



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2007/0115**

**Information Commissioner's Ref: FER0155651**

**Paper Hearing: Procession House, London, EC4**    **Decision Promulgated**  
**on 29 May 2008**

**On 11 August 2008**

**BEFORE**

**DEPUTY CHAIRMAN**

**ROBIN CALLENDER SMITH**

**and**

**LAY MEMBERS**

**SUZANNE COSGRAVE**

**ANDREW WHETNALL**

**Between**

**PETER HOAR**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**BASINGSTOKE AND DEANE BOROUGH COUNCIL**

**Additional Party**

**Representation on the documents:**

For the Appellant:        Mr Peter Hoar (in person)

For the Respondent:       Ms Anya Proops (Counsel instructed by Information  
Commissioner)

For the Additional Party: George White (Information Officer, Basingstoke and Deane  
Borough Council)

## Decision

The Tribunal upholds the Information Commissioner's Decision Notice dated 2 October 2007 and dismisses the appeal.

### Reasons for Decision

#### Introduction

1. Mr Peter Hoar (the Appellant) lives in a house in a village in Hampshire. His home has been affected by business activity on neighbouring property in what is essentially a residential area. The non-residential use appears to have been long established, but a series of complaints from Mr Hoar to Basingstoke and Deane Borough Council (the Additional Party) concerned their grant of planning permission for redevelopment of the neighbouring site, subject to conditions, in August 1992. There have been exchanges concerning the nature and enforcement of the planning conditions, the extent of the legal powers to vary or extend them, inconclusive attempts at dispute resolution including the possibility of a screen fence, and a complaint by Mr Hoar to the Local Government Ombudsman. The Tribunal's role is confined to Mr Hoar's appeal against the Information Commissioner's decision notice concerning the Council's response to requests for information.

#### The request for information

2. On 2 April 2005 Mr Hoar asked the Council for "a list of all correspondence and telephone conversations between the public

authority and the Local Government Ombudsman (LGO) prior to the public authority's letter to the LGO of 19 May 2003".

3. On 12 July 2005 Mr Hoar made a second request to the Council for the following information:
  - (a) Internal memoranda and other communications seeking legal advice on planning grounds as referred to in the Chief Executive's letter of 12 January 1996;
  - (b) A report referred to as item 19 on the agenda of the public authority's planning committee meeting the 6 March 1996;
  - (c) A copy of an audio recording allegedly made of a planning committee meeting dated 14 February 1996; and
  - (d) A copy of any information on the council's solicitor's involvement in or knowledge about a threat made against Mr Hoar's neighbour or his property.
4. The Council responded to the requests by letter dated 4 August 2005 providing some of the information, withholding other information on the basis that it was exempt under section 36 or section 42 of the Freedom of Information Act 2000. It also claimed that it did not as a matter of fact hold some of the information being sought by Mr Hoar.

#### The complaint to the Information Commissioner

5. Mr Hoar was not satisfied with the Council's response to his requests and on 4 August 2005 he complained to the Information Commissioner.
6. Mr Hoar requested an Internal review of both Council responses on 25 August 2005 and the Council held an internal review and provided the details in a letter dated 9 September 2005.
7. The Information Commissioner corresponded with Mr Hoar and the Council to achieve clarification of the issues and the relevant legislation

for each of the issues which included the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Data Protection Act 1998 (DPA).

8. The Information Commissioner concluded that:
  - (a) the information falling within the first limb of the second request amounted to “environmental information” that the purposes of regulation 2 (1) (EIR) and, as such, fell to be considered under the EIR rather than FOIA; and
  - (b) certain information being withheld from Mr Hoar constituted information amounting to Mr Hoar’s “personal data”, particularly two planning committee reports and two memoranda dated respectively 9 and 11 January 1996. In the light of this conclusion the Information Commissioner asked the Council to reconsider whether to disclose that information on an application of the Data Protection Act 1998.
9. On 23 July 2007 the Council wrote to Mr Hoar. It provided him with a copy of the memorandum dated 22 December 1995, a memorandum dated 9 January 1996 and a letter to the LGO dated 19 May 2003. The Council confirmed it would not disclose other information without the consent of Mr Hoar’s neighbour and that it was “not possible to remove references to another individual and leave a coherent document”.
10. The Information Commissioner’s Decision Notice dated 2 October 2007 was that Basingstoke and Deane Borough Council had dealt with the following elements of the request in accordance with the requirements of the legislation and, in particular:
  - (a) The public authority provided the letter to the LGO (request 1) and the memorandum of 22 December 1995 (request 2) to the complainant in accordance with regulation 5 (1) EIR;

- (b) The public authority had correctly withheld the internal memorandum of 10 January 1996 (request 2) by applying regulation 12(1) (b) and 12(5) (b) EIR;
- (c) The public authority had provided all the information it held in response to the alleged tape-recording (request 2) in accordance with section 1 (1) of the Act; and
- (d) The public authority had provided all the information it held in response to the alleged threat against the complainant's neighbour (request 2) in accordance with section 1 (1) of the Act.

11. While the Information Commissioner decided that other elements of the request were not dealt with in accordance with the Environmental Information Regulations or the Freedom of Information Act he did not require steps to be taken by the Council.

#### The appeal to the Tribunal

12. On 29 October 2007 Mr Hoar lodged a notice of appeal along with a letter dated 25 October 2007 setting out his grounds of appeal. On 21 December 2007 he submitted a further document to the Tribunal entitled "Extent and Grounds of Appeal" which for practical purposes has formed the grounds of his appeal.

13. Those grounds are that the Information Commissioner erred when he concluded that:

- (a) the 10 January 1996 memo was exempt from disclosure under regulation 12(5) (b) EIR;
- (b) the four memos he referred to in his decision satisfied the range of Mr Hoar's request to see "the exchange of memos or other communications". In particular he erred because there was correspondence which fell within the ambit of his request which had not been disclosed;

(c) Mr Hoar had been provided with all the information held by the Council with respect to the request for information relating to the alleged threat; and

(d) Mr Hoar had submitted requests under the Freedom of Information Act in relation to a planning dispute with his neighbour.

#### The questions for the Tribunal

14. Whether the Information Commissioners decision about Regulation 12 (1) (b) and 12(5) (b) EIR with regard to the memorandum of 10 January 1996 was correct.

15. Whether there were other memoranda or communications seeking legal advice on planning powers as referred to in the Chief Executive's Letter of 12 January 1996 held by the Additional Party which should have been disclosed to the Appellant.

16. The accuracy of the statement in Paragraph 36 of the Decision Notice dated 2 October 2007.

17. The accuracy of descriptions used in the Decision Notice to explain the Appellant's Freedom of Information request.

#### Evidence

18. Mr Hoar produced a significant quantity of evidence dealing with the background to an issue which has clearly blighted his life for the last 16 years.

19. At one stage he describes his situation as feeling as if he had been "left up a gum tree, with no fence even in my garden, and a boundary dispute emerging...". He makes it clear in his final submission to the Tribunal (at page 33) that he and his neighbour are no longer in dispute and that the focus of his complaint is against the Council. For completeness, his written and visual evidence – which the Tribunal has read, watched and studied in detail - is listed below:

- (a) Complaint to Basingstoke Council – 31 March 1994
- (b) Chief Executive's reply – 6 May 1994
- (c) Complaint to the Local Government Ombudsman – October 1994
- (d) Statement to the Nolan Committee on Standards in Public Life – 8 October 1996 "Aspects of Conduct in Local Government"
- (e) Submission to Department of Environment – Review of Planning Regulations "How to Manipulate and Abuse the Planning System" – 28 April 1998
- (f) Videotape "3 Videos" compiled by the Appellant – 1994 to 1995
- (g) Complaint to Local Government Ombudsman – 7 December 2002.

20. The Tribunal has seen complete versions of redacted Council documents as well as suggested completions of redacted passages supplied by Mr Hoar. The Tribunal makes no comment about the accuracy or otherwise of his attempts at this.
21. The Tribunal has also considered a closed bundle of evidence provided by the Additional Party in relation to all the material that actually exists that was requested by the Appellant.
22. The Tribunal issued further directions following its initial consideration of the case concerning a memorandum dated 8 January 1996. It is now clear to the Tribunal that the memorandum of the 8 January 1996 does not exist and that reference to it is a typographical error. The reference to it – in the Council's memorandum of 10 January 1996 – should have been to a memorandum of 9 January 1996.

### Tribunal's Decision

23. Under Section 1(1) of the Freedom of Information Act 2000 a person who has made a request to a "public authority" for information is

entitled to be informed in writing by the public authority whether it holds information of the descriptions specified in the request and, if the public authority does hold the information, to have that information communicated to him.

24. The duty to provide the requested information will not arise where the information is itself exempted under provisions contained in Part II of the Freedom of Information Act. This provides for both absolute and qualified exemptions. Where the information is subject to a qualified exemption under Part II then the question of whether the information should be disclosed turns on the application of the public interest test.
25. The public interest requires information to be disclosed save where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (Section 2 (2) FOIA). If the scales are level in terms of the competing interests then the public authority must disclose the information (**Department for Education and Skills v Information Commissioner EA/2006/10** paragraph 64). It is for the public authority to prove, on the balance of probabilities, that the scales weigh in favour of the information being withheld.
26. The exempting provision in relation to the current appeal here is Section 42 FOIA. This provides that information will be exempt information if it is “information in respect of which a claim to legal professional privilege could be maintained.... in legal proceedings”.
27. Section 42 provides for a qualified exemption so that where information falls within its ambit it must be disclosed unless – by applying the public interest test – the public interest balance weighs in favour of nondisclosure. A series of Tribunal decisions have determined that there is a strong public interest in withholding legally privileged information because legal privilege is “a fundamental condition on which the administration of justice as a whole rests” (**Bellamy v Information Commissioner EA/ 2005/0023**).



28. Where a request for information embraces a request for “environmental information” as defined by Regulation 2 (1) of the Environmental Information Regulations 2004 then Regulation 5(1) EIR imposes a general obligation on public authorities to make available on request environmental information which they hold.

29. However the general duty to disclose environmental information under Regulation 5 is subject to a number of exceptions which are provided for in Part 3 EIR. Those exceptions are set out in Regulation 12 (whose core points in relation to this appeal are set out below):

**12.** - (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

....

(5) For the purposes of paragraph (1) (a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

....

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

30. The Tribunal decision in **Kirkaldie v Information Commissioner (EA/2006/001)** held that the exemption provided for under Regulation 12 (5) (b) in effect provides for information which is legally privileged to be treated as exempt information, subject to an application of the public interest test and that, as such, it is broadly comparable to the

exemption provided for under Section 42 FOIA. Information which is legally privileged will be exempt from disclosure provided that, on application of the public interest test, the public interest weighs in favour of the exemption being maintained.

31. Exemptions under Regulation 12 (5) (b) were further considered by the Tribunal in **Archer v Information Commissioner EA/2006/0037**. The Tribunal decided as follows:

“50. Under Regulation 12(5) (b), a public authority can refuse to disclose information to the extent that its disclosure would have adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of the criminal or disciplinary nature”.

“51. There are several points to note here. First, it is not enough the disclosure should simply affect the matters set out in paragraph 50 above; the effect must be “adverse”. Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure “would” have an adverse effect – not that it could or might have such an effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”. All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify nondisclosure is a high one.”

32. The test about whether disclosure “would adversely affect” the administration of justice is set out in **Hogan v Information Commissioner (EA/2006/0026 and EA/2005/0030)** where the Tribunal confirmed that the test of “would prejudice” was whether the prejudice was more probable than not.

33. The Tribunal finds, to the required standard, as follows:

**(a) 10 January 1996 Memorandum**

- (1) This memorandum clearly has legal professional privilege as a written communication from a lawyer to the Council for the dominant purpose of providing legal advice on dealing with two planning applications.
- (2) The Tribunal has had the benefit of reading and reviewing the memorandum in the closed bundle in this appeal. There would need to be a strong public interest in ordering its disclosure. There is nothing in that memorandum which approaches the point where the Tribunal would consider it should strip away the public interest in maintaining the exemption in respect of the document.
- (3) For the avoidance of doubt, as far as Mr Hoar is concerned, the contents do not reveal any kind of “smoking gun” that might have caused the Tribunal to arrive at a different conclusion in relation to the public interest balancing test.

**(b) Other Withheld Memoranda**

- (1) The Tribunal finds that there are no other memoranda or communications seeking legal advice on planning powers which are held by the Council and which should have been disclosed.
- (2) The Tribunal has gone to significant additional lengths in its enquiries in relation to this and is satisfied that all that could be disclosed has been disclosed.

**(c) Paragraph 36 of the Information Commissioner’s Decision Notice**

- (1) The Information Commissioner has agreed that Paragraph 36 of the decision of 2 October 2007 contained certain inaccuracies. In particular it should not have referred to a letter being sent by the Council to the neighbour but should instead have referred to a letter

being sent to the Council from the neighbour. It also referred to a letter sent by Mr Hoar dated 12 July 1996 when it should in fact have referred to a letter from Mr Hoar dated 12 July 2005. The 12 July 2005 letter makes reference to a letter from Mr Hoar's neighbour to the Council referring to a warning which had allegedly been given to the neighbour by a Council employee.

- (2) The Tribunal notes that the Information Commissioner has apologised in his Reply for any misunderstanding which may have arisen in connection with this part of the decision. The Tribunal finds - in any event - that there was no further information held by the Council falling within the ambit of the Appellant's requests relating to the alleged threats.
- (3) Given the apology contained in the appeal papers the Tribunal declines to amend this portion of the Information Commissioner's decision. The Appellant knows that the Information Commissioner has accepted those inaccuracies and those inaccuracies are recorded here as part of the appeal process and record. They are inaccuracies which do not go to the heart of this appeal.

**(d) The Freedom of Information Request**

- (1) The Tribunal finds from the material submitted that Mr Hoar has been dissatisfied with the Borough Council's planning decisions concerning his neighbour's site since at least 1992. That he has been in a planning dispute with the Council since that date is clear. It is not for us to review his complaints.
- (2) The Council drew the Information Commissioner's attention to its concern not to revive an apparently dormant underlying dispute between Mr Hoar and his neighbour. The Information Commissioner was entitled to reflect that as part of the background to his decision but we do not see it as materially affecting his conclusions. Nor do we agree with Mr Hoar that the Council raised

the point only as an attempt to “pervert the truth” and “rewrite history”. We note from Mr Hoar’s written submission that he is now on better terms with this neighbour.

Conclusion and remedy

34. The appeal is dismissed

35. There is no order as to costs.

36. Our decision is unanimous.

Signed

Robin Callender Smith

Deputy Chairman, Information Tribunal

Date 7 August 2008