

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

20 September 2010

**Public Authority:** Greenwich Council  
**Address:** Town Hall  
Wellington Street  
Woolwich  
London  
SE18 6PW

### Summary

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The complainant requested the Council to disclose all correspondence between Trust Thamesmead and its officers and Councillors between 1 July and 7 November 2008. The Council responded disclosing some information to the complainant, however, it decided correspondence between the Trust and Councillor (name reacted A) (part (a)) was not held for the purposes of the Act by virtue of section 3(2)(a). It also decided to withhold correspondence between the Trust and Councillor (name reacted B) (part (b)) under sections 40(2) and 41 of the Act. During the Commissioner's investigation the Council changed its view in respect of part (b) of the withheld information and informed the Commissioner that it was now of the view that this information was not held for the purposes of the Act by virtue of section 3(2)(a). The Commissioner has considered both parts of the requested information. Regarding part (a), the Commissioner concluded that this information was not held for the purposes of the Act by virtue of section 3(2)(a). However, in respect of part (b), he concluded that this information was held to some extent for Council purposes and therefore the Council was incorrect to withhold this information by virtue of section 3(2)(a) of the Act. The Commissioner has therefore requested the Council to either disclose part (b) of the requested information to the complainant or issue a further Refusal Notice in accordance with section 17 of the Act within 35 days of the date of this Notice.

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

## The Request

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2. The complainant wrote to the Council on 13 November 2008 to request that the following information be released under the Act:

"Copies of all correspondence between Trust Thamesmead and any Greenwich council officers and councillors between July 1, 2008, and November 7".

3. The Council responded on 13 March 2009, following various emails from the complainant chasing a response. It provided a schedule which detailed the information it was disclosing and the information it was unwilling to disclose. It divided the withheld information into two categories:

- (a) correspondence between Trust Thamesmead and Councillor (name redacted A);
- (b) correspondence between Trust Thamesmead and Councillor (name redacted B).

For part (a), it advised the complainant that this information was not held by the Council for the purposes of the Act by virtue of section 3(2)(a). For part (b), it confirmed that it does hold this information for the purposes of the Act but felt it was exempt from disclosure under section 40(2).

4. The complainant contacted the Council on 16 March 2009 to request an internal review.
5. The Council responded on 2 April 2009. In relation to part (a) it explained in further detail why it remained of the view that this information was not held by the Council for the purposes of the Act. Concerning part (b), it advised the complainant that it was now willing to disclose some information and attached this to its response. It informed the complainant that it remained of the view that the remaining information was exempt from disclosure under sections 40(2) and 41 of the Act.

## **The Investigation**

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### **Scope of the case**

6. On 6 April 2009 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 was correct to withhold the requested information (parts (a) and (b) as listed above) under the Act.

### **Chronology**

7. The Commissioner wrote to the Council on 28 May 2009 to request some additional information. For part (a) of the withheld information, he requested additional arguments from the Council to support its view that it was not held by the Council for the purposes of the Act by virtue of section 3(2)(a). In respect of part (b) of the withheld information, the Commissioner requested a copy to be supplied and further arguments from the Council to support its applications of section 40(2) and 41 of the Act.
8. The Council responded on 25 June 2009 providing the additional information requested.
9. The Commissioner wrote to the Council on 30 November 2009 to request some further information in relation to part (b) of the withheld information. In particular, he asked the Council to explain exactly how this information differed to part (a) of the withheld information and why the Council reached the view that part (b) was held for the purposes of the Act.
10. The Council responded on 10 December 2009 explaining in further detail why part (b) of the withheld information was considered to be held by the Council for the purposes of Act in accordance with section 3(2)(a).
11. The Commissioner wrote to the Council on 25 January 2010 to request some additional information in respect of part (b) of the withheld information and the Council's application of sections 40(2) and 41 of the Act.
12. Despite the Commissioner granting extensions on 2 February, 16 February and 8 March 2010 the Council's response was not forthcoming. As the Council missed the final deadline set by the

Commissioner of 22 March 2010, he served an Information Notice on the Council on 24 March 2010 requesting that all outstanding information be supplied within 35 days of this Notice.

13. The Council responded on 1 April 2010 providing a copy of the legal advice it had obtained from Counsel in respect of this request. It informed the Commissioner that it was now of the view that part (b) of the withheld information was not held for the purposes of the Act by virtue of section 3(2)(a). The legal advice it supplied to the Commissioner explained in more detail why the Council had now reached this decision.

## Analysis

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### **Is the requested information held by the Council for the purposes of the Act?**

14. Section 3(2) of the Act provides that:

*“For the purposes of this Act, information is held by a public authority if –*

- *it is held by the authority, otherwise than on behalf of another person, or*
- *it is held by another person on behalf of the authority”.*

15. In the Commissioner’s view, where information is held by a public authority, to any extent for its own purposes, then it holds that information otherwise than on behalf of another person, and therefore it holds the information for the purposes of the Act.
16. The only circumstance in which information would not be held by a public authority by virtue of section 3(2)(a) would be where information is only held on behalf of another person, and is not held at all for that public authority's own purposes.
17. For both part (a) and (b) of the withheld information the Council has argued that the information was not held for its own purposes and was therefore not held for the purposes of the Act by virtue of section 3(2)(a). The Commissioner will now address parts (a) and (b) in turn.

#### *Part (a)*

18. The Council has argued that it did not disclose the correspondence between Trust Thamesmead and Councillor (name reacted A) as it did not hold that information for the purposes of Council business and it was therefore not held pursuant to section 3(2)(a) of the Act.
19. It explained that Councillor (name reacted A) was not a member of the board of Trust Thamesmead in her capacity as a member of the Council. The Council confirmed that her appointment to the board of Trust Thamesmead was an entirely separate appointment to that of Councillor and her position on that board predates her election to Councillor.
20. The Council stated that Councillor (name reacted A) has sole control over the use of any of the information that is contained in these communications, which happened to be stored in the Council's email system at the time the information request was received. It argued that it is not entitled to delete, amend or disclose this information without discussing the matter with Councillor (name reacted A) first. It therefore has no control over this information. The Council confirmed that the information has not been disseminated to any other officers within the organisation; it is not relevant to Council business and has therefore never been used for any Council purpose. The Council confirmed that the only persons who have access to it are Councillor (name reacted A) and her personal assistant.
21. The Council further explained that it does not provide administrative assistance to Councillor (name reacted A) in relation to her directorship of outside bodies, other than the very basic provision of email storage facilities which she is entitled to receive as a Councillor.
22. It is the Commissioner's view that information created or received by a Councillor but held on a public authority's computer system or premises will only be covered by the Act if it is held for the authority's own business. It will not be covered by the Act if it was produced by the councillor for private or political purposes and the authority is just providing storage, office space or computing facilities.
23. The Commissioner is satisfied that Councillor (name reacted A)'s role on the board of Trust Thamesmead was an entirely separate appointment to her role as Councillor. Councillor (name reacted A)'s role as Chair of the board was wholly separate to her role as Councillor; she did not represent the Council on the board in anyway and the role of Chair had no connection to the Council's functions or business. The Commissioner is therefore satisfied that the Council only holds the information on behalf of Councillor (name reacted A) due to the fact that she used the Council's email system as a means of

storage for this information, which she received in her capacity as Chair. The Council has confirmed that it has no interest in the information, it is not related to Council business and it has no control over the use of this information.

24. For the reasons explained above, the Commissioner is satisfied that part (a) of the withheld information was not held for the purposes of the Act by virtue of section 3(2)(a).

*Part (b)*

25. As explained earlier in this Notice, initially, the Council decided that part (b) of the withheld information i.e. correspondence between Trust Thamesmead and Councillor (name reacted B) was held for the purposes of the Act but was exempt from disclosure under sections 40(2) and 41 of the Act. However, the Council later changed its view having received legal advice from Counsel on the matter. In response to the Commissioner's Information Notice, the Council confirmed that it now wished to assert that this information was not held for the purposes of the Act by virtue of section 3(2) for the reasons explained below.
26. The Council confirmed that Councillor (name reacted B) was appointed to the board of Trust Thamesmead by the Council to represent its interests. It stated that it was not possible to take a blanket approach to all correspondence Councillor (name reacted B) received from Trust Thamesmead during the timeframe specified in the complainant's request. It felt that there is a strong argument that correspondence sent to Councillor (name reacted B) predominantly in his capacity as Director of the Trust was not held by the Council for the purposes of the Act, in so far as it did not directly concern Council business. However, it stated that a different approach should be taken to correspondence sent or received by Councillor (name reacted B) in his capacity as a board member and which directly affect Council business, for example, correspondence which was sent or received which represents the Council's view on a certain issue. It felt this type of correspondence would be held by the Council on its own behalf and therefore for the purposes of the Act.
27. Turning now to the contents of the information, the Council stated that the correspondence in question concerns two members of the board of the Trust. It argued that there was nothing in the contents of this correspondence which indicates that this matter was relevant to Council business or that Councillor (name reacted B) was representing the Council during the process. It confirmed that it was therefore clear that any correspondence sent or received by Councillor (name reacted

- B) was sent or received in his capacity as a trustee rather than as Councillor. Equally, it stated that none of the correspondence asked Councillor (name reacted B) to explain or express the Council's view.
28. For these reasons the Council confirmed that it was of the view that the information is not held by the Council within the meaning of section 3(2) of the Act, as it was held on behalf of Councillor (name reacted B).
  29. To enable the Commissioner to reach a decision, he requested the Council to explain in more detail the role Councillor (name reacted B) holds on the board, whether the role has a dual capacity and what sorts of issues he would become involved in on behalf of the Council.
  30. In its response, the Council confirmed that Councillor (name reacted B) has one role only and was appointed as Director of the Trust by the Council to take part in the normal running of the company, except on very limited occasions when he is 'representing the Council'. It explained that Councillor (name reacted B)'s role is to act as a normal director and as such he is involved in duties of a Director not just Council business. The Council stated that the nature of the requested information does not relate to Council business and therefore Councillor (name reacted B) was dealing with the information in his capacity as Director. The Council explained that it appoints representatives to serve on a number of outside bodies. It confirmed that it is not specific in the role these representatives play but generally it varies from representing the Council's views to acting in accordance with the individual's judgement.
  31. As confirmed by the Council, Councillor (name reacted B) is on the board of the Trust because the Council appointed him to the board to be its representative. It is therefore the Commissioner's view that Councillor (name reacted B) is only on the board of the Trust by virtue of this appointment and therefore received and sent the requested correspondence in his capacity as the Council's representative. The Commissioner also notes that the Council is not specific in the role such representatives play when appointed to the board of outside bodies. It confirmed itself that it is often left to the representative's discretion whether to become involved in a particular issue or not. He therefore finds it difficult to accept in this case the Council's argument that the requested information does not relate to Councillor (name reacted B)'s capacity as Council representative.
  32. The Commissioner has reviewed the contents of the requested information and it is his view that it is reasonable to take the view that the contents do relate to Council business in some way. A number of



the emails discuss the possibility of postponing board meetings until further notice and how the organisation will operate in light of the particular matter being considered at that time. The postponement of board meetings would in turn mean that decisions on current issues and projects which may be of concern or particular interest to the Council would also have to be postponed until further notice.

33. Whether information relates to the authority's own purposes does not depend solely on the legal status or functions of the authority. Relevant factors may include the amount of control the authority has over the information, whether the information is produced or used by the authority's staff and whether the authority provides for these purposes out of its own budget.
34. In the Information Tribunal hearing of *Ennis McBride v Information Commissioner and The Ministry of Justice (formerly The Privy Council Office) EA/2007/0105* the Tribunal established that the Privy Council Office ('PCO') could edit or delete the requested information and could decide whom to send it to and whom to withhold it from. Indeed, the Tribunal made reference to the fact that the PCO did disclose some of the requested information to the complainant. The Tribunal concluded from this that the PCO managed and controlled the information and therefore held it on its own behalf.
35. The Tribunal also referred to the fact that the PCO provided administrative support and assistance to the person whom the PCO had claimed held the information in a private capacity and concluded that this was another factor which suggested that the PCO held the information on its own behalf.
36. Turning to the specifics of this case, the Commissioner notes at the time of the internal review (see paragraph 5) the Council considered all correspondence between the Trust and Councillor (name reacted B) and reached a decision about what to disclose and what to withhold, suggesting that the Council manages and controls this information and any other information Councillor (name reacted B) may receive or send relating to the Trust to some degree.
37. He also notes that, unlike part (a) of the requested information, the Council provides administrative support and assistance to Councillor (name reacted B), out of its own budget, for his appointment to the Trust.
38. For the reasons explained above, the Commissioner is not convinced from the evidence supplied by the Council that part (b) of the withheld information is not held for the Council's purposes. He considers that



this information is to some extent held for its own purposes and is therefore held for the purposes of the Act.

## **Procedural Requirements**

39. The Commissioner notes that the Council failed to issue its Refusal Notice within 20 working days of the date of the request. He has therefore found that the Council was in breach of section 10(1) of the Act in this case.
40. The Commissioner also notes that due to its late reliance, the Council failed to inform the complainant that it was of the view that part (b) of the requested information was not held for the purposes of the Act by virtue of section 3(2)(a) within 20 working days of her request. He has therefore found that the Council was in breach of section 1(1)(a) of the Act.

## **The Decision**

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41. The Commissioner's decision is that the Council dealt with the following elements of the request for information in accordance with the Act:
  - it correctly withheld part (a) of the requested information by virtue of section 3(2)(a) of the Act.
42. The Commissioner's decision is that the Council did not deal with the following elements of the request in accordance with the Act:
  - it incorrectly withheld part (b) of the requested information by virtue of section 3(2)(a) of the Act;
  - it breached section 10(1) of the Act by failing to issue a Refusal Notice within 20 working days of the request;
  - it breached section 1(1)(a) of the Act due to its late reliance of section 3(2)(a) and its failure to inform the complainant of this decision within 20 working days of his request.

## **Steps Required**

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43. The Commissioner requires the Council to take the following steps to ensure compliance with the Act:

- in respect of part (b) of the withheld information, the Council should either disclose this information to the complainant or issue a further Refusal Notice in accordance with section 17 of the Act advising him why the information cannot be disclosed citing the relevant exemption(s) under the Act.
44. The Council must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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45. 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.

## Right of Appeal

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46. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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 sent.

**Dated the 20<sup>th</sup> day of September 2010**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **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.”

### **Section 3(2)**

Provides that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person,  
or
- (b) it is held by another person on behalf of the authority.”

### **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.”

### **Section 40(2)**

Provides that –

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

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

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

#### **Section 40(4)**

Provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

#### **Section 41(1)**

Provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."