

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 7 May 2009

**Public Authority:** Fareham Borough Council  
**Address:** Civic Offices  
Civic Way  
Fareham  
PO16 7AZ

### Summary

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Fareham Borough Council ("the Council") was asked to provide all unpublished information in connection with the decision to sell the freehold of Portchester Parish Hall. The Council disclosed a limited amount of information and withheld the majority citing exemptions under the Freedom of Information Act 2000 ("the FOIA"). During the investigation, the Council agreed to disclose a significant amount of the information that it had originally withheld with the exception of some information that it maintained was exempt under section 42 of the FOIA. The Commissioner investigated and was satisfied that some of this information need not be considered because it falls outside the scope of the request. In relation to the remaining information, he was satisfied that section 42 applied and the public interest in maintaining the exemption outweighed the public interest in disclosing the information although he found a breach of section 17(1) and 17(1)(c) because the Council failed to state why the exemption applied in its refusal notice and internal review. The complainant also raised some particular questions regarding information that he thought ought to be held by the Council. The Commissioner investigated this and was satisfied that this information was not held.

### 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 10 April 2002, the Council granted a lease of the land on which the Portchester Parish Hall is built to the trustees of the Portchester Parish Hall (a registered charity). In 2005, the trustees asked if they could purchase the

freehold. Their request was considered and reported to the Council's Executive for a decision on 7 November 2005. The Executive agreed to sell the freehold to the trustees and the transfer of the land was completed on 2 October 2006.

## The Request

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3. On 7 February 2006, the Portchester Society ("the complainant") wrote to the Council and requested information in the following terms:

*"...the Portchester Society now requests release of all unpublished information in connection with the decision to sell the above freehold. We would wish to have sight of all letters, memoranda, e-mails and officers' reports not already in the public domain".*

4. The Council responded on 6 March 2006 and enclosed some information. It stated that it had not included correspondence from or to the complainant because it assumed that these were not required. The Council also provided a refusal notice stating that it had withheld information under sections 36, 42 and 43 of the FOIA. It also stated that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
5. On 7 March 2006, the Council wrote further and stated that it had enclosed a copy of the Council's complaints procedure relating to information requests. It stated that this ought to have been provided along with its refusal notice.
6. On 11 May 2006, the complainant wrote to the Council in order to appeal the refusal.
7. The Council completed its internal review on 7 June 2006. It stated that it had decided to uphold its original refusal.

## The Investigation

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### Scope of the case

8. On 1 December 2006 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly refused to provide the information. However, during the Commissioner's investigation, a significant amount of information was disclosed. For clarity, this Decision Notice therefore only concerns the information that the Council is continuing to withhold under section 42 of the FOIA and it also addresses particular concerns raised by the complainant during the investigation about the extent of the information held by the Council.

9. During the Commissioner's investigation, the complainant also indicated that he believed all correspondence relating to the satisfactory settlement of financial arrangements between the Council and the Trustees of Portchester Parish Hall concerning the construction of the new hall in 2001 fell within the scope of his original request. As the Commissioner did not agree with this position, this information has not been considered in the Decision Notice.
10. The Commissioner has also excluded from his investigation three emails that the Council withheld under section 42 relating to its decision to exclude the public from a meeting at which the decision to sell the land was discussed and not to make a copy of the associated report publicly available. In the original request, the complainant had asked for all unpublished information in connection with the decision to sell the land. In the Commissioner's view, the emails do not relate to the decision to sell the land as they only relate to the decision to exclude the public from a meeting and to withhold a report and these are separate side issues. As the Commissioner did not consider that this information fell within the scope of the original request, it has not been considered in this Notice.

### **Chronology**

11. On 14 August 2007, the Commissioner wrote to the Council and asked to be provided with copies of the withheld information. He also made some initial enquiries about the request.
12. The Council replied to the Commissioner's initial questions on 10 September 2007 and provided copies of the withheld information.
13. On 20 September 2007, the Commissioner telephoned the Council and asked it to clarify what information was being withheld under section 42.
14. The Council provided some clarification to the Commissioner regarding the withheld information on 24 September 2007.
15. Further to the disclosure of some information and an enquiry about whether the complainant wished to pursue the complaint, the complainant wrote to the Commissioner on 28 August 2008 and confirmed that it wished the Commissioner to consider the application of the exemption under section 42. It also posed questions concerning whether certain items of information were held by the Council.
16. On 24 October 2008, the Commissioner contacted the Council and pointed out that it had not been entirely clear from the Council's previous submissions what information was being withheld under section 42. He asked for the Council's clarification and for further more detailed supporting arguments if it wished to maintain its position.
17. On 27 October 2008, the Commissioner also wrote to the complainant and addressed some of the questions posed about information held by the Council. In particular, he explained that he did not believe that some of the information the

- complainant wanted was capable of falling within the scope of the original request.
18. The complainant wrote further to the Commissioner on 22 November 2008. He questioned the Commissioner's conclusion about the scope of the request.
  19. On 4 December 2008, the Council responded to the Commissioner's enquiries. It explained that it had disclosed to the complainant some of the information it was withholding under section 42 in redacted form.
  20. On 15 December 2008, the Commissioner wrote to the complainant and advised him that some of the information he wanted fell outside the scope of the request and he had the option of making a new request if he wished but it would not be investigated as part of this complaint. He also asked the complainant to state whether he wished to pursue the complaint.
  21. On 19 December 2008, the Commissioner wrote further to the Council. He pointed out that the Council had not provided sufficient argument to justify withholding the information and he asked the Council to elaborate if it wished to maintain its position.
  22. On 2 January 2009, the complainant replied to the Commissioner and confirmed that he wished to pursue the complaint regarding the withheld information. He also made some further specific queries regarding information that he believed was held by the Council.
  23. On 9 January 2009, the Council wrote to the Commissioner and provided more detailed arguments concerning its application of section 42 to the remaining information.
  24. From 19 January 2009 until 13 March 2009, correspondence passed between the Council and the Commissioner with the purpose of investigating whether any of the items specifically requested by the complainant were held and whether the remaining information was exempt under section 42. The Council responded to the Commissioner's questions and maintained its position that no information of the description specified by the complainant was held.
  25. On 23 March 2009, the Commissioner telephoned the Council and discussed certain details regarding its application of section 42.

## Analysis

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### Procedural matters

26. Although the Council cited section 42 in its refusal notice, it did not state why the exemption applied (because the Council considered that the information was covered by legal advice privilege) within 20 working days. This was a breach of section 17(1) of the FOIA and because this problem had not been corrected by

the date of the Council's internal review, the Council breached its obligation under section 17(1)(c) to state (if it would not otherwise be apparent) why an exemption applies.

27. During the Commissioner's investigation, the complainant asked for particular items of information that had not been provided and which were not part of the withheld information in the Commissioner's possession. Some were provided and these do not therefore form part of the Commissioner's considerations. The Council advised the Commissioner that it did not hold the following items requested by the complainant.

- Item 1 – A copy of a particular council officer's email to a particular councillor (mentioned in one of the emails disclosed to the complainant)
- Item 2 – Emails from the Council's solicitor regarding financial completion which the complainant presumes were sent on 12 January 2006
- Item 3 – Reply from one of the trustees of Portchester Parish Hall to the Council's Senior Legal Assistant's letter on 5 December 2005
- Item 4 – A copy of the Charity Commissioner's approval of purchase

28. The Council does not dispute that it is likely to have once held item 1 as it is mentioned in another email. However, the Council maintains that this information is no longer held because it was deleted before the request was received. There is no record of its deletion but the Council has explained that its deletion would not have been in contravention of any legal obligation to retain the information or the Council's policies and arrangements regarding the retention of records. The Council's Information Disposal Schedule lists specific types of information which need to be kept for specific periods and states:

*"Most other information need only be kept for as long as the information is of value and is being used for business or audit purposes".*

The Council has checked its records to ensure that the information is no longer held and consulted relevant individuals. Additionally, the Commissioner was satisfied that the councillor would not have held the information on behalf of the Council as he was acting in his capacity as a ward councillor and not an office holder at the Council.

29. Regarding item 2, the Council advised the Commissioner that it has never held emails sent from the Council's solicitor regarding financial completion on or around 12 January 2006. In support of this, it has pointed out that the sale was not completed until October 2006. Any information held by the Council concerning the completion would post-date the request. The Council did nonetheless check its records and consult relevant staff and was satisfied that it did not hold this information.

30. The Council informed the Commissioner that item 3 had never been held. The Council explained that the particular trustee did not reply to the letter because after the letter from the Senior Legal Assistant, the matter passed into the hands of the trustees' solicitors and the response from them post-dates the complainant's request for information. The Council checked its records and

having consulted relevant staff, was satisfied that it did not hold the reply requested.

31. Again, the Council confirmed that item 4 had never been held. The Charity Commissioner wrote to the Council at a time post-dating the request stating that his approval would not be necessary. The Council has checked its records and consulted relevant staff and is satisfied that this information was never held.
32. In view of the above, the Commissioner is satisfied that there is no evidence suggesting that the above information was held by the Council when it responded to the request for information. The Commissioner therefore does not consider that the Council breached its obligations to either communicate the information under section 1(1)(b) or to refuse it in accordance with section 17(1).

### **Exemption**

33. 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).
34. In this case, the Council relied upon advice privilege to withhold a number of emails, the record of a telephone conversation with a councillor and paragraphs 8 and 9 of the Executive Briefing Report dated 7 November 2005.
35. All the emails consist of communications either from or to the Council's solicitor, Principal Solicitor and Senior Legal Assistant who is a fellow of the Institute of Legal Executives. The Commissioner inspected their contents and was satisfied that they all represent confidential communications relating to the provision of legal advice between a legally qualified person and their client.
36. As regards the telephone conversation record, the Commissioner was satisfied that the legal advice that was given to the Councillor by the Council's Senior Legal Assistant and solicitor was given to him in relation to his role as a councillor. In these circumstances, the Commissioner accepts that he was a client of the Council and that the communication was privileged.
37. The Council also withheld two paragraphs of the Executive Briefing Report dated 7 November 2005 having disclosed the rest during the course of the Commissioner's investigation. The Council explained that these paragraphs represent legal advice on the terms of the current lease and the implications of disposing of the freehold. The Commissioner inspected the paragraphs in question and was satisfied by the nature of the information itself, the circumstances of the drafting of the particular report and the similar content of other legal advice seen by the Commissioner during the handling of this matter, that the paragraphs in question do represent a record of legal advice given by the Council's Principal Solicitor.



38. Having satisfied himself that the dominant purpose of all the communications 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. Even if information was privileged, this can be lost (waived) if the client has shared it with third parties and it has lost 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.

### Public Interest Test

39. In view of the above, the Commissioner was satisfied that the information was covered by Legal Advice Privilege. However, as section 42 is a qualified exemption (meaning that it is subject to a public interest test), the Commissioner also needed to satisfy himself that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing it.
40. The Commissioner's guidance on section 42 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”.*

In light of the above, there will always be strong arguments 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...”*

41. 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. With this in mind, the Commissioner considered whether there were any circumstances in this case which would mean that the public interest favoured disclosure.
42. Firstly, the Commissioner took 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. Disclosure of the information would help the public to understand more about the reasons why the Council made its decision to sell the land. However, despite demonstrating initial reluctance to disclose a lot of information about the sale

even once the sale had been completed, the Council has now disclosed the majority of information that it holds thereby achieving significant transparency.

43. There are clearly accountability issues where public funds are concerned and sometimes the amount of money involved can be so significant that this adds a lot of weight to the need for full disclosure of legal advice. Having considered the circumstances of this case, the Commissioner does not believe that the amount of money involved was significant enough to add much weight to the argument for disclosure.
44. The argument in favour of disclosure is also increased in cases where the matter in question affects a large amount of people. There is nothing in the circumstances of this case that would lead the Commissioner to suppose that a significant number of people would be affected by the sale of the freehold. The Executive Briefing Report which has been made publicly available with the exception of paragraphs 8 and 9 sets out steps that the Council has taken to protect the public's interest such as imposing restrictions on the use of the site, securing continued access to the area of informal open space and first right of refusal if the land is sold.
45. The Commissioner also took into account that the likelihood and severity of harm to be suffered will be affected by whether the advice is recent (particularly if it is still live) and/or protecting the rights of individuals. The information in this case dates from 2005 and it is therefore the Commissioner's view that the advice is still relatively recent and that some of the information may prejudice the Council's interests in the future. Although it does not relate to the rights of individuals, the Commissioner considers that this does not detract from the weighty arguments in favour of a public authority being able to seek confidential advice on its legal position.
46. In view of all of the above, the Commissioner's view is that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

## The Decision

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47. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the FOIA:
  - It did not fail to communicate or refuse to provide information that it held in accordance with its obligations under section 1(1)(b) and section 17(1).
  - It correctly withheld information using the exemption under section 42 and correctly determined that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in this particular case.
48. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:



- The Council did not state why the exemption applied (because the Council considered that the information was covered by legal advice privilege) within 20 working days. This was a breach of section 17(1) of the FOIA and because this problem had not been corrected by the date of the Council's internal review, the Council breached its obligation under section 17(1)(c) to state (if it would not otherwise be apparent) why an exemption applies.

## Steps Required

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49. The Commissioner requires no steps to be taken.

## Right of Appeal

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50. 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 7th day of May 2009**

**Signed .....**

**Gerrard Tracey  
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.”

### 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.”