

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 January 2010

Public Authority: Swanage Town Council
Address: Town Hall
High Street
Swanage
Dorset
BH 19 2NZ

Summary

The complainant requested terms of reference for a financial options appraisal in relation to a caravan park. The Council refused the request on the basis that the information was subject to legal professional privilege and therefore exempt by virtue of section 42 of the Freedom of Information Act 2000, and that it also constituted commercially sensitive information and was exempt by section 43 of the Freedom of Information Act 2000. The Commissioner has investigated and has determined that the exemptions are not engaged, and the Council was incorrect to refuse the request. Therefore the Commissioner finds that the withheld information should be disclosed. The Commissioner also identified a series of procedural breaches in relation to the way the Council dealt with the request.

The Commissioner's Role

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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In 1974, Swanage Town Council ('the Council') acquired land on which a large number of caravan sites were situated in addition to a leisure complex. The Council managed the site until about 2004, and such management generated an income stream.

3. Following a review of the Council's Annual Accounts for 2004/2005 and 2005/2006, the Audit Commission raised concerns with the legality of the income stream received from the caravan site. Following the threat of a legal challenge from the Audit Commission, the Council resolved on 21 August 2008 to explore a lease option in respect of the future management and operation of the caravan park.
4. In February 2009 the Council's solicitors were instructed to advertise nationally for the appointment of a national land agent to conduct a tender process. Following this process Fox Leisure was chosen to commence a national tender procedure by way of long lease or sale of the caravan park.

The Request

5. On 2 July 2008 the complainant requested "a copy of the TOR [terms of reference] for Charles F Jones financial options appraisal".
6. The Council responded to the request for information on 31 July 2008. The Council refused the request for information and cited two exemptions under the Act, namely section 42 (legal professional privilege) and section 43 (commercial interests).
7. On 19 August 2008 the complainant requested an internal review of the decision not to disclose the information requested.
8. The Council responded on 26 September 2008 upholding the decision not to provide the request for information.

The Investigation

Scope of the case

9. On 2 October 2008 the complainant contacted the Commissioner to complain about the way that his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information was exempt by virtue of section 42 and section 43 of the Act.

Chronology

10. On 20 April 2009 the Commissioner wrote to the Council requesting a copy of the withheld information and further detail on its application of sections 42 and 43 of the Act.

11. On 21 May 2009 the solicitors acting on behalf of the Council responded to the Commissioner's correspondence providing background information.
12. On 1 June 2009 the Commissioner corresponded with the Council advising that the withheld information was required in order to progress his investigation. He further outlined his information gathering powers under section 51 of the Act and requested that the Council forward a copy of the withheld information and a response to his letter.
13. Following instructions from the Council, the Commissioner contacted the Council's solicitors on 18 June 2009. The Council's solicitors advised that it would not release the information to him voluntarily, and stated that he would have to issue an Information Notice.
14. On the same day the Commissioner issued an Information Notice requiring compliance within 30 days.
15. On 16 July 2009 the Council submitted an appeal to the Information Tribunal claiming that to provide the information requested to the Commissioner would constitute a waiver of legal professional privilege.
16. On 15 September 2009 the Council disclosed some of the information requested to the Commissioner.
17. The Information Tribunal dismissed the appeal on 28 October 2009.
18. On 2 November 2009 the Commissioner corresponded with the Council's solicitors and requested the information which was the subject of the appeal by return.
19. On 11 November 2009 the Commissioner once again contacted the Council's solicitors requesting the information. The solicitors advised that the information would be provided by 20 November 2009.
20. On 24 November 2009 the Council's solicitors contacted the Commissioner to advise that it would endeavour to provide a response by the end of that week. On the same day the Commissioner wrote to the Council's solicitors placing it on formal notice that if a response was not received by 1 December 2009, he would lodge a certificate of non-compliance with the High Court.
21. The Commissioner received a response from the Council on 25 November 2009. The response contained the outstanding information requested in the Information Notice dated 18 June 2009.

Analysis

Exemptions

Section 42 – Legal professional privilege

22. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege. The full text of section 42 can be found in the Legal Annex attached to this Notice.

23. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the Information Tribunal described LPP as:

“... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and *[third]* parties if such communication or exchanges come into being for the purpose of preparing for litigation..”(paragraph 9)

24. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.

25. The Council has claimed that the withheld information is subject to litigation privilege and legal advice privilege.

Litigation privilege

26. The Commissioner considers that litigation privilege may only be claimed in respect of certain limited communications that meet the following requirements:

- (i) Litigation is pending or in contemplation
- (ii) The communication is made between the appropriate parties
- (iii) The dominant purpose for the creation of the documents/information was to assist in the litigation

27. In order to determine whether the information is subject to litigation privilege the Commissioner has considered each of these requirements in turn.

Litigation is pending or in contemplation

28. As set out in his guidance on this matter (http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/legal_professional_privilege.pdf), the Commissioner's view is that the appropriate test for deciding on the degree of likelihood of litigation is

whether or not there was a reasonable prospect (not just a fear or possibility) of litigation at the time of the creation of the document.

29. The Council has advised that the Audit Commission openly published a 'threat' of injunctive relief¹ to stop the sale of caravans, and the Council's income stream from these sales. Whilst the Commissioner has not been provided with details of the threat from the Audit Commission, he notes that the potential action is widely documented in the public domain.
30. The Commissioner therefore considers that in this instance there was a real threat of litigation and that this requirement is met.

The Communication is made between appropriate parties

31. The Commissioner accepts that litigation privilege is not limited to communications between lawyer and client. The Commissioner recognises that litigation privilege can be extended to third parties but his view is that in order for information to attract litigation privilege, the dominant purpose (main purpose) needs to be to assist in the preparation of an actual or contemplated case. This is a question of fact in each case and may be obvious from inspecting the documents in question. In order to clarify whether litigation privilege extends to the withheld information in this case the Commissioner therefore considered its dominant purpose and his view is set out in paragraph 32, below.

Dominant purpose

32. The Council has suggested that the dominant purpose of the withheld information is to assist in the preparation of the potential legal challenge by the Audit Commission. It advised that as a result of the threat of injunctive action from the Audit Commission, the Council embarked on an exercise which became known as an Options Appraisal which resulted in a challenge by the Audit Commission.
33. It further advised that as a result of the challenge from the Audit Commission it commissioned a supplementary options appraisal with the terms of reference (the withheld information) being set with sanction and direct input by the Audit Commission.
34. The Commissioner accepts that litigation was in contemplation when the Council drafted the withheld information; however he considers that this is not enough to attract litigation privilege. Such an approach is supported by Sir John Donaldson in *M&W Grazebrook v Wallens*².

¹ a court-ordered act or prohibition against an act or condition which has been requested, and sometimes granted, in a petition to the court for an injunction. Such an act is the use of judicial (court) authority to handle a problem, and is not a judgment for money. Whether the relief will be granted is usually argued by both sides in a hearing rather than in a full-scale trial, although sometimes it is part of a lawsuit for damages and/or contract performance. Historically, the power to grant injunctive relief stems from English equity courts rather than damages from law courts (legal-dictionary.thefreedictionary.com)

² [1973] IRL 139 cited in UKEAT/0574/05/LA

35. Sir John Donaldson at paragraph 10 stated that litigation privilege “exists only in relation to communications with an actual view to the litigation in hand and the mode of conduct of it. It does not exist in relation to the situation at the time when the matters complained of were arising.”
36. The Commissioner has viewed the withheld information and considered the representations put forward by the Council in support of its application of litigation privilege. The Commissioner is not satisfied that the dominant purpose of the withheld information is to assist in the preparation of the potential legal challenge by the Audit Commission.
37. The Commissioner is of the opinion that the significant, immediate purpose of the withheld information is to request an evaluation of the options available to the Council for the disposal of the caravan site, and not to assist in the preparation of contemplated litigation. The Commissioner’s view of this matter is that the Audit Commission raised concerns about the income the Council received directly from the caravan park and in order to address this matter the Council asked a third party to appraise the Council’s options. While there is a clear link to the potential legal challenge by the Audit Commission – i.e. by addressing the concerns raised by the Audit Commission the Council would avoid the threatened action – the withheld information does not relate directly to or assist with the preparation for the threatened legal action.
38. As a result of the fact that the dominant purpose of the withheld information is not to assist in the preparation or assistance of a case, the Commissioner has determined that the withheld information does not attract litigation privilege. He has therefore gone on to consider whether legal advice privilege applies to the withheld information.

Legal advice privilege

39. Legal advice privilege protects communications between a professional legal adviser and his client provided that:
 - (i) the communication is confidential
 - (ii) the communication is for the purpose of seeking or giving legal advice.The Commissioner’s view is that documents sent to or from an independent third party (even if created with the dominant purpose of obtaining legal advice) are not covered by this head of privilege.

The communications must be made between a legally qualified professional and his client

40. The Commissioner considers that “legally qualified professionals” will include solicitors or barristers in independent practice, foreign lawyers, in house lawyers (provided that the communication is made in relation to legal advice) and non-legally qualified personnel, for example trainee solicitors and paralegals acting under the direction or supervision of solicitors or barristers.
41. Such an approach is supported by the recent High Court decision in R (on the application of Prudential Plc and another) v Special Commissioner of Income Tax

- and another³. In this case Charles J found that privilege did not extend to accountants, despite the fact that accountants frequently advise on tax law and represent clients. He commented that “a link to the legal profession was and remains a natural one given the close relationship of lawyers with the administration of justice and their professional duties”⁴.
42. In light of the requirement that the communications must be made between a legally qualified professional and his client, the Commissioner asked the Council to confirm that this requirement was met. In response, the Council explained that the information had only been shared with its professional advisors and included a list of these advisors to the Commissioner.
43. Having reviewed the withheld information (the terms of reference for the Charles F Jones & Son Options Appraisal) it appears to the Commissioner that the terms of reference constitute a communication between the Council and Charles F Jones & Son.
44. In the list of its professional advisors, the Council has stated that the Chartered Surveyor from Charles F Jones & Son is a Fellow of the Royal Institution of Chartered Surveyors. On the basis of the information provided by the Council, it appears to the Commissioner that the Council is suggesting that the Fellow from Charles F Jones & Son is a ‘professional legal advisor’.
45. The Commissioner has therefore considered whether a Fellow of the Royal Institution of Chartered Surveyors could be considered a legally qualified professional. In order to do this, and in the absence of any further explanation from the Council, the Commissioner has considered the information available from the Royal Institute of Chartered Surveyors⁵, the Law Society⁶ and the Institute of Legal Executives (ILEX)⁷.
46. The Commissioner has had regard to the information publically available from the Royal Institute of Chartered Surveyors in relation to the work of members of the Institute. The Commissioner notes that members of the Royal Institute of Chartered Surveyors are experts in land management, there is not however a requirement to be legally qualified. From the public information available from the Royal Institute of Chartered Surveyors, the Commissioner is unable to conclude that a Fellow of the Royal Institute of Chartered Surveyors is a ‘legally qualified professional’ for the purpose of legal advice privilege.
47. The Commissioner has also searched the online membership databases for ILEX and the Law Society. He notes that the Fellow of the Royal Institute of Chartered Surveyors identified by the Council does not appear to be a solicitor or a member of ILEX.

³ [2009] EWHC 2494B (Admin)

⁴ Paragraph 45(2)

⁵ http://www.rics.org/site/scripts/documents_info.aspx?documentID=334&pageNumber=3

⁶ <http://www.lawsociety.org.uk/choosingandusing/findasolicitor/view=solsearch.law>

⁷ http://www.ilex.org.uk/about_legal_executives/legal_executives_directory.aspx

48. The Commissioner is therefore unable to conclude that the communication was between a legally qualified professional and his client, as the Fellow of the Royal Institution of Chartered Surveyors, identified by the Council, does not appear to be a legally qualified professional. He therefore finds that the withheld information does not attract legal advice privilege.
49. As the Commissioner has determined that the withheld information is not subject to either litigation privilege or legal advice privilege, he finds that section 42 of the Act is not engaged for the withheld information.

Section 43 – Commercial interests

50. Section 43(2) of the Act provides that information will be exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority).
51. The Council has argued that to disclose the withheld information would undermine the process of competitive tendering where it had an obligation to secure best value for money. It has further suggested that disclosing the withheld information to the complainant would put him at a commercial advantage as he would have access to information denied to the other competitive tenderers.
52. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is “real, actual or of substance”⁸ and show some link between the potential disclosure and the prejudice. Further, a public authority also needs to demonstrate that the prejudice would occur if the information was disclosed.
53. The Council has stated in this case, that disclosure of the information ‘would’ cause prejudice commercial interests. The Commissioner notes the Tribunal’s comments in *Hogan v Oxford City Council & the Information Commissioner* (EA/2005/0030) that the ‘would prejudice’ limb of the test

“.....places a much stronger evidential burden on the public authority to discharge.”
54. The Commissioner’s view, taking into account the Tribunal’s comments in *Hogan* is that there is an evidential burden on public authorities to be able to demonstrate that:
 - The nature of the prejudice claimed can be linked back to the disclosure of the information in question
 - The likelihood of prejudice occurring meets the test for the level of likelihood claimed
55. This approach was demonstrated in *Reith v Information Commissioner and London Borough of Hammersmith and Fulham* (LBHF) (EA/2006/0058), the Tribunal found that the public authority had not provided evidence of a causal link, and as a result the exemption (in this case section 31(1)(g) in conjunction with

⁸ Hansard HL (VOL. 162, April 20, 2000, col. 827)

section 31(2)(c) was not engaged. LBHF relied upon its own belief that prejudice would occur, but had not provided evidence beyond this. The Tribunal considered that “[i]ts evidence is not independent, and being unsupported amounts to bare assertion. Such examples as given by LBHF do not demonstrate anything other than an unsupported fear that disclosure might increase illegal parking.”

56. The Council has put forward very little to support its application of the exemption available at section 43(2). The Council stated that “[t]o allow access to information not given to the other 11 tenderers, would have provided the complainant with a commercial advantage”. It also referred the Commissioner to its refusal notice stating that it considered it contained a ‘sufficient explanation’ of the application of the exemption.

57. The Commissioner has had regard to the refusal notice which states:

“Such disclosure could affect the future of the Swanage Bay View Holiday Park to the extent that such disclosure would provide the [complainant] with an unfair advantage over the other tenderers in the event that the Council decides to invite formal tenderers to secure a viable option for the future if the Park.

The Council is not prepared to run the risk of a decision to disclose or partially disclose the information becoming challengeable as a breach of procedural duty by way of Judicial Review nor even less, run the very real risk of the legal costs likely to be unnecessarily incurred.”

58. The Commissioner has considered the withheld information in relation to the representations provided by the Council. It is the Commissioner’s view that the Council has not explained in enough detail the prejudice claimed or how the disclosure of the withheld information would lead to that prejudice.

59. As the Council has not provided the required level of detail, or provided evidence to support its statement that disclosure would cause prejudice, the Commissioner is unable to conclude that the exemption is engaged. Further the Commissioner considers that the Councils suggestion that a commercial advantage would be provided to the complainant is somewhat mitigated by the fact that a disclosure under the Act would in essence be to the public at large. Therefore all tenderers would have access to the information.

Procedural Requirements

Section 1 – duty to make information available

60. By incorrectly refusing to make the information requested available by the time of the internal review, the Council have breached section 1(1)(b)

Section 10 – time for compliance

61. In failing to provide the information requested within 20 working days, the Council breached section 10(1) of the Act.

Section 17 – refusal notice

62. In not providing details of the public interest test in relation to the application of section 42 and 43 of the Act, the Council failed to adequately explain why it considered that the exemptions were engaged. As such, the Council breached 17(1) (c) of the Act.
63. Further, in failing to undertake a public interest test, the Council breached section 17(3)(b) of the Act in that it failed to demonstrate, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

64. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in that it incorrectly applied the exemptions at sections 42(1) and 43(2).
65. The Commissioner has also identified breaches of sections 10(1), 17(1)(c) and 17(3)(b).

Steps Required

65. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Disclose the information requested.
66. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

67. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

68. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

69. The Commissioner notes that in the handling of this request the Council took into account what it considered to be the complainant's reason for requesting the information. The Commissioner is of the view that, when addressing requests for information under the Act, disclosure is to be regarded as a disclosure to the public at large. Public authorities should not take into consideration the perceived motive of the applicant.

Right of Appeal

70. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: 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 26th day of January 2010

Signed

**Anne Jones
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.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

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.”

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.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

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 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”