent for the site following the rent review. The Council also provided more detailed arguments concerning its application of section 43 of the Act and why it felt disclosure would or would be likely to prejudice the commercial interests of the chartered surveyor and the Council.
22. The Council also advised the Commissioner that it wished to apply a further exemption to the requested information. It stated that it was of the view that the information requested was subject to legal professional privilege and therefore exempt from disclosure under section 42 of the Act. It explained that the requested information was a series of communications between the Council, its legal adviser and the chartered surveyor and the dominant purpose of these communications was the giving and seeking of legal advice between the Council and its legal adviser in relation to the rent review undertaken.
 23. As the two exemptions cited are qualified exemptions, the Council advised that it had applied the public interest test to the requested information. Although it did not elaborate on the reasons why, it confirmed that it was of the view that the public interest in maintaining these exemptions outweighed the public interest in disclosing the requested information.
 24. As the Council had cited an additional exemption, the Commissioner wrote to the Council on 1 March 2007 to request some additional information concerning its application of section 42 of the Act.
 25. The Council responded on 29 March 2007. It confirmed that legal advice was sought during the rent review to ensure that, as landlord, the Council was obtaining the best advice possible. It stated that it was therefore of the view that the requested information is subject to legal professional privilege and exempt from disclosure under section 42 of the Act.
 26. The Commissioner wrote to the Council again on 13 April 2007 to request that it elaborate further on its application of the public interest test under section 42 of the Act.
 27. The Council replied on 10 May 2007 submitting similar arguments to those already supplied to the Commissioner for its application of section 43 of the Act. Briefly, it confirmed that it was of the view that disclosure would put related parties (competitors and other tenants) at an advantage in the future when further rent reviews are undertaken by the Council.
 28. The Commissioner wrote to the Council on 5 June 2007 to request that it reconsider its application of section 42 of the Act to some of the requested information.
 29. The Council replied on 30 July 2007 informing the Commissioner that it disagreed with his interpretation of section 42 of the Act. It confirmed that if it was unable to rely on this exemption, it still remained of the view that the requested information was exempt from disclosure under section 43 of the Act.

30. The Commissioner reviewed the Council's application of section 43 of the Act and wrote to the Council on 14 November 2007 to request that it reconsider releasing some or all of the requested information.
31. The Council responded on 13 December 2007 and 16 January 2008. It advised that it was now willing to disclose to the complainant the documents labelled 1, 2, 5 and 11. However, it remained of the view that the remaining documents should be withheld and submitted further information on 16 January 2008 to the Commissioner to support this decision.
32. As the Council agreed to disclose documents 1, 2, 5 and 11, this Notice will now focus on its decision to withhold the remaining documents and its application of section 42 and 43 of the Act to this information.

Analysis

Procedural issues

33. The Commissioner notes that the Council failed to identify initially that the complainant was making a request for information under the Act. As a result the complainant had to remind the Council of its obligations under the Act and to request a Refusal Notice. Although the Council issued a Refusal Notice within the 20 working day timeframe, the Notice itself was inadequate for the purposes of the Act. Firstly, the Council failed to state clearly why it was withholding information and which exemption it wished to rely on. Secondly, the Council failed to cite a further exemption it later relied on; section 42 of the Act. The Commissioner has therefore found that the Council was in breach of section 17(1) of the Act.
34. The Commissioner also notes that the Council did not outline the public interest test in its Refusal Notice. As section 17(3) of the Act stipulates that the Council should state the reasoning for claiming the public interest in maintaining the exemption outweighs the public interest in disclosing the information when a qualified exemption is being claimed, the Commissioner has concluded that the Council was in breach of this section of the Act.
35. Section 17(7) also states that a Refusal Notice must contain details of any internal complaints procedure in place at the Council for dealing with complaints about the handling of information requests. It also stipulates that the Notice should contain information about the complainant's right under section 50 of the Act to approach the Commissioner if he/she remains dissatisfied. As the Refusal Notice issued in this case did not contain any of this information, the Commissioner has reached the decision that the Council was in breach of section 17(7) of the Act.
36. Turning now to the Council's decision to withhold the remaining information, the Commissioner will first consider the Council's application of section 42 of the Act.

Section 42 – legal professional privilege

37. Section 42 of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege; legal advice privilege and litigation privilege. Legal professional privilege protects the confidential communications between professional legal adviser (including an in-house legal adviser) and clients from being disclosed.
38. The Council stated that the requested information is a series of communications between the Council, its legal adviser and the chartered surveyor which carried out the rent review for the site. It confirmed that the dominant purpose of these communications was the giving and seeking of legal advice between the Council and its legal adviser in relation to the rent review and concerning its role as landlord.
39. The Commissioner has reviewed the requested information and acknowledges that it is a series of communications between the Council, its legal adviser and the chartered surveyor which carried out the rent review. Specifically, he notes that documents 3, 6, 8 and 16 are communications between the Council and its legal adviser. Document 14 is an attendance note for a meeting between the Council and its legal adviser, at which the chartered surveyor was present, which documents advice given to the Council by its legal adviser. The remaining documents (documents 4, 7, 9, 10, 12, 13, 15 and 17) are, however, communications between the Council's legal adviser and the chartered surveyor which carried out the rent review.
40. The Commissioner will first address those documents which are communications between the Council and its legal adviser and document 14; the attendance note.
41. As stated above, document 14 is an attendance note prepared by the Council's legal adviser of a meeting with the Council and the chartered surveyor at which the rent review was discussed. The Commissioner is satisfied that this was a meeting between the Council and its legal adviser, also attended by the chartered surveyor; at which legal advice was given and therefore that this document is subject to legal advice privilege.
42. The Commissioner has reviewed documents 3, 6, 8 and 16. He is satisfied that these documents are confidential communications between the Council and its legal adviser made for the dominant purpose of providing or obtaining legal advice or providing information to facilitate the provision of such advice. It is therefore the Commissioner's view that these documents are also subject to legal advice privilege.
43. The Commissioner notes that the remaining documents (those labelled 4, 7, 9, 10, 12, 13, 15 and 17) are not communications between client and lawyer; they are communications between the Council's legal adviser and the chartered surveyor which carried out the rent review. In order to decide whether these communications are subject to legal advice privilege it is necessary to consider the role of the chartered surveyor in these communications; whether it was

merely acting as agent to the Council or whether it was acting in an independent professional capacity. If it is the case that the chartered surveyor was merely acting as agent to the Council, therefore simply forwarding information to its legal adviser following specific instructions from the Council, it is the Commissioner's view that legal advice privilege may extend to cover these communications. However, the chartered surveyor was acting in an independent professional capacity, the Commissioner is of the view that such correspondence would not be subject to legal advice privilege.

44. The Commissioner has reviewed these documents and considered the role of the chartered surveyor in these communications. It is his view that the chartered surveyor was acting in an independent professional capacity, offering assistance and information to the Council's legal adviser, during these communications. For this reason, he has concluded that these documents are not subject to legal advice privilege.
45. The Commissioner accepts that such communications with third party expert advisers may be covered by litigation privilege, as this branch of legal professional privilege is slightly wider in scope and would include communications with a third party provided that the communications are used by the legal adviser in connection with litigation. However, the Commissioner has questioned the Council several times to establish whether there is any litigation in progress or whether litigation is contemplated and no evidence has been submitted to date to suggest that this is the case.
46. As documents 3, 6, 8, 14 and 16 are subject to legal advice privilege, it is now necessary to consider whether the Council has waived its right to claim legal professional privilege in respect of these documents. Waiver of privilege usually happens when a public authority discloses, shares or copies the legal advice it has obtained with the public or a third party free of restriction.
47. The Council confirmed that it has not disclosed the contents of its legal advice to the public or shared or copied such information with any third party free of restriction. The Commissioner is therefore satisfied that for these documents the Council has not waived its right to claim legal professional privilege.

Public interest

48. As the Commissioner is satisfied that section 42 of the Act applies to documents 3, 6, 8, 14 and 16 and this is a qualified exemption, it is necessary to consider the public interest test. In reaching a view on the public interest, the Commissioner has taken into account those cases already heard by the Information Tribunal in which the issue of legal professional privilege and the public interest have been considered.
49. In the case of *Bellamy v Information Commissioner and the DTI (EA/2005/2003)* the Information Tribunal concluded that:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing consideration would need to be adduced to override

that inbuilt public interest... 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 cut cases”.

50. In a similar case, *Kitchener v Information Commissioner and Derby City Council 9EA/2006/0044*) the Information Tribunal stated that:

“if either lawyer or the client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered”.

51. These cases are not binding upon the Commissioner’s decision, as each case is considered on its own merits. However, these cases provide the Commissioner with guidance in determining what weight should be given to the public interest arguments in this matter.

52. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority’s role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. In this case the Commissioner accepts that the complainant requires access to this information to understand fully how the rent review was undertaken for the site and to possibly assist her in a legal challenge with the current tenant of the site.

53. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.

54. However, it is the Commissioner’s view that there are stronger public interest arguments in favour of maintaining this exemption. The Council needs to be able to obtain full and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Council’s ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is provided freely without the consideration of its wider disclosure.

55. It is also the Commissioner’s view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR or the Act. It is therefore the Commissioner’s view that there is a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.

56. For the reasons explained above, the Commissioner has concluded that in this case the public interest in maintaining the exemption provided by section 42 of the Act outweighs the public interest in disclosure.

Section 43 – commercial interests

57. As the Commissioner is satisfied that section 42 of the Act does not apply to documents 4, 7, 9, 10, 12, 13, 15 and 17, he will now go on to consider the Council's application of section 43 of the Act to this information. Before considering each of these remaining documents in turn, it is necessary to outline what tests the Council would need to satisfy in order for the Commissioner to agree that this exemption is engaged.
58. In order for the Commissioner to agree that section 43 of the Act is engaged, the Council will first need to demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council and/or the chartered surveyor which undertook the rent review on its behalf and that this prejudice is real and of substance. This view is taken from the Information Tribunal hearing of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005)* and its decision, which outlined the tribunal's interpretation of "likely to prejudice". The tribunal confirmed that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. Secondly, and once the prejudice test is satisfied, the Council then needs to apply the public interest test weighing up the arguments for disclosure against non disclosure.

Document 4

59. The document contains two emails between the Council's legal adviser and the chartered surveyor. The document discusses the setting of the rent for the site and refers to a suggestion that was made by the chartered surveyor for the Council to consider an alternative to the possible extension of the existing lease with its tenant. The Council first argued that disclosure would or would be likely to be harmful to its functions as a landlord. It stated that if this information were released into the public domain, it may lead to an increase in pressure from outside parties and other tenants to enter into such alternatives.
60. The Commissioner does not accept this view. The document simply refers to a suggestion that was made by the chartered surveyor of a possible option available to the council in place of an extended lease. Despite being given several opportunities to expand on this rationale, the Council has failed to demonstrate exactly how its commercial interests would or would be likely to be prejudiced by disclosure and to provide evidence to support its argument that disclosure would or would be likely to lead to increased pressure. In more recent correspondence the Council in fact changed its view and informed the Commissioner that it was more concerned that the document referred to negotiations over the rental amount for the site.
61. The Commissioner notes that this document discusses the rental amount and what was hoped to be achieved in terms of the level of rent from the negotiations

taking place with the tenant. However, he also notes that the rent was agreed between both parties six months prior to the complainant's request and the Council is happy to disclose the amount agreed. While the Commissioner may accept that disclosure of such discussions during the negotiation process would or would be likely to be prejudicial to the commercial interests of the Council, as this could lead to, for example, a lesser amount being achieved, he does not accept there would be any prejudice once the rent has been agreed, as at this point negotiations with the tenant over the level of rent had ended. It is also the Commissioner's view that there is a strong public interest in the general public knowing what rent was agreed for publicly owned land, how this was arrived at and whether a competitive price was achieved.

62. For the reasons explained above, the Commissioner has concluded that section 43 is not engaged for this particular document.

Document 7

63. This document is an email between the Council's legal adviser and the chartered surveyor and in terms of content it is very similar to document 4 as outlined above. It discusses the rental amount being negotiated between the Council and its tenant at that time.
64. For the reasons previously explained in paragraphs 60 and 61 above, the Commissioner does not agree that disclosure of this document would or would be likely to prejudice the commercial interests of the Council. He has therefore concluded that section 43 of the Act is not engaged for this document.

Document 9

65. This is a letter from the chartered surveyor to the Council's legal adviser which again discusses various aspects of the rent review. The Council argued that this document refers to a set of "comparables" used by the chartered surveyor when carrying out the rent review. It stated that the chartered surveyor has specialist experience in the caravan industry and this is a highly competitive environment with only two or possibly three other firms in the UK specialising in this area. It confirmed that it was of the opinion that this document would release information about the working practices of the chartered surveyor and the fact that it uses "comparables" when carrying out such rent reviews. It explained that the use of such "comparables" is a unique working practice within the industry.
66. The Council also stated that the document discusses the existing lease and possibilities available to it when the current lease expires or when it does enter into future negotiations with the tenant over the existing lease. It advised that it was of the view that such information is confidential between the Council, as landlord, and its tenant and therefore it should not be released into the public domain.
67. It is the Commissioner's view that this letter does not contain any commercially sensitive information relating to the Council as landlord or the current tenant of the site. Concerning the reference to "comparables", the letter simply refers to the

fact that “comparables” have been used. It does not contain any specific information about these “comparables”; what they are or how exactly they were used. The Commissioner also notes from the contents of this letter that the chartered surveyor openly disclosed the fact that it used “comparables” to one of its competitors in the industry.

68. Similarly, although it briefly mentions the possibility of a new lease with the tenant and the option of different provisions, the document does not go into any detail of what the new lease may entail if indeed one is to be implemented or release any specific information. It is the Commissioner’s view that, generally, leases have specific terms and once these expire they are subject to renewed negotiations. It is also the Commissioner’s opinion that it is not unusual for either party to the lease to wish to implement revised conditions when discussing the possibility of renewing the existing lease.
69. As the Council has failed to demonstrate exactly how disclosure would or would be likely to be prejudicial to the commercial interests of the Council or the chartered surveyor and it is not obvious from reviewing the information itself, the Commissioner has concluded that section 43 of the Act is not engaged for this particular document.

Document 10

70. This is a letter to the Council’s legal adviser from the chartered surveyor. It contains information relating to the “comparables” used by the chartered surveyor when carrying out the rent review for the site. The “comparables” are six other randomly selected clients of the chartered surveyor which own caravan parks in the UK. Each “comparable” contains statistical information relating to each of these parks, for example, its location, number of pitches, rent, rent per pitch and so on. These “comparables” were used by the chartered surveyor to confirm and support the proposed rent for this site.
71. The Council argued that these “comparables” are client confidential and relate to information obtained by the chartered surveyor, collated over a number of years of experience in the caravan industry. Although the rent will now have increased, it confirmed that these “comparables” are still very much current. The Council stated that disclosure would or would be likely to prejudice the commercial interests of the chartered surveyor. It explained that disclosure would harm the relationship between the chartered surveyor and its clients, as it would be disclosing confidential statistics relating to its clients’ sites. This would in turn damage its commercial reputation within the industry and place it at a commercial disadvantage in the future when competing for similar business. As referred to previously, the Council confirmed that the caravan industry is highly competitive, with only two or three other chartered surveyors in the UK specialising in this type of work. It explained that market evidence of the rental valuation of caravan sites is rare and therefore disclosure would release commercially sensitive information into the public domain which could be used by the chartered surveyor’s competitors to its disadvantage.

72. The Commissioner noted that the “comparables” are not client specific as they only refer to the location of each site within the UK and do not contain, for example, the name of each caravan park or its client. When questioned further about this, the Council explained more clearly that competitors or any individual wishing to utilise these “comparables” could easily identify which caravan park is being referred to in each “comparable”. It explained that it would be easy to identify from the geographical location, the size of the caravan park and the number of pitches which park was being referred to.
73. The Council also advised that the chartered surveyor’s clients to which these “comparables” relate would most definitely object to the requested information being disclosed. It explained that if these “comparables” were disclosed, other caravan park owners would be able to use this information to undercut the pitch rents on their own site. This would then place the clients used in the comparison at a commercial disadvantage.
74. The Commissioner accepts that the caravan industry is competitive, market evidence of rental valuation of caravan sites is rare and that the chartered surveyor is one of possibly two or three practices that specialise in this particular type of work. As it has taken the chartered surveyor a number of years to acquire this information and therefore be in a position to conduct such reviews by way of comparison, in principle, the Commissioner can see how such information could be regarded as commercially sensitive.
75. However, it is evident from the contents of this document and document 9 that the chartered surveyor openly shared these “comparables” with one of its few competitors during the rent review that was undertaken. It therefore openly disclosed the fact that it does use “comparables” and shared client confidential information which has taken years to acquire with a competitor in the industry. When the Commissioner questioned this, the Council confirmed that the chartered surveyor does not usually disclose such information during such negotiations. In this case it was asked to do so and this is unusual practice. It stated that, in any event, limited disclosure in this context is not the same as disclosure to the public at large.
76. The Commissioner accepts that the “comparables” used by the chartered surveyor were only disclosed to a select few. However, the information was shared with one of the chartered surveyor’s few competitors. It is therefore the Commissioner’s view that such action goes some way to weakening the arguments presented by the Council, as outlined in paragraphs 67 to 69, regarding the potential damage to the chartered surveyor if details of these “comparables” were released under the Act.
77. On the other hand, however, the Commissioner agrees that limited disclosure in this context is not the same as disclosure to the public at large. Although these “comparables” were shared with one competitor, it remains the case that there is one or possibly two other chartered surveyors in the industry that specialise in this type of work and other chartered surveyors in the UK which may wish to acquire such specialist knowledge. As it would be possible for others in the industry to identify from the location of each “comparable” which caravan parks

were used in the comparison, the Commissioner accepts that disclosure would provide other chartered surveyors in the industry with specific rental evaluation information, which by its nature, is rare and difficult to acquire without years of industry experience. If this information were disclosed, other practices could utilise this information for their own working and business purposes to the detriment of the chartered surveyor.

78. The Commissioner also accepts that disclosure would be likely to damage the chartered surveyor's reputation and current standing in the industry. As individual clients can be identified from the requested information, disclosure would possibly release the message that the chartered surveyor is willing in some situations to release client information to others in the industry by way of comparables. Existing clients or prospective clients which require their information to remain confidential may feel differently about doing business with the chartered surveyor and possibly turn to another practice in the industry for its services.
79. For the reasons explained above, the Commissioner accepts that disclosure of this document in its entirety would or would be likely to prejudice the commercial interests of the chartered surveyor.
80. However, the Commissioner notes from the Council's arguments that the identification of each client can only be achieved by linking the specific information together, for example, the location of each park to the size and the number of pitches. It is therefore the Commissioner's view that the information would not be commercially sensitive if the location of each comparable was not disclosed, as the identification of each client would not then be possible. The Commissioner has therefore concluded that the Council should release this document to the complainant with the location of each "comparable" redacted.

Document 12

81. This document is a letter from the chartered surveyor which undertook the rent review to the Council's solicitor. The first part of this letter discusses the rent for the site. As the Commissioner has already outlined his view on the application of section 43 to this information when considering documents 4 and 7, he will not repeat these arguments here, other than to say that he does not agree this exemption applies.
82. The second part of this letter discusses the possibility of an extension to the existing lease between the Council and the tenant of the site and contains some recommendations from the chartered surveyor for the Council to consider when discussing this possibility and the option of revised terms with its tenant.
83. Although the Council confirmed that it was not in any negotiation with its tenant in respect of this matter at the time of the complainant's request, it remains of the view that disclosure would or would be likely to prejudice its commercial interests. It stated that it is not known what arrangements may or may not be in place in the future for this site or with its current tenant. However, it is of the view that it would be placed at a commercial disadvantage if it does become necessary to discuss the existing lease with the tenant and this information were disclosed, as

information would be released about some of the options it has provisionally considered. It explained that this document specifically refers to alternative rent review provisions and a possible premium for a new lease if this were granted and what this premium is. The Council stated that it is likely that it will enter into discussions with the tenant at some time in the future over the current lease and what will happen once this expires. It is of the view that if this information were disclosed prior to these negotiations, the tenant would have knowledge of the terms already recommended by the Council's chartered surveyor, which would then hinder any negotiations and give the tenant prior knowledge of the likely financial details sought in a new arrangement.

84. The Council also stated that it is the landlord of another caravan park which is currently leased and subject to future rent reviews and lease renewals. It is therefore of the view that disclosure of this information would or would be likely to prejudice the commercial interests of the Council when entering into future negotiations with its other tenant over rent and the existing lease.
85. Although the Council was not in any formal negotiations with the tenant at the time of the complainant's request, the Commissioner notes that it is likely that it will enter into such negotiations in the future, as the current lease has a specific term and will therefore expire. There is also evidence to suggest that the tenant wished to discuss the existing lease and options for the future at the time of the rent review and therefore the Commissioner accepts that such discussions may take place some time before the existing lease is due to expire in 2019.
86. The Commissioner is of the opinion that if these financial details were released at this time, the tenant would gain prior knowledge of what the Council may wish to achieve from any negotiations that may take place over the existing lease. He notes that this would place the Council at a disadvantage and undermine the purpose of such negotiations and its ability to achieve the best possible terms and rent for the site.
87. For the reasons explained above, the Commissioner agrees that disclosure of the financial details quoted in this document would be likely to prejudice the commercial interests of the Council. He has therefore concluded that, for some parts of this letter, section 43 of the Act is engaged.

Document 13

88. This document is a letter from the Council to the chartered surveyor, which briefly discusses the site and the proposed rent following the rent review undertaken. For the same reasons previously explained in respect of documents 4 and 7, the Commissioner queried exactly how and to what extent disclosure of this information would or would be likely to prejudice the commercial interests of the Council or the chartered surveyor.
89. Despite being provided with various opportunities to elaborate further, the Council failed to supply any additional arguments to support its decision to withhold this document. It is therefore the Commissioner's view that the Council has failed to demonstrate how disclosure would or would be likely to prejudice the commercial

interests of the Council or the chartered surveyor and therefore that section 43 of the Act is not engaged.

Document 15

90. This is a letter from the Council to the chartered surveyor. The first half of the letter discusses the rent review provisions in the existing lease and the second half discusses the possibility of a breach of the current lease by the tenant.
91. Concerning the identification of a possible breach of the existing lease, the Council argued that this information is commercially sensitive and should remain confidential between it as landlord and its tenant. It stated that prior disclosure of this information could hinder any negotiations between the Council and its tenant and undermine its ability to deal with this matter sensitively and effectively. The Council also confirmed that disclosure would be likely to damage its reputation as a landlord and therefore impact on its current relationship with its tenants. It also felt that if its approach to this matter were disclosed, this may encourage other tenants to change the way they currently operate under their existing leases.
92. The Commissioner has reviewed this document. Concerning the first half of this letter, he notes that the Council has not submitted any arguments to demonstrate why disclosure of this section of the document would or would be likely to be prejudicial to the commercial interests of the Council or a third party. As it is not obvious from the information itself, and this part of the letter simply dictates the current rent provision in the existing lease, the Commissioner has concluded that section 43 of the Act is not engaged for this part of this document.
93. As stated above the remainder of this document discusses the possibility of a breach of the existing lease and offers the chartered surveyor's opinion of the likely success of the Council if it were to be challenged. It is the Commissioner's view that the only argument of substance submitted by the Council against disclosure is one of embarrassment. From the evidence supplied, it appears the Council is only concerned about its approach to this matter being disclosed and the possible message this may send to its other tenants.
94. It is the Commissioner's view that the purpose of this exemption is not to protect public authorities against embarrassment and if this is the only reason for non disclosure, the requested information should be released. As the Council has failed to raise any further arguments to demonstrate why disclosure would or would be likely to prejudice the commercial interests of the Council or a third party, the Commissioner has concluded that the exemption does not apply to the remainder of this document.

Document 17

95. Again this document is a letter from the chartered surveyor to the Council's solicitor. Paragraph 1 discusses the current lease and the existing rent review provisions. Paragraph 2 simply refers to the tenant's wish to enter into negotiations with the Council regarding the existing lease. Paragraph 3 and

subsections (a) and (b) discuss the possible breach of the existing lease and explain the actions taken by the tenant which constitute this possible breach.

96. Concerning the first two paragraphs, it is the Commissioner's opinion that these paragraphs do not contain any commercially sensitive information. The first paragraph simply documents when the existing lease was signed, for what term and the commencing rent. The Commissioner also notes that this information was released by the Council in response to the complainant's initial request under the Act (please refer to paragraphs 3 and 8). The second paragraph briefly states that the tenant wishes to discuss the possibility of extending the existing lease with the Council. The Commissioner does not consider the simple reference to this preference is commercially sensitive.
97. The Commissioner notes that the third paragraph and subsections (a) and (b) discuss the possible breach of the existing lease. For the reasons previously explained in paragraph 94 above, the Commissioner has concluded that for this information section 43 of the Act is not engaged.

Conclusion

98. For documents 4, 7, 9, 13, 15 and 17 the Commissioner has concluded that section 43 of the Act is not engaged. This is because the Council has failed to demonstrate the prejudice disclosure would or would likely cause and the likelihood of this prejudice. As a result there is no need for the Commissioner to consider the public interest test for these documents.
99. As the Commissioner concluded that section 43 of the Act applies to certain information in documents 10 and 12, it is now necessary to consider the public interest test for this specific information.

Public interest

In favour of disclosure

100. The Commissioner accepts that there is considerable local public interest in the rent review that was undertaken for this site by the Council, particularly from those residents of the site who are members of the residents association. For the residents association the information is required to enable them to understand more fully how the review was undertaken and what factors were taken into account. The Commissioner also notes that the information is required to assist the residents association in pursuing its own interests and to assist a possible legal challenge.
101. The Commissioner also accepts that there is a public interest in public authorities acting in an open and transparent manner and members of the public being able to view how decisions of this nature are made.
102. There is also a public interest in public authorities being accountable, particularly where its actions are in relation to the accumulation or use of public funds and assets. The Commissioner notes that the site is publicly owned and leased to the

current tenant at a premium. There is a public interest in knowing how rents for such resources are set and to ensure that a competitive rent is being obtained.

Against disclosure

103. The Commissioner will first address document 10 and the location of each “comparable”. Although private sector companies which engage in commercial activities with the public sector must expect some information about its activities to be disclosed, the Commissioner reached the decision that disclosure of this document in its entirety would be likely to be prejudicial to the commercial interests of the chartered surveyor. Disclosure of the location of each “comparable”, for reasons previously explained, would potentially damage the chartered surveyor’s reputation, its commercial interests and current standing in an industry which is already highly competitive. The Commissioner therefore accepts that there is a strong public interest in maintaining this exemption.
104. The Commissioner also believes there is a strong public interest in ensuring companies are able to compete fairly and that a level playing field is maintained. He accepts that if this information were disclosed this could distort competition in an environment where only a select few chartered surveyors are able to carry out such work and he does not consider that this is in the public interest.
105. Turning now to document 12. The Commissioner is of the view that there is a public interest in allowing public authorities the space and opportunity to contemplate courses of action and options available to them. Although the Commissioner notes that the Council was not in any negotiations with the tenant over the existing lease at the time of the complainant’s request and that the Council has confirmed that the lease and possible alternatives have not to date been considered. The Commissioner is aware that it is likely that the Council will enter into such negotiations with the tenant in the future and it is likely that both parties may wish for revised terms to be implemented. As stated previously, this document highlights some suggestions made by the chartered surveyor that the Council should consider when negotiating with the tenant on this matter. If this information were disclosed at this time, it would be released prior to any form of negotiations and would be likely to hinder the negotiation process when this is commenced. Disclosure would also be likely to place the Council at a commercial disadvantage, as the tenant would have prior knowledge of what the Council hoped to achieve from such negotiations. This could then lead to the Council being unable to secure the terms and rent it desires in the future for this site.
106. There is also a strong public interest in ensuring that public authorities utilise resources effectively and, for publicly owned land which they rent out, obtain a competitive level of rent. The Commissioner is of the view that disclosure in this case would be likely to place the Council at a commercial disadvantage when it does decide to enter into negotiations with the tenant over the existing lease. Disclosure would mean that the tenant would have prior knowledge of what the Council hoped to achieve from these negotiations; how future rent would be calculated and the premium it was considering to levy for the renewal of the lease. Disclosure at this stage could therefore lead to the Council failing to obtain

the best possible terms for this site and the most cost effective rent review provisions.

107. The Commissioner has carefully considered the arguments for and against disclosure. For the reasons explained in paragraphs 103 to 106 above, he has concluded that the public interest in maintaining the exemption for the remaining information in documents 10 and 12 outweighs the public interest in releasing this information.

The Decision

108. Concerning the procedural issues outlined in paragraphs 33 to 35, the Commissioner found that in this case the Council was in breach of sections 17(1), 17(3) and 17(7) of the Act.
109. With regards to documents 3, 6, 8, 14 and 16 the Commissioner has concluded that the Council was correct to rely on section 42 of the Act.
110. For documents 4, 7, 9, 13, 15 and 17, the Commissioner has concluded that the Council did not deal with the complainant's request in accordance with section 1 of the Act. This is because for this information, the Council inappropriately relied on section 43 of the Act and therefore failed to communicate this information to the complainant.
111. Regarding documents 10 and 12, the Commissioner has concluded that the Council was partially correct to rely on section 43 of the Act. The Commissioner has decided that section 43 of the Act can only apply to some of the information contained in these documents; the location of each "comparable" (document 10) and the financial details relating to renewal of the lease, if and when this takes place (document 12). For the remainder of these documents, section 43 of the Act does not apply and this information should have been communicated to the complainant in accordance with section 1 of the Act.

Steps Required

112. In view of the matters referred to above the Commissioner gives notice that in exercise of its powers under section 50 he requires the Council to disclose the following information to the complainant within 35 days of the receipt of this Notice:
- Documents 4, 7, 9, 13, 15 and 17.
 - Document 10 with the location of each "comparable" redacted.
 - Document 12 with the financial information contained in this document relating to possible alternative rent provisions and the possible premium to be levied on renewal of the lease redacted.

Other matters

113. Concerning the complainant's request for an internal review, the Commissioner notes that the Council responded to part 1 of the complainant's request (outlined in paragraph 5) on 9 December 2005. However, it failed to carry out an internal review of part 2 of the complainant's request until some months later, on 24 August 2006, and following the intervention of the Commissioner. Section VI of the Code of Practice under section 45 of the Act states that a public authority should have a procedure in place for dealing with complaints in relation to the handling of information requests. This should comprise desirable practices about how such complaints will be handled including the requirement to deal with such complaints promptly and in a timely manner. It is the Commissioner's view that 20 working days is a reasonable timeframe for dealing with complaints of this nature. As the Council failed to respond to the second element of the complainant's request for eight months, the Commissioner has concluded that the Council failed to meet its obligations under the Code of Practice issued under section 45 of the Act in this case.
114. The Commissioner would like to draw the Council's attention to the unacceptable delays throughout this investigation in providing additional information or further explanations to the Commissioner. Although reasonable timeframes have been given and in some cases further extensions, the Council repeatedly failed to provide the additional information in a timely manner. The Commissioner would therefore like to remind the Council of its obligations under the Act and the level of co-operation required during such investigations. The Council should also familiarise itself with the Codes of Practice associated with the Act and the Commissioner's guidance available on his website at www.ico.gov.uk

Right of Appeal

115. 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 31st of March 2008

Signed

**David Smith
Deputy Commissioner**

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

Annex A

The final report of the rent review undertaken on the site is made up of the following documents:

1. email from the chartered surveyor to the Council's solicitor dated 10 May 2005
2. email from the Council's solicitor to the chartered surveyor dated 4 May 2005
3. letter from the Council to its solicitor dated 29 April 2005
4. emails between the Council's solicitor and the chartered surveyor dated 19 April 2005
5. email from the chartered surveyor to the Council's solicitor dated 18 April 2005
6. letter from the Council to its solicitor dated 18 April 2005
7. email from the chartered surveyor to the Council's solicitor dated 13 April 2005
8. letter from the Council's solicitor to the Council dated 8 March 2005
9. letter from the chartered surveyor to the Council's solicitor dated 7 February 2005
10. letter from the chartered surveyor to the Council's solicitor dated 7 February 2005
11. letter from the chartered surveyor acting on behalf of the tenant to the Council's solicitor dated 27 January 2005
12. letter from the chartered surveyor to the Council's solicitor dated 18 October 2004
13. letter from the Council's solicitor to the chartered surveyor dated 1 October 2004
14. attendance note of the Council's solicitor dated 14 September 2004 and 28 September 2004
15. letter from the Council's solicitor to the chartered surveyor dated 7 September 2004
16. letter from the Council to the Council's solicitor dated 21 July 2002 (with enclosures; and
17. letter from the chartered surveyor to the Council's solicitor dated 15 June 2004

Legal Annex

Freedom of Information Act (2000)

Section 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.”

Section 17(1)

Provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3)

Provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(7)

Provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Section 43(2)

Provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 42(1)

Provides 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.”