

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 October 2009**

**Public Authority:** The London Borough of Bromley  
**Address:** Civic Centre  
Stockwell Close  
Bromley  
BR1 3UH

### Summary

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The complainant asked to be provided with the external legal advice provided to the London Borough of Bromley ("the Council") relating to the evidence the Council said it held at a planning meeting in 2002 that Manor Park was a public highway. The Information Commissioner ("the Commissioner") investigated and decided that the legal advice held was exempt under section 42(1) of the Freedom of Information Act 2000 ("the FOIA") and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner found breaches of section 17(3)(b) and 17(7) of the FOIA.

### The Commissioner's Role

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1. 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 FOIA. This Notice sets out his decision.

### Background

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- 2 On 6 June 2002, the Council's Plans No. 1 Sub-Committee granted the Manor Park Chislehurst Road Trust planning permission for the erection of entrance gates and piers. At this meeting, the Council's solicitor pointed out that Manor Park was included in the Council's non-statutory list of un-adopted roads. The permission was granted with an "informative" that implementation "is likely to contravene legislation contained in the Highways Act 1980 and in so doing cause an offence to be committed". The offence referred to was obstruction of the highway contrary to Section 137 of the 1980 Act. The Manor Park Chislehurst Road Trust did not proceed with the planning permission because of the

informative. It has been in correspondence with the Council from this time until the present asserting its view that Manor Park is a private road and challenging the Council's position. It would like to apply for new planning permission to erect gates but is concerned about the Council's position with regard to the status of Manor Park.

## The Request

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3. On 7 March 2008, the complainant wrote to the Council and asked for information in the following terms:

"I have established that the Council has sort [sic] external legal advice from G Lawrence on 7 occasions between January 2000 and March 2001 (before Manor Park applied for planning permission to erect gates) and from M Orlik on 18 occasions between July 2002 and April 2004 (after Manor Park had challenged the Council to make available the alleged evidence it held relating to Manor Park).

Can you please make available copies of any written advice offered by either of these to Counsels [sic] and or any file notes of officers attending meetings with such Counsel".

4. On 25 March 2008, the Council replied. It stated that the advice was exempt under the FOIA because it was covered by Legal Professional Privilege. It stated that having due regard to the public interest test it was not appropriate to waive the privilege.
5. On 6 April 2008, the complainant wrote to the Council to request an internal review. He wrote in the email that he was seeking an internal review of the Council's decision, "...not to release copies to [sic] the legal advice given by G Lawrence and M Orlik relating [sic] the evidence alleged to be held by the Council as to the status of Manor Park".
6. On 2 May 2008, the Council completed its internal review. It stated that Mr Lawrence had never advised the Council on Manor Park however it had received legal advice from Mr Orlik. It confirmed that it was relying on section 42 of the FOIA to withhold the information and stated that its position had not changed following review.

## The Investigation

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### Scope of the case

7. On 8 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had been correct to withhold the information he had requested on 7 March 2008.

8. During the Commissioner's investigation, the Commissioner pointed out to the complainant that the Council had confirmed that it did not hold any legal advice given by Mr Lawrence relating to the status of Manor Park and the complainant did not challenge the point. The complainant also wrote to the Commissioner confirming that he wanted the legal advice given by Mr Orlik. The Commissioner has not therefore considered in this Notice the part of the request relating to Mr Lawrence's legal advice.
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the FOIA.

### Chronology

10. On 13 May 2009, the Commissioner wrote to the complainant to set out his understanding of the request and the complaint. The Commissioner pointed out that the internal review had revealed that the Council did not hold legal advice from Mr Lawrence regarding Manor Park. The Commissioner therefore stated that he understood the complainant wished to be provided with copies of legal advice from Mr Orlik regarding whether Manor Park is a public highway. The Commissioner asked the complainant to confirm his continued interest in pursuing the complaint and that the Commissioner had accurately reflected the details of the complaint.
11. On 4 June 2009, the complainant replied to the Commissioner. The complainant explained to the Commissioner that at the planning meeting referred to in the Background section of this Notice, council officers had advised the Sub-Committee that the Council held evidence that Manor Park was a public highway. He stated that the Council had refused to provide this evidence. The complainant indicated that he wished to have access to the legal advice sought by the Council to assess the evidence which the Council had relied upon at the meeting and to assess its "veracity". The complainant wrote that the advice sought from Mr Orlik is clearly specific to Manor Park so the release of the advice could not prejudice the Council's position in respect of other roads in the borough.
12. On 19 June 2009, the Commissioner wrote to the complainant again pointing out that he had not clearly confirmed whether the Commissioner had accurately represented the complaint. He wrote that having considered the contents of the complainant's letter dated 4 June 2009 the Commissioner had concluded that the complainant was seeking information of the following description:
  - Copies of the legal advice from Mr Orlik concerning the evidence that the Council said it held (at the meeting in June 2002) that Manor Park was a public highway
  - Copies of file notes of officers attending meetings with Mr Orlik concerning the evidence that the Council said it held (at the same meeting) that Manor Park was a public highway.

The Commissioner stated that he understood that the complainant believed the Council held information of the above description and he would like the

- Commissioner to consider whether the Council had been correct to withhold this information.
13. On 26 June 2009, the complainant replied. It confirmed that the Commissioner had correctly identified the information sought.
  14. On 29 June 2009, the Commissioner wrote to the Council. He set out the scope of the complainant's request and complaint as described above and he asked the Council to provide copies of the information it held. The Commissioner also asked a number of other questions to help him to consider the complaint.
  15. On 27 July 2009, the Council responded to the Commissioner. It provided copies of legal advice it held from Mr Orlik dating from 22 July 2002 to 21 April 2004 and some background documents. It provided a brief summary of the background and confirmed that the Council's non-statutory list of un-adopted highways "effectively constituted the evidence relied on at the 6<sup>th</sup> June meeting". It also responded to the other questions posed by the Commissioner.
  16. On 31 July 2009, the Commissioner contacted the Council to discuss its letter. He asked whether the Council objected to the Commissioner communicating to the complainant that the only evidence it was relying on at the time of the planning meeting was that Manor Park appeared on the list of un-adopted highways in an attempt to try to achieve informal resolution of the complaint. The Council confirmed that it had no objection to this.
  17. On 31 July 2009, the Commissioner wrote to the complainant. He stated that the correspondence that the complainant had sent to the Commissioner suggested that the complainant was concerned to establish what evidence the Council was relying upon at the planning meeting in 2002. He informed the complainant that the Council had confirmed the only evidence was the fact that Manor Park was on the list of un-adopted highways.
  18. The complainant responded to the Commissioner on 15 August 2009. He stated that the Trust still wished to have sight of the legal advice given to the Council by Mr Orlik to understand what advice he provided to the Council in relation to the Council's non-statutory list of un-adopted highways.

## Analysis

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### Exemptions

#### Section 42

19. Section 42(1) provides an exemption for information that is protected by Legal Professional Privilege. The principle is based on the need to protect a client's confidence that any communication with his/her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no

- litigation is contemplated or pending) and litigation privilege (where litigation is contemplated or pending).
20. The Commissioner inspected the withheld information and was satisfied that it was clearly legal advice from an external solicitor that was provided to the Council's Senior Solicitor. The Commissioner was therefore satisfied that the information was covered by legal advice privilege.
  21. Having satisfied himself that the dominant purpose of all of the information being withheld related to the provision of legal advice, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived in this case. Even if information is privilege, this can be lost (waived) if the client has shared it with third parties and it has lost its confidentiality. The Commissioner asked the Council questions concerning any public disclosure or disclosure to third parties and was satisfied that waiver did not apply to any of the information in this case.
  22. In view of the above, the Commissioner was satisfied that the information was covered by legal advice privilege. However, section 42(1) is a qualified exemption (meaning that it is subject to a public interest test). The Commissioner therefore also needs to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of disclosing the requested information**

23. The Commissioner has taken into account that there exists within the FOIA itself a general presumption in favour of disclosure. Some weight must therefore be attached to the general principles of achieving accountability and transparency.
24. Disclosure of this particular information would help the complainant and other residents of the road (and the roads it provides access to) to understand more about the Council's reasons for challenging the status of Manor Park as a private road. This would assist them in engaging with the Council further in order to challenge this position.
25. It is evident from the documentation presented to the Commissioner that in addition to the problem encountered by the complainant, there have been a number of other cases in the borough where residents have sought to declare their roads private and taken steps to prevent public usage. Disclosure of this information may also assist other members of the public in similar disputes over the status of roads to understand the Council's general considerations.
26. In addition, there is a wider public interest in bringing to light more information about the problems encountered by the Council with regard to defending the status of roads appearing on its non-statutory records as un-adopted highways. This will allow non residents of the roads more opportunity to understand what action the Council is taking to investigate the status of the roads and to protect that status where necessary.

27. There are also clearly accountability issues where public funds are concerned. The legal advice in this case was sought from an external solicitor and there is therefore a public interest in understanding what advice was sought from and given by the external solicitor in view of the fact that the Council chose to incur additional expense by seeking external legal advice. There is also the possibility that the Council may incur further significant expense if it faces a legal challenge in connection with the status of any road.

### **Public interest arguments in favour of maintaining the exemption**

28. The Commissioner's guidance on section 42(1) states the following:

"Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice".

29. In light of the above, there will always be a strong argument in favour of maintaining the public interest exemption because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the case of *Bellamy v Information Commissioner* (EA/2005/0023; 4 April 2006) when it stated that:

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

30. The above does not mean however that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.
31. As well as the above, the Commissioner has taken into account the timing of the complainant's request. The request was made on 7 March 2008 and the legal advice in question covers a time period from 2002 until 2004. Although by the time of the request, the earliest legal advice dated back six years, the Council has explained that if it faced a legal challenge in the future, it would still wish to rely on this advice to defend its position. Therefore, there is a possibility that disclosure of the advice would prejudice the Council's legal position in the future.

### **Balance of the public interest arguments**

32. The Commissioner appreciates that there is a public interest in public authorities being as accountable as possible in relation to highway issues. However, although the Commissioner understands that the complainant and other local residents have a particular interest in this matter, he does not consider that the public interest in disclosure weighs as heavily in the balance when compared to the strong public interest inherent in maintaining the Council's right to seek

confidential legal advice, particularly in view of the fact that there are ongoing disputes about the status of the roads. The Commissioner therefore concluded that in the circumstances of this case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

### Procedural Requirements

33. On 7 March 2008, the complainant asked for copies of the legal advice from Mr Orlik which he acknowledged had been sought after the planning meeting. When he requested an internal review on 6 April 2008, he asked for copies of the legal advice relating to the evidence alleged to be held by the Council as to the status of Manor Park. The Commissioner carefully considered whether the terms of the request had changed.
34. The Commissioner considered that although the complainant did not specifically refer to wanting legal advice relating to the status of Manor Park in his request on 7 March 2008, the context indicates that this was the case. The Council explained to the Commissioner that the evidence it had relied upon at the planning meeting (referred to by the complainant on 6 April 2008) was the fact that Manor Park was on the Council's non-statutory list of un-adopted highways. It is clear that Mr Orlik's legal advice was sought as a result of the existence of the record and to explore the Council's options. The Commissioner therefore accepts that all the legal advice could be said to "relate to" the Council's non-statutory list. In view of this, the Commissioner does not consider that the scope of the complainant's request changed following his request for an internal review on 6 April 2008.
35. When the Council responded to the complainant's request on 7 March 2008, it stated that the advice was covered by the legal professional privilege exemption and that it was not appropriate to waive that privilege having had "due regard" to the public interest test. The Commissioner considers that the Council's response breached section 17(3)(b) because it failed to set out its reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Finally, the Council's response breached section 17(7) for not containing details of the Council's internal review procedure and the right to complain to the Commissioner.

### The Decision

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36. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the FOIA:
  - It correctly applied the exemption under section 42(1) of the FOIA and correctly determined that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:

- The Council breached section 17(3)(b) because it failed to set out its considerations in the public interest test.
- The Council breached section 17(7) for failing to provide details of its internal review procedure and the right to appeal to the Commissioner within 20 working days following receipt of the request.

### **Steps Required**

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38. The Commissioner requires no steps to be taken.



## Right of Appeal

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39. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 5<sup>th</sup> day of October 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

### Refusal of Request

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.”

### Legal Professional Privilege

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.”