

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 2 July 2007**

**Public Authority:** Waverley Borough Council  
**Address:** Council Offices  
The Burys  
Godalming  
Surrey  
GU7 1HR

### Summary

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The complainant requested the Council to provide a copy of a proposed lease between the Council and the developers which concerned the site of the bowling club and that was attached to a conditional contract between the two parties. The Council responded to the complainant's request advising him that it was unwilling to release this information citing section 43 of the Act. As the complainant remained dissatisfied with this decision he asked the Commissioner to consider his case and whether the Council had correctly applied this exemption. The Commissioner investigated this matter and concluded that the Council had inappropriately relied on section 43 of the Act for the non-disclosure of this information and had therefore not dealt with the complainant's request in accordance with section 1 of the Act. The Commissioner has therefore requested the Council to release the information requested to the complainant within 35 days of the receipt of this notice.

### The Commissioner's Role

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1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### The Request

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2. The complainant initially requested on 16 June 2005 a copy of the lease between Brightwell Bowling Club ('the club') and the Council under section 1 of the Act (the full text of this section of the Act is available in the Legal Annex section at the end of this Notice). The complainant was informed by the Council on 27 June 2005

that no lease existed. However, it later came to the complainant's attention that there was a proposed lease between the Council and a developer relating to the site of the club and that this was attached to a conditional contract between the two parties. The complainant therefore made a second information request by telephone (date of request unknown) to the Council under the Act as follows:

A copy of "a lease which was attached to the conditional contract between [the council] and the developers [name redacted]".

For clarification, it is the second information request to the Council on which the Commissioner has been asked to adjudicate.

3. The Council responded to this information request on 14 July 2005 advising the complainant that it was unwilling to release this information, as it felt the information was exempt from disclosure under section 43 of the Act (the full text of this section of the Act is available in the Legal Annex section at the end of this Notice).
4. The complainant wrote to the Council on 30 July 2005 to dispute its decision and to request that the matter be reconsidered. The complainant advised the Council that he felt the release of this information was in the interests of the club's members and the public as a whole.
5. The Council issued a further response to the complainant on 15 August 2005 and confirmed that it had reconsidered his information request in accordance with its internal complaints procedure. However, it was unwilling to change its decision and remained of the opinion that the information should not be disclosed to the complainant.
6. As the complainant remained dissatisfied with the Council's decision to withhold the information requested, he contacted the Commissioner to request that he consider the Council's handling of his information request.

### **Validity of request**

7. The Act states that a request for information should be made in writing. As the complainant's second information request was made verbally, the Commissioner has considered whether this request is a valid one for the purposes of the Act. The Commissioner notes that the Council accepted the complainant's second request as a valid information request and proceeded to correspond with him in accordance with the provisions of the Act. Although in practice the Council could have refused to deal with the request as it was not made in writing, the Council would have been expected to advise the complainant that his request must be made in writing through providing advice and assistance. It is likely that had this approach been taken that the complainant would then have submitted a written request. The Information Tribunal considered a similar situation in the case of *Mr M Kirkcaldie vs. Information Commissioner and Thanet District Council* (reference: EA/2006/001) and concluded that a reasonable and pragmatic approach should be taken. The Commissioner acknowledges that both parties were happy for the matter to be dealt with under the Act and that the Council took

a pragmatic approach to the complainant's second request by accepting it as a valid request. This is confirmed by the Council's letter dated 14 July 2005, which acknowledged and outlined the nature of the complainant's second request for information. The Commissioner is therefore satisfied that the complainant's second information request is eligible for consideration under the Act.

## The Investigation

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### Scope of the case

8. The Commissioner's investigation into the complainant's concerns sought to establish whether the Council had complied with the requirements of section 1 of the Act and, in particular, whether it had appropriately applied the exemption cited.
9. This case was initially investigated in conjunction with another complaint raised with the Commissioner, as both cases and the information requested relate to the same conditional contract between the Council and the developer. The Commissioner will therefore be referring to two letters (dated 12 October 2006 and 2 November 2006) in paragraphs 10 and 11, which pre-date the formal allocation of this case to a case officer for investigation.

### Chronology of the case

10. The Commissioner wrote to the Council on 12 October 2006 to obtain a copy of the information being withheld and to ask a series of questions to assist in understanding how it had reached its decision.
11. The Council replied on 2 November 2006 confirming that it wished to rely on the exemption contained in section 43 of the Act in withholding the information requested. The Council provided the Commissioner with a copy of the proposed lease to which the complainant requires access and explained further why it was unwilling to disclose this document. The proposed lease is an annex to a conditional contract between the Council and the developer, which was signed in April 2003. The conditional contract outlined specific conditions relating to both the Council and the developer concerning the development of East Street in Farnham. At the time the conditional contract was drawn up it was anticipated that the site would continue to be used as a bowling club and the proposed lease was a draft of an underlease that would be required between the Council and the developer if this initial proposal went ahead. It confirmed that the proposed lease contains headings with short explanations that may be contained in other proposed leases and that the contents of the proposed lease had not been discussed or negotiated with any third party. The Council felt that if the contents of this draft lease were to be released into the public domain, this would damage its negotiating position considerably should it become necessary in the future to re-tender for the development and/or appoint a new developer.

12. The Commissioner wrote to the Council on 16 February 2007 to request a more detailed explanation as to why it considered this exemption applied. The Commissioner reminded the Council that the application of this qualified exemption was first subject to the prejudice test and secondly, the public interest test. The Council would therefore need to demonstrate that prejudice was likely to occur if this information were released and then, that the public interest in maintaining the exemption outweighed the public interest in its release.
13. The Council responded on 9 March 2007. It explained in further detail the two reasons why it considered this information should not be released under section 43 of the Act. Firstly, it advised that the proposed lease in question was not an existing lease between the Council and the club, which was the nature of the complainant's first request for information to the Council dated 16 June 2005. Secondly, the Council felt that the information requested was only a draft of a proposed lease that would come into force if the site continued to be used as a bowling club following the proposed development of East Street. It advised that more current plans of the development do not propose to use the site as a bowling club and therefore the proposed lease may not come into play. However, it considered that the conditional contract was still subject to change and negotiation with the developer, as certain conditions had been extended and may be subject to further discussions. It considers that it would be inappropriate to release this information until such negotiations were completed. In addition, the Council stated that the contract was only conditional and that if it became necessary to re-tender for the development, the release of this document would weaken the Council's position to negotiate effectively with third parties and alternative developers.

## Analysis

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### Section 43 Commercial Interests

14. As stated above in order for the Commissioner to agree that section 43 of the Act is engaged, the Council would first need to demonstrate that prejudice would or is likely to occur to the Council and/or the developer if the information were disclosed and that the prejudice claimed was real and of substance. This view is taken from the Information Tribunal hearing of the case of *John Press Associated Ltd vs. Information Commissioner* and its decision, which outlined the tribunal's interpretation of "likely to prejudice". The tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk". Secondly and once the prejudice test is satisfied, the Council would then need to apply the public interest test weighing up the arguments for non disclosure against disclosure.
15. The Commissioner has examined the information that the complainant requested and the submissions from the Council. Whilst he accepts the Council's argument that the draft lease does contain headings with short explanations that may be contained in other proposed leases, it is the Commissioner's view that these headings and explanations are of a standard nature and are therefore very similar

- to the headings in any lease. This is further supported by the Council's submission that the headings used in this proposed lease are headings it intends to use in a further two proposed leases with other properties. The Commissioner does not accept that the proposed lease contains any commercially sensitive information about either party to the conditional contract or any other information that would or would likely cause damage to the commercial interests of either party if it were released. The Commissioner has given the council the opportunity to explain its reasons further and to provide evidence of the prejudice claimed. However, the council has failed to provide any further evidence or convincing arguments.
16. The Council also stated that it felt it was inappropriate to release a copy of the lease whilst it was still in negotiations with the developer concerning certain conditions contained within the conditional contract. However, the Commissioner does not accept that the conditional contract itself is still subject to negotiation as it was signed in April 2003. It accepts that certain conditions have been subject to more recent negotiation and that it anticipates further discussions will be necessary with the developer in relation to certain conditions and how East Street will be developed as a whole. However, the Commissioner is not satisfied that the Council has demonstrated how and to what extent its commercial interests, further discussions with the current developer or possible future negotiations with other third parties would be prejudiced if this particular information were released. The Commissioner considers that it is apparent on a review of the information requested that the contents of the proposed lease would not be capable of having such an impact.
  17. The Commissioner also notes that based on the current plans for the development of East Street it is unlikely that the site will be used as a bowling club and therefore that it is unlikely that this proposed lease will be required.
  18. As it is the Commissioner's view that the Council has not explained in detail the prejudice claimed or how likely the release of this lease would damage the commercial interests of either party and it is not apparent on the face of the information, he cannot establish the likelihood of prejudice in this case and therefore does not accept that the exemption provided by section 43 of the Act is engaged.
  19. Being a qualified exemption, the information requested is also subject to the public interest test. Although the Council failed to provide any public interest arguments in its submissions of 9 March 2007, it is the Commissioner's view that there is no need to consider the public interest test in this case. This is because the Commissioner is satisfied that the exemption is not engaged for the reasons explained in paragraphs 15 to 17.

## **The Decision**

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20. The Commissioner has concluded that the Council has not dealt with the complainant's request in accordance with section 1 of the Act. The Council

inappropriately applied section 43 of the Act to the information and therefore failed to communicate to the complainant the information it held relevant to his request.

## Action Required

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21. In view of the matters referred to above the Commissioner gives notice that in exercise of its powers under section 50 he requires the Council to disclose the information that the complainant requested to him within 35 days of the receipt of this Notice.

## Right of Appeal

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

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 2<sup>nd</sup> day of July 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## **Legal Annex**

### **Freedom of Information Act (2000)**

#### **Section 1**

Provides that “any person making a request for information to a public authority is entitled –

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

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

#### **Section 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).”