



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2006/0049 & 50

Freedom of Information Act 2000 (FOIA)

Heard at the Finance and Tax Appeal Tribunal

Decision Promulgated

17th and 18th April 2007

12th July 2007

and on the papers 14th May 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Fiona Henderson

And

LAY MEMBERS

Paul Taylor

And

Rosalind Tatam

Between

Mr Anthony Berend

Appellant

And

Information Commissioner

Respondent

And

The London Borough of Richmond upon Thames

Additional Party

Representation:

For the Appellant: In person

For the Respondent: James Cornwell

For the Additional Party: Jane Oldham

Decision

The Tribunal considers both Appeals and Decision Notices at the same time. For the reasons set out in the Tribunal's determination, the Tribunal allows the Appeal in part. No changes are required to Decision Notice FS50087341 and Decision Notice FS50073576 is amended to the following extent by adding the paragraphs set out below to those in the original Decision Notice:

5.17 There were additional breaches of section 1(1) FOIA in that the London Borough of Richmond Upon Thames gave no consideration to the request for "all working papers" or the items listed in paragraphs 79 et seq below.

5.18 There was therefore an additional breach of section 10 FOIA in that the London Borough of Richmond Upon Thames exceeded the statutory time limit for responding to a request made under section 1(1) in respect of the items set out in paragraphs 79 et seq below.

Action Required

6.2 The London Borough of Richmond Upon Thames should consider the request afresh in light of the Tribunal's findings (set out below) and provide Mr Berend with the information requested or a refusal notice in accordance with Section 17 FOIA within 28 days from today.

Reasons for Decision

The first request for information

1. This is an appeal by the Appellant (Mr Berend) to the Information Tribunal under section 57 of *the Freedom of Information Act 2000* (FOIA).
2. The London Borough of Richmond Upon Thames (LBRT) sold a long lease on a piece of land (the Squires Garden Centre and Fulwell Golf Club) in 1986. In 1992 the terms of the long lease were varied. Mr Berend and others have been campaigning since for appropriate scrutiny of the transaction. The District Auditor and the Audit Commission have both produced reports on the matter of the sale of the land. A Task Group to investigate the background to the sale, was set up under the auspices of the LBRT Strategy and Resources Overview and Scrutiny Committee in Summer 2002; they published their report in March 2005. The Task Group met in private and Mr Berend's information request related to information pertaining to those meetings.
3. On March 17th 2005 Mr Berend wrote to LBRT stating that this was a request under FOIA and asking to be supplied with:

a) *Copies of the letters sent to each of the eight individuals [the "key players" regarding the lease arrangements], all replies and all subsequent correspondence both sent to and received from the 8 individuals or anyone purporting to act on their behalf including notes of telephone calls and meetings if any.*

b) *Any internal memorandums or notes relating to the correspondence in "a" between Officers and Officers and Councillors, former Councillors and their advisors if any.*

Please include copies of material that you hold in the form of paper and electronic records including emails and hand written notes of telephone conversations or informal meetings/discussions

c) *Copy Minutes and Agendas of all 15 meetings of the Task force re Squires and Fulwell together with all working papers and documents attached to Agendas.*

...Alternatively allow me to inspect the files together with my colleagues.

If I can help to clarify this request please telephone me.."

4. The letter was sent as an attachment to an email of the same date, which noted "...Since all these papers were reviewed by the Task Force last week I presume they are all readily available"...

5. A holding letter acknowledging receipt of the request was sent by email on 17th March 2005 by Parveen Bindra (Data Protection & Information Officer, Legal Services Department). Mr Berend and LBRT corresponded further in relation to whether LBRT was acting promptly, and various other matters mentioned in the holding letter. Ms Collins (the Manager of Democratic Services, under the Chief Executive) who had Clerked the Task Group, was copied in to the request and this correspondence.

6. On the 18th April (the 20th working day since the request was received, and the day before a question put down by Mr Berend was due to be answered at a Council meeting), Mr Berend spoke to Mr Ginn (Information Lawyer, Legal Services Department) and received an email from him at 18.04 in which Mr Ginn said:

"I have now spoken to Mary Collins. She is in the process of collating the non-exempt information, which LBRT is prepared to disclose and which is not subject to the public interest test. I am informed by Mary that that information will be ready tomorrow. In respect of the other information requested, LBRT will require a further 20 working days in which to consider the public interest issues. However, every attempt will be made to furnish you with a decision prior to that date."

7. Mr Berend sent a letter that evening in which he stated that:

- a. LBRT had a duty to reply promptly,
- b. They were already out of time,
- c. The email did not specify the exemption relied upon,
- d. Asked for assistance in tracing the section 45 Code of Conduct,

- e. Sought clarification of who was the Information Officer, and
- f. Reminded LBRT of their duties under sec 16 FOIA.

The Chief Executive (Gillian Norton) was copied in to this correspondence.

8. Mr Berend received redacted copies of the 8 letters sent to the individuals ("a" of his request) attached to an email of 19th April 2005 sent at 15.50. This email elaborated:
"Personal information has been redacted from the letters, as we do not have the consent of the individuals to release that information. We will endeavour to provide the other information you requested which is subject to the public interest test as soon as practically possible. I indicated yesterday I have requested a further 20 working days in which to consider the public interest test... I will keep you informed as to developments".
9. Mr Berend appealed to the Information Commissioner's Office on 27th April 2005, but the case was not allocated a caseworker until August 2005.
10. On 17th May Mr Ginn emailed Mr Berend to say that he had spoken to Ms Collins and hoped to be able to furnish him with *"such information which is not deemed to be exempt"* by Friday 20th May. (The 17th May was the 20th working day since 18th April). Having received no further information or communication when the 20th May deadline expired, Mr Berend chased the matter on 23rd May by letter to the Chief Executive. He chased the matter again by email to Mr Ginn on 8th June 2005.
11. The correspondence between Mr Berend and Mr Ginn and the Chief Executive, in which he expressed dissatisfaction with the way in which the request was being dealt and disputed LBRT's interpretation of FOIA (a selection of which has been summarised above), was treated by LBRT as a complaint and internal review of the decision taken. The complaint was considered by Mr. Chesman (Assistant head of Legal Services) who wrote on 10th June 2005 concluding that he did not find the complaint well founded apart from the supply of redacted letters one day late. In relation to other matters raised he concluded that:
 - *"The reference to an extension of 20 working days in the email of 19th April, was an estimate and in the event was not achieved, and that a renewed estimate was provided"*.
 - *"There are no Minutes as such, rather a series of notes of meetings of the Group taken by Ms Collins... which will be likely to need to be redacted in a similar way to the remainder of the documents to which your refer .."*
 - The request related to *"material of public importance with 2 detailed investigations. It therefore seems to me that LBRT has inevitably to consider the public interest test before responding to your request. In addition a substantial element in the request deals with personalised matters concerning specific individuals"*,

12. Mr Berend wrote a detailed response on 16th June to which he had received no response by 27th June (when he sent a chasing letter to Mr Chesman), neither had he received the outstanding information or any estimate as to when it might be provided. Mr Berend also chased the Chief Executive for her substantive reply to his letter of 23rd May on 27th June and was told by email on 28th June that she had herself chased his request "last week".
13. Mr Chesman emailed a reply on 30th June stating inter alia:
"I have recently reminded Ms Collins that the balance of material sought in your letter dated 17th March is still to be supplied and hope that this will not be much further delayed" He also indicated that he had progressed the complaint to LBRT's Head of Legal Services.
14. Mr Berend had still received no information by 19th July when he again chased the Chief Executive and she emailed that she hoped to be able to respond within 7 days. Mr Ginn sent a letter on 25th July indicating *"I am awaiting instructions from Mary Collins and will write to you again as soon as possible in respect of that request"*.
15. A file note of 26th July shows that Mr Ginn spoke to Ms Collins and she confirmed:
"all the documents sent to [Mr Ginn] were to go out and that she did not hold any other information in respect of the information [Mr Berend] requested in his letter dated March 2005".
16. A substantive reply was sent on 28th July 2005 (some 19 weeks after the receipt of the original request) providing the following information in relation to the itemised request:
 - g. *"In relation to the correspondence sent to 8 individuals (already disclosed) 6 wrote back copies enclosed.*
 - h. *I am instructed that there are no such internal memoranda or notes."*
 - i. Attaching a schedule of Notes and Agendas, in which for 10 of the 15 Task Group meeting dates the phrase "none issued" appeared.
 - j. Disclosing 5 Notes (in minute form) and 5 AgendasSome additional documents which had been physically attached to the Agendas were also enclosed, but the letter did not specify this. The letter confirmed the decision to redact the names and addresses of the 8 individuals so as not to contravene the Data Protection Act (DPA). Mr Ginn stated that the information was redacted *"as we did not have consent to divulge this personal information to you.. Having considered the matter, I determined that it was not appropriate to furnish you with that information without the consent of those concerned."*

17. Mr Mellor Head of Legal Services for LBRT wrote to Mr Berend on 11th August 2005 notifying him of the results of the 2nd stage review (see para 13 above). This review concluded inter alia that:

- *“the notice did not state which exemption might apply and why it is considered that the public interest test needs to be considered. This is simply because LBRT was not in a position to give this information because of the sensitive nature of the issues involved, the past history of the matter (with two detailed investigations previously) and the amount of documentation”.*
- *“We did not fail to comply with section 16 FOIA”.*
As Mr Berend ought from correspondence to have been aware of the progress of his request.
- This was not a case where LBRT needed to assist Mr Berend to focus his request, perhaps by advising of the types of information available within the requested category – *“your requests clearly show that you knew precisely what information LBRT might have”* –
- Sec 40 – *“the authority had to consider all aspects, including any risk to any of the individuals concerned before releasing any information”.*
- Information given by a client to a lawyer for the purposes of seeking advice and communications in which advice is given *“...is exempt information”.*

18. Mr Berend wrote to Mr Mellor on 12th September 2005 challenging the review and stating that he would be writing to the Chief Executive. The matter was then escalated to a third stage review by Mrs Carol MacBean (Partnership Manager, LBRT) whose conclusions were set out in a letter from the Chief Executive dated 15th November 2005 in which LBRT accepted that the length of time taken to deal with the request was too long (reiterating the Chief Executive’s apology for the time delay in her letter of 5th August 2005) and that the extension notice did not contain all the elements it should have. LBRT did not uphold the complaints relating to the provision of advice and assistance or the need to consider data protection issues before releasing information.

The second request for information

19. On 6th May 2005 Mr Berend submitted a second freedom of information request asking for disclosure of material generated by his original request namely:

I *“the following correspondence between 17th March 2005 and 6th May 2005 related to my request for information under the FIA dated 17th March 2005 between:*

LBRT and the “eight people” written to in October 2003 [listed] ..

i and any other person to whom LBRT may have written...

j Including advisors to any of the above.

II Any internal memorandums, e-mails, Minutes of meetings, handwritten notes of meeting or telephone conversations etc between any of the following [list of Officers and employees of LBRT]...

f. Any other officer or Councillor with whom contact has been made with regards to my application under the FIA dated 17th March 2005."

20. Mr Berend received a holding reply from Ms Bindra dated 12th May 2005 and a substantive reply from Mr Ginn dated 3rd of June in which he purported to enclose certain information and refused the rest relying upon legal professional privilege. It also notified Mr Berend of his right of Appeal to LBRT.

21. Upon being told by Mr Berend on 8th June that the disclosed information was not attached, Mr Ginn apologised by email of the same date and promised to send it out to him. This information had still not been received by 27th June 2005 when Mr Berend chased the matter again, and Mr Ginn sent it by first class post on 28th June 2005. This information largely consisted of people being copied in to Mr Berend's correspondence. Mr Ginn later added the following:

a) By email dated 13th July:

"..documents containing legal advice have been withheld but I have nevertheless given you a synopsis of them although this was not necessary to comply with the Act."

b) By email dated 14th July:

"I do not hold any records of telephone calls made in relation to your request. To the best of my knowledge the eight people you refer to were not written to during that period. I have not attended any meetings in relation to this matter.."

c) By letter dated 25th July:

- Enclosing an email where legal professional privilege was no longer claimed,
- Confirming that 3 outstanding emails were the subject of the exemption,.

22. The 2nd stage review by Mr Mellor Head of Legal Services for LBRT also encompassed elements relating to the second request and he concluded in his letter of 11th August 2005 that:

- The fact that papers were not sent with the letter of 3rd June – was a delay due to Mr Ginn being away from the office.

The review did not comment upon the subsequent 20 day delay before the enclosures were in fact sent.

23. The complaints relating to the first and second requests having become somewhat entangled, in their letter of 21st October 2005 the Information Commissioner's Office accepted that both complaints had been treated together and therefore Mr Berend did not need to initiate a separate complaints' procedure in relation to the second information

request. No party takes a point on this, and the Tribunal does not therefore consider it further.

24. It should be noted that the extracts of correspondence set out above are by no means complete. Mr Berend corresponded frequently with LBRT in relation to both of his information requests explaining his understanding of FOIA pointing out where he felt they were failing in their duties and seeking advice and assistance. He received various acknowledgments and responses but nothing beyond that recorded above which progressed his FOIA request for information.

The Complaints to the Information Commissioner

25. Mr Berend first complained to the Information Commissioner's Office on 27th April in relation to his 17th March 2005 information request. He explained that he had applied to LBRT for:

" Minutes of a Task Group etc. Twenty working days later no information has been made available. Very minor information was made available the following day.

An e-mail was received on the 20th working day [after business hrs] stating that LBRT required a further 20 working days to consider the "public interest test".. However this purported notice was invalid, as it did not comply with the requirements of the FIA.."

He itemised his grounds of appeal as:

- i. Failure to reply "promptly" or even "within 20 working days",
- ii. Serving an extension notice out of time and without including reasons etc....
- iii. Failure to inform the applicant of who was to act as the Information Officer,
- iv. Failure to give the Applicant details of LBRT's internal appeal procedures,
- v. Failure to give advice and assistance [section 16]....

26. Mr Berend made a complaint in relation to his second request (6th May 2005) on 10th August 2005. In this he alleged that:

- There had been non-disclosure of non-exempt documents,
- There had been a failure to give details of all documents and records held,
- There had been a failure to give valid reasons for non-disclosure under the Public Interest test,
- There had been a failure to provide advice and assistance,

Mr Berend also commented at length about the handling of his original request for information and asked that both complaints to the Commissioner be dealt with together.

27. A caseworker was allocated in August 2005 and following the LBRT's 3rd stage review in November 2005 the Commissioner's Office actively

considered the complaints. LBRT confirmed in relation to the first complaint that:

- No information under item (b) of the 17th March 2005 request was held and that all other information requested in that request had been supplied,
- Any documents attached to Agendas had been supplied,
- The drafts of the Task Group Report were not attached to the Agendas and therefore not included in the request,
- Unredacted copies of the 8 letters which had been disclosed in redacted form pursuant to part a) of the request, were shown to the Commissioner.
- The factors considered by LBRT in their evaluation of the public interest test were as set out in an email from Mr Ginn namely that:
 - i. This request was not compatible with data processing principles.
 - ii. The subjects had a legitimate expectation that the information would not be disclosed to other persons.
 - iii. Releasing the information could cause substantial damage or distress to the data subject.
 - iv. Hence it was not in the public interest.
- Any documents attached to Agendas were sent to Mr Berend (except for his own correspondence with the Task Group and documents already provided under (a) of his request). (Email from Mr Ginn dated 3rd October 2005).

In relation to the second complaint, LBRT supplied copies of the emails which they asserted were exempt due to legal professional privilege.

28. The Decision Notice (Reference Number FS50073576) dated 29th June 2006 in relation to the first complaint found as follows:

- LBRT breached section 10(1) FOIA by exceeding the statutory time limit for responding to a request made under section 1(1) (the response being made on 28th July 2005).
- There was no breach of section 17(2)(b) FOIA as the extension notice was served within the 20 day time limit. However, there was a breach of section 17(1)(b) as the notice did not specify the exemption in question,
- Section 17(7) of the Act was breached as the response of 28th July did not include details of complaint procedures,
- There was no breach of section 16(1) FOIA (and the section 45 Code of Practice) as inter alia:
 - a) LBRT engaged sufficiently to establish what was wanted, assisted him in obtaining it, and maintained a dialogue.
 - b) No further clarification was required to establish what information the complainant wanted.

- c) Entering into a debate about interpretation of FOIA was beyond the scope of section 16 FOIA.
 - d) Section 16 FOIA (and the section 45 Code of Practice) does not require a public authority to reply to communications by return.
 - Section 1 FOIA was breached as the section 40 FOIA exemption was incorrectly applied in relation to some of the information.
 - LBRT were required to provide the redacted data that the Commissioner had identified within the notice as not being exempt by virtue of section 40 FOIA within 30 days.
29. The Decision Notice (Reference Number FS50087341) dated 29th June 2006 in relation to the second complaint found as follows:
- LBRT had breached section 1(1) and 10(1) of FOIA in that the refusal notice did not contain the information requested which was not provided until 28th June, and 25th July respectively.
 - There was no breach of section 16 FOIA
 - There was a breach of section 17(7)(b) FOIA as there were no details of the right to complain to the Information Commissioner in the refusal notice of 3rd June 2005.
 - The section 42 FOIA (legal professional privilege) exemption applied to the material that was withheld and the public interest lay in withholding the information.

The Appeal to the Tribunal

30. The Appellant appealed to the Tribunal in relation to both Decision Notices. The Notice of Appeal EA/2006/0050 dated 26th July 2006, disputed Decision Notice FS50073576 (relating to the 17th March 2005 request) on the following grounds:
- There was a breach of 17(2)(b) because the extension notice was null and void and in effect could not be said to have been served (in light of the acknowledged breach of section 17(1)(b)).
 - The Commissioner failed to consider certain aspects of the complaint, (this complaint also applied to the second request)
 - The Commissioner was wrong to conclude that there was no breach of Sec 16 FOIA (this complaint also applied to the second request).
31. The Notice of Appeal EA/2006/0049 dated 26th July 2006 disputed Decision Notice FS50087341 (relating to the 6th May 2005 request) on the following grounds:
- The Commissioner erred in his consideration of the legal professional privilege exemption, treating it as an absolute exemption.

32. The Commissioner opposed these appeals on the grounds that his decisions were correct. LBRT were joined as an additional party pursuant to Rule 7(2) of the *Information Tribunal (Enforcement Appeals) Rules 2005 SI 2005 No.14* on 21st September 2006 and also opposed the appeal adopting the same grounds as those advanced by the Commissioner.
33. The 2 Appeals were consolidated pursuant to rule 13(1)(a) *Information Tribunal (Enforcement Appeals) Rules 2005 SI 2005 No.14* (namely that some common question of law or fact arises in both of them) at the directions hearing on 22nd of November 2006.

The Oral Hearing

34. The Tribunal considered the appeal at an oral hearing on 17th and 18th April 2007, which was adjourned to enable all parties to expand upon their oral submissions which had been limited by time constraints. Upon receipt of further written material from all parties pursuant to the directions of 18th April 2007, the Tribunal reconvened to consider and determine the case on the papers on 14th May 2007.

The Issues for the Tribunal to decide

35. Upon consideration of all of the material before it, the Tribunal is satisfied that the issues that it is required to determine are:
- i. Section 16 FOIA 2000, whether the Commissioner was correct to find that the LBRT had complied with its obligations to advise and assist the Appellant under the Act, in that the Appellant asserts that they had:
 - (a) failed to initiate contact with the Appellant;
 - (b) failed to assist the Appellant to reformulate his request to include a request for documents relevant to the Task Group investigations.
 - (c) Failed to provide the name of an identifiable information officer,
 - (d) Failed to tell the Appellant that there were no Minutes as such, but some notes and only limited Agendas of relevant Task Group meetings.
 - ii. Section 17 FOIA 2000: whether the Commissioner was wrong to conclude that LBRT had not breached section 17(2)(b) of FOIA 2000 in light of the Appellant's assertion that the notice was null and void (and could not therefore be said to have been served) as a result of the acknowledged failure to comply with section 17(1)(b) of the Act.

- iii. Section 42 FOIA 2000: whether the Commissioner was wrong to conclude that the public interest in maintaining the section 42 FOIA 2000 exemption (legal professional privilege) outweighs the public interest in disclosing the requested information and whether therefore the Commissioner has wrongly applied the public interest test.
- iv. Whether the Commissioner was wrong to accept the bare assertion of LBRT that they had disclosed (Section 1(1)(b) FOIA), or claimed an exemption (Section 2(2)(b) FOIA) for all the information that they held that had been requested by the Appellant, and whether LBRT at the time of the request held further undisclosed information which should have been disclosed under the Act. In particular this includes:
 - i) The Minutes or notes and Agendas of the 10 relevant sub-committee meetings,
 - ii) The replies to letters from the 8 people referred to in the request (to include letters, emails, notes of telephone calls).

The Powers of the Tribunal

36. The Tribunal's powers in relation to appeals under section 57 FOIA are set out in section 58 of FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

37. The question of whether LBRT had complied with its section 16 and section 1 FOIA obligations are questions of fact. Whether the exemption in Section 42 FOIA and the consequential public interest test was properly applied is a question of law based upon the analysis of the facts. The question of whether there was a breach of section 17(2)(b) FOIA is a question of law. The Tribunal may substitute its own view for that of the Commissioner on these issues if it considers that

the Commissioner's conclusion was wrong. This is not a case where the Commissioner was required to exercise his discretion.

38. The Tribunal is satisfied that the following points do not fall to be determined by this Tribunal:

- Whether the Commissioner was correct in his findings in relation to material redacted in reliance upon section 40 FOIA and data protection considerations. (This was not appealed by either party.)
- Whether the Task Group had material withheld from it that it ought to have been in a position to consider. (If material did not form part of the Task Group's work it does not fall within the terms of Mr Berend's requests).
- Whether the Task Group was a formal or informal committee, its constitutional status and whether it was well administered. (The matters before the Tribunal concern what does exist not what should have existed).
- Mr Berend initially made an allegation (that he accepted he could not substantiate) that there had been a "mass shredding of evidence". No evidence has been provided by Mr Berend or his witnesses that this is the case and LBRT gave evidence that all the documents relating to the Task Group are still held. Consequently the Tribunal makes no finding in relation to whether any documents have been destroyed and does not consider the matter further in this appeal.

Section 16 FOIA 2000

39. Section 16 provides as follows:

- a. *It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*
- b. *Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.*

40. Under section 45 FOIA the Lord Chancellor has published a Code of Practice (the Code) to assist public authorities. Where the public authority has complied with the Code they will be held to have fulfilled their obligations, however, failure to comply with the Code does not inevitably mean that a public authority has breached section 16 FOIA.

41. The Appellant alleges that LBRT have breached section 16 FOIA by failing to initiate contact with the Appellant. The Tribunal is satisfied as a matter of principle that there is no general duty under the Act to initiate contact. Section 1 FOIA states:

(3) Where a public authority-

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

42. The only obligation to initiate contact with the applicant under the Section 45 Code relates to the situation that arises where the request requires clarification (a similar duty to that set out in section 1(3) FOIA). The other requirements to initiate contact are dealt with pursuant to the duties to supply or refuse information within the timescales set out in sections 1, 10 and 17 FOIA.

43. In the particular circumstances of this case Mr Berend was in frequent contact with Mr Ginn, Ms Collins, Mr Chesman and Ms Norton (the Chief Executive of LBRT). He set timescales that suited his circumstances but did not make allowance for the fact that his information request was not the only priority of LBRT, and that it was therefore unreasonable to expect instantaneous responses. That said, the Appellant had every reason to feel frustrated at the lack of progress relating to his request. In particular the Tribunal does note that having failed to meet deadlines of its own making LBRT did not contact the Appellant to advance an explanation. However, Mr Berend was quick to chase such deadlines upon their expiry and the Tribunal feels that this matter has been properly dealt with under sections 10 and 17 FOIA both of which were breached (as found by the Commissioner in the Decision Notice).

44. The Appellant alleges that LBRT have breached section 16 FOIA by failing to assist him to reformulate his request to include a request for documents relevant to the Task Group investigations. It should be noted that the Appellant maintains that his request read objectively included a request for "all working papers" but that this has been read restrictively by LBRT. He advances these arguments in the light of LBRT's reading of his request whilst disputing their interpretation.

45. The first edition of the Code was in force on the date that the request was received. The second edition being dated 27th April 2005. Consequently all references to the Code in this decision relate to the first edition. Part II of the section 45 FOIA Code of Practice (the Code)

includes the following:

9. *Where the applicant does not describe the information sought in a way which would enable the public authority to identify or locate it, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant....*

46. The Tribunal is satisfied that the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request. Indeed the section 45 Code at paragraph 9 specifically warns against consideration of the motive or interest in the information when providing advice and assistance. Additionally section 8 FOIA appears to provide an objective definition of "information requested".

8. - (1) In this Act any reference to a "request for information" is a reference to such a request which- ..

(c) describes the information requested

There is no caveat or imputation of subjectivity contained within that section.

47. Section 1(3) FOIA provides for a situation where the request is not clear and further information is sought in order to comply with the request for information. In this case the Tribunal accepts that the request appeared plain when read objectively by the public authority who considered it to mean "working papers attached to Agendas" and "documents attached to Agendas", and that consequently there was no requirement for LBRT to seek a second meaning or ask for clarification.. (The Tribunal considers (at paragraph 85 et seq) below whether the request when read objectively was capable of two meanings).

48. Mr Berend further argues that LBRT breached section 16 FOIA as they failed to provide the name of an identifiable information officer. Part II of the section 45 Code of Practice (the Code) includes the following:

The Provision of advice and assistance to persons making requests for information:

6 *The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. A telephone number should also be provided, where possible that of a named individual who can provide assistance....*

49. The Tribunal heard evidence that when Mr Berend contacted LBRT he

was given the name and details of Ms Bindra. When the case was passed over to Mr Ginn he again provided direct contact details and (albeit hesitantly) agreed in a telephone conversation that he was dealing with Mr Berend's request. There is no statutory requirement for an "information officer", and a named individual should be identified only "where possible". The Code appears to be seeking to prevent an applicant dealing with a faceless authority with no point of contact and no accountability to enable them to keep track of their request. In this case Mr Berend had the direct contact details of the administrator, lawyer and person who was sourcing the information. As such the Tribunal is satisfied that Mr Berend reads too much into the Code and that LBRT complied with their obligations under the Code in this respect.

50. Mr Berend alleges that LBRT breached section 16 FOIA in that they failed to tell the Appellant that there were no Minutes as such, but some notes and only limited Agendas of relevant Task Group meetings. Under FOIA, the obligation was upon LBRT to tell Mr Berend what information was held within 20 working days. This is to be found in sections 1 and 10 of FOIA respectively:

1. - (1) 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.

...

10. - (1) 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.

(3) If, and to the extent that-

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

51. The Tribunal considers this complaint has only tangential relevance to section 16 FOIA. Mr Berend was told in the review dated 10th June 2005 by Mr Chesman that there were "no Minutes as such only a series of notes of meetings of the Group taken by Ms Collins". That

information did not in fact progress his request since he had not yet been told that he would receive only five sets of “minute like” Notes (those that were prepared and distributed to the Task Group), and not fifteen sets (one from each of the meetings of the Task Group). It was not made plain to him until the appeal was lodged, that handwritten, contemporaneous notes from the other ten meetings of the Task Group were in existence; these notes had not been worked on to produce “minute like” information nor had they been typed up. Mr Berend was told at the end of July 2005 that Agendas were prepared and issued for only five of the meetings and “minute like” notes for only five meetings; he then made a fresh request for information. Consequently the Tribunal is satisfied that whilst the duty to advise and assist would have enabled him to make a fresh request, the primary duty is to comply with the mandatory time limit in sections 1 and 10 FOIA and had this been complied with Mr Berend would have been in a position to make his fresh request at a much earlier stage. Even if the information had been provided under section 16 and a request for clarification sought under section 1(3) FOIA, this would have had the same effect as proper compliance with the 20 working day limit.

Section 17 FOIA 2000

52. The Tribunal considers whether the Commissioner was wrong to conclude that LBRT had not breached section 17(2)(b) of FOIA. Mr Berend alleges that the notice was null and void (and could not therefore be said to have been served) as a result of the acknowledged failure to comply with section 17(1)(b) of the Act. Section 17 provides as follows:

(1) A public authority which, in relation to any request for information, is to any extent relying 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.*

(2) ...

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority ...has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(7) A notice under subsection (1), (3) or (5) must-

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

53. Mr Berend's argument is that the entirety of the notice was invalid because:

- The notice was served out of time,
- The notice breached section 17(1)(b) in that no exemptions were identified,

Consequently the purported compliance with 17(2)(b) (indicating that no decision has yet been reached and providing an estimate of a further 20 working days in order to reach the decision) was also invalid since the breaches identified meant that in law no valid notice had been served.

54. The Commissioner and LBRT rely upon *R v Secretary of State for the Home Department, ex parte Jeyanthan* [2000] 1 WLR 354. in which the Court held that rather than addressing whether the wording of a provision was mandatory or directory a more helpful set of considerations was as follows:

- "a) *Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
- b) *Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.*
- c) *If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question)."*

55. Mr Berend relies upon *Sedac Investments Ltd v Tanner and others* 1982 EWHC Ch1. The Tribunal is satisfied that this is a decision that predates *Jeyanthean* and is from a lower Court and that as such where it is not in accordance with *Jeyanthean*, it does not reflect the current state of the law.

56. The Tribunal agrees with the analysis of the facts as applied to the law by the Commissioner and adopted by LBRT in that the purpose of section 17 FOIA is to alert the Appellant to the fact that an exemption is being considered (hence the absence of either the information or a refusal notice). It is accepted by the Tribunal that in failing to specify the exemption, the Appellant could not be expected to know which

exemption was being relied upon. Indeed from Mr Chesman's review it would appear that at that stage LBRT were themselves not clear which exemption they were relying upon. The Tribunal comments (at paragraph 104 et seq) below upon the way that LBRT handled the information request, but feels that there was substantial compliance in that:

- LBRT identified that no final decision had yet been made,
 - The public interest test was being considered,
 - A provisional estimate of a further 20 working days was provided.
- This was sufficient to enable the Appellant to exercise his right to appeal to the Commissioner (although it is acknowledged that in breach of section 17(7) the details of how to appeal were omitted from the notice).

57. The Commissioner argues that Mr Berend was aware that the exemption being considered was the section 40 FOIA (Personal Data) exemption from disclosure of the redacted information provided on 19th April 2005. The Tribunal does not agree. From the disclosure of the redacted information it would appear that that public interest test had already been considered and decided upon in relation to that material. As noted above, from Mr Chesman's review it would appear that at that time LBRT (not having looked at the information) did not yet know what exemptions they might wish to consider, and consequently which, if any, public interest test was applicable.

58. The Tribunal poses the question of what would have been the consequence of LBRT failing to issue any sort of notice under section 17 FOIA? They would have remained in breach of sections 1 and 10 of FOIA. By the time the substantive response was received on 28th July 2006 the purpose of section 17 had already passed. Consequently finding that the notice itself was null and void and that there had been a consequential breach of section 17(2)(b) would have no longer served any purpose. The section 17 Notice did include a revised time estimate and an indication that no decision had yet been made. Finding that there had been a technical breach of section 17(2)(b) would have been misleading in light of the finding of facts relating to the contents. The Tribunal is satisfied that it is of assistance if in a Decision Notice it is clear to a public authority which aspects of the Act they have interpreted correctly and where they have committed a specific breach.

59. There is no specific provision within the Act that allows for the time for complying with section 17 FOIA to be extended. However, in practice the remedies available to the Commissioner and the Tribunal under section 50 FOIA are consistent with an extension of time being granted. This is because the Commissioner could require a fresh section 17 Notice to be served notwithstanding that 20 working days had elapsed since the original request. Section 50 provides that:

- (1) *Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the*

complainant to a public authority has been dealt with in accordance with the requirements of Part I.

- (4) *Where the Commissioner decides that a public authority-*
(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
(b) has failed to comply with any of the requirements of sections 11 and 17,

*the Decision Notice must specify the steps which must be taken by the authority for complying with **that** requirement and the period within which they must be taken. (The emphasis is that of the Tribunal).*

60. The Act provides that where the Commissioner finds that a requirement of section 17 FOIA has not been complied with, the Commissioner can direct the action required to remedy the specific breach. This Tribunal finds that requiring the Commissioner to find that the whole of section 17 FOIA must necessarily be found to be breached if one element is missing, is incompatible with this provision.

61. The Tribunal wishes to note at this stage that notwithstanding its findings in relation to the breach or otherwise of section 17(2)(b) the use of section 17 FOIA by LBRT as an attempt to "buy more time" to undertake the primary consideration of the material and thus circumvent the obligation under section 1(1) to confirm or deny what information was held within 20 working days is an inappropriate use of the provisions of the Act, and is surprised that the Commissioner did not remark upon this in his Decision Notice.

62. Mr Berend appears to be arguing that the notice was served out of time because it was sent at 18.04 which was outside working hours on the 20th working day. FOIA makes reference to 20 working days, it makes no reference to the length of a working day. The Tribunal is satisfied that the use of "working" in this context relates to the definition found within section 10 of the Act namely:

(1) 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.

...
(6) *In this section- ..*
.."working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

63. There is no definition within the Act as to the length of a day and in the absence of any such definition, we are satisfied that a day ends at midnight and that the email at 18.04 was sent during the 20th working day. We would also note that Mr Ginn was clearly still in his office and working at 18.04 and as such this was part of his working day.

64. As has already been noted by the Commissioner in his Decision Notice the very limited material that was disclosed was not provided until the 21st working day, however, this we are satisfied relates to the section 1 FOIA breach, and does not affect the purported service of the Section 17 FOIA Notice.

Legal Professional Privilege (Section 42 FOIA 2000)

65. The Appellant argues that the Commissioner was wrong to conclude that the public interest in maintaining the section 42 FOIA 2000 exemption (legal professional privilege) outweighs the public interest in disclosing the requested information and that therefore the Commissioner has wrongly applied the public interest test.

66. The right to be provided with information is subject to the caveat set out in section 2 FOIA which states:

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

Under section 2 (3) FOIA, section 42 FOIA is not listed as an absolute exemption, consequently the public interest test set out in section 2(2)(b) FOIA falls to be considered.

67. Section 42 FOIA states that

(1) Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

68. The Tribunal has seen the 3 withheld emails and has heard evidence and argument relating to them in the absence of the Appellant. Mr Berend is aware from the Decision Notice and the open submissions that it is LBRT's contention that:

- The emails were communications between a professional legal advisor (Mr Ginn) and his client (LBRT acting through one of its officers, Ms Collins).
- The Commissioner found that the emails consisted of information passing between a Solicitor and his client as part of a continuum aimed at keeping both informed so that instructions could be taken and advice sought and given.

69. Whilst Mr Berend does not specifically challenge the applicability of legal professional privilege in his grounds of appeal, in his submissions he has questioned whether Mr Ginn was acting as a Solicitor or an "Information Officer" in these emails. The Tribunal is satisfied that there is no statutory definition of "Information Officer" and consequently nothing which precludes an Information Officer also acting as a legal advisor. The circumstances in which legal professional privilege can be claimed have been analysed fully in *Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48*. Applying that analysis to the facts of this case, Mr Ginn's role was dependent upon his legal status. He was part of the legal department, whilst he may have been co-ordinating the response to an information request, his role was also to ensure that LBRT complied with their legal obligations under FOIA and that as such he was in a position to take instructions and give legal advice. Having viewed the emails the Tribunal is satisfied that the communications were between a professional legal adviser and his client and that they contained information passing between them as part of a continuum. Consequently the Tribunal is satisfied that section 42 FOIA is engaged.

70. The Tribunal must next consider the public interest test and is assisted by the analysis of the case law relating to legal professional privilege and its application to the public interest test contained with the Tribunal's decision of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry EA/2005/0023* (a decision from this Tribunal differently constituted). In particular this Tribunal adopts the view expressed in that case that:

"..there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned"

71. In that case the Tribunal was of the view that the Appellant had failed to adduce sufficient considerations which would demonstrate that the public interest in justifying disclosure was, outweighed by the public interest in maintaining the exemption.

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".

72. In his arguments Mr Berend points to the general arguments in favour of disclosure:

- That disclosure would promote accountability,
- That disclosure would assist in determining whether a public authority was acting appropriately in the execution of its public duties.

Mr Berend further speculates as to the contents of the emails and why the contents might then tip the balance in favour of public disclosure. The Tribunal has seen the emails and is satisfied that there is nothing in their contents which assists Mr Berend's arguments.

73. Mr Berend argues that the fact that the Commissioner considered that there was a strong public interest in protecting the established principle of legal professional privilege meant that the exemption was being treated as absolute. The Tribunal rejects that contention and recognises that there will be circumstances where the public interest will lie in disclosure, however, in this case there is nothing beyond the general arguments of principle to counteract the strong public interest. Whereas Mr Ginn on behalf of LBRT in his evidence relies upon the additional points that:

- the emails related to a matter that was ongoing,
- release of the information would reduce confidence in the effectiveness of a final decision taken by officers,
- would hinder discussion by officers with legal advisers.

74. Mr Berend's assertion that the test requires some overriding reason why it is in the public interest to withhold the information is contrary to the body of case law as set out in *Bellamy* and with the analysis of which this Tribunal concurs. The Tribunal is satisfied that the Commissioner did not treat the legal professional privilege exemption as an absolute exemption and that he correctly undertook the balancing exercise required in consideration of the public interest test.

75. In an email dated 13th July 2005 to Mr Berend, Mr Ginn said (in relation to the emails to which legal professional privilege attached):

"I have nevertheless given you a synopsis of them although this was not necessary to comply with the Act".

Mr Ginn in his evidence was unable to point to any correspondence in which he had provided a synopsis and thought it might have been in a telephone conversation. It was put to him by Mr Berend that there had not been any such telephone call and Mr Ginn agreed that this might be the case. Mr Berend's case is that he has not been given a synopsis of the emails and LBRT do not accept that they have waived privilege. Consequently in the absence of direct evidence or assertion of waiver of privilege the Tribunal does not consider the issue further.

The Commissioner's investigative role into the sufficiency of the material disclosed

76. Mr Berend argues that the Commissioner was wrong to accept the bare assertion of LBRT that they had disclosed, or claimed an exemption for all the information that they held that had been requested by the Appellant, and failed to consider whether LBRT at the time of the request held further undisclosed information which should have been disclosed under the Act. In particular this includes:

- The Minutes or notes and Agendas of the 10 relevant sub-committee meetings,
- The replies to letters from the 8 people referred to in the request (to include letters, emails, notes of telephone calls).

77. In preparation for this appeal it has been agreed by all parties that there were additional breaches of section 1 and consequently section 10 FOIA by LBRT and that some of these should have been apparent to the Commissioner during the investigation. To that extent there is no dispute that this aspect of the appeal must be allowed at least in part.

78. The Tribunal recognises that the investigation in this case took place in the early stages of the implementation of FOIA and that the Commissioner's Office was in receipt at that time of a very large number of complaints. The Tribunal accepts from the evidence of the caseworker Mrs Adshead, that were the investigation to take place now, further steps would have been taken to test LBRT's assertions. These she has identified would have been:

- Clarifying whether "none issued" in relation to Minutes and Agendas meant none was ever created,
- Clarifying whether there was an index of Minutes/notes of meetings,
- Establishing the procedure regarding the taking of Minutes at LBRT.
- Seeking an explanation as to why no Minutes were taken/retained at meetings.

Whilst the Commissioner's Office sought some information from LBRT (most notably in relation to the public interest test involved in the section 40 FOIA personal data exemption), the Tribunal notes that the Commissioner's Office did not consider the sufficiency of the disclosure that had taken place (on the basis of the evidence copied to them).

79. During the preparation of the Appeal, and in line with the Information Commissioner's current policy, Mrs Adshead noticed that not all the documents that were listed as attached to the Agendas and sent on 28th July 2005 had in fact been disclosed. It is agreed by all parties that the following should have been disclosed, were not disclosed, but have now been provided to Mr Berend:

- 4 items referred to as attached to the Agenda of the Task Group meeting of 3rd September 2002,
- 6 items + 4 enclosures referred to as attached to the Agenda of the Task Group meeting of 4 November 2002,

Notwithstanding her assertion in her first witness statement dated 15th March 2007 that *"everything requested by the Appellant on 17th March 2005 and 6 May 2005 in LBRT's possession has been disclosed to [Mr Berend] apart from any items, which have been withheld by reason of their being exempt from disclosure"*, Ms Collins subsequently provided 3 items listed as additional correspondence for the 4th November 2002 meeting of the Task Group. In her evidence Ms Collins explained that this was because they were physically attached to the addendum Agenda.

80. Additionally, there was a note of a telephone call from one of the 8 people listed in part "a" of the request which had not been disclosed under part "b" and ought to have been (it was provided to Mr Berend on the first day of the hearing). In light of the assertion by Mr Ginn on

instructions received from Ms Collins (21st September 2005) that there was no information in the category “b” held and hence no such conversation, we do not criticize the Commissioner’s Office for their acceptance of that evidence. The Tribunal addresses the matter at paragraph 109 below.

81. In his letter dated 10th August 2005 to the Commissioner, Mr Berend specifically asserted that although additional documents had been issued they were not complete. Whilst the Tribunal is only considering material that was in fact held (rather than that which “ought” to have existed), this should have caused the Commissioner’s Office to consider the sufficiency of the disclosure.

“I find it most unusual that no formal Minutes were taken at the Task Groups proceedings and that Agenda and notice of meetings were seldom issued.. Indeed after November 2002 some 2 ½ years before the report was issued no notes were taken or Agendas and notices of meeting were issued save one according to Mr Ginn’s Letter.. To be blunt it is unbelievable and probably contrary to Standing Orders”

82. Mr Berend also raised the issues that:

- *“Nor have any papers circulated to the Group members been made available to me”*
- *“In my formal letter of request I asked for ALL documents...”*
- *papers I have written myself were circulated to the Group members as well as other reports and papers that were address to my colleagues and myself were circulated. None of these documents have been mentioned in any response to my FIA request.*

It was apparent from the email to the Commissioner’s Office of 21st September 2005 from Mr Ginn that correspondence listed as attached but emanating from Mr Berend had not been provided to him by LBRT e.g

Agenda 25th July 2002 :

- d) *14 July letters from Messrs Berend, Green and Nicol-Gent (+copy of their letter to Audit Commission) – attached*
18 July 2002 letter from Cllr Jowit to Messrs Berend, Green and Nicol-Gent – attached

The Commissioner did not link this to Mr Berend’s specific complaint in the letter of 10th August that documents prepared by him and circulated had not been mentioned in any FOIA reply. Neither did the Commissioner consider that Mr Berend had never been notified that this information was held, that Mr Berend had not been told that it was not going to be provided and no exemption (e.g. section 21 FOIA information accessible by other means), was relied upon, and that as such this was in breach of section 1 FOIA.

83. The Tribunal deals with the scope of the request (paragraphs 47 above and 85 below), however, the Tribunal also feels that notwithstanding the objective reading of the bulk of the request, the Commissioner’s office should have been alive to the restricted interpretation that was

put upon elements of the request by LBRT. For example the Commissioner never sought clarification of what exactly constituted “attached”. Having not cross checked the disclosed information with that listed as attached, it is clear that the Commissioner’s office cannot have considered the absence of documents alleged by Mr Berend to have been circulated or listed as “circulated” or “to follow” which were consequently attached by reference, and whether that fell within the request e.g. from Agenda 3rd September 2002:

- k. *Audit Commission report (July 2001) Circulated 31 July 2002*
- l. *29 July 2002 letter from Mr Green (+ copies of 3 letters to the Audit Commission January, November and December 2001) – Circulated 6 August 2002,*

84. In light of this evidence before the Commissioner the Tribunal feels that the Commissioner’s failure to investigate the matter goes beyond the flaws that they have conceded and that the Commissioner was wrong to accept the bare assertion without investigation that all information covered by the request not subject to an exemption had been disclosed.

If not all the information requested was exempt, whether it had been disclosed to Mr Berend,

85. In addition to the matters set out above which have now been disclosed, Mr Berend’s case was that his request when read objectively meant:

“all working papers” and “all documents attached to Agendas”. If “all working papers” were encompassed within the original request, it is not disputed that there is a substantial body of material that has never been considered by LBRT as part of this request. The Tribunal heard evidence and argument in relation to whether Mr Berend’s expectation is included within an objective reading of his original request.

86. The Tribunal is satisfied as set out above (paragraph 47 et seq) that:

- the request should be read objectively by the public authority,
- there is no requirement to go behind what appears to be a clear request,
- the Tribunal is tasked to consider the request in the terms in which it was phrased and (in the absence of clarification under section 1(3) or amplification under section 16 FOIA and the section 45 Code) that subsequent amplification of the request should be treated as a fresh request.

The Tribunal does not comment at this stage on the situation where a public authority ignores amplification or clarification (failing to treat it as a fresh request or to deal with it under the terms of the original request) since Mr Berend’s case is that his **original**

request was a request for “all working papers” not only those attached to Agendas.

87. On consideration of the syntax of the request, Mr Berend relies upon his use of the word “all” as evidence that his request was for “all working papers” not just those attached to Agendas. The Commissioner and LBRT assert that the “all” should properly be read as ensuring that all working papers attached to Agendas (rather than some of them) were provided and that the “all” should properly be said to apply to the “documents” as well. Equally Mr Berend draws support from his use of the phrase “working papers” as well as “documents” since the latter would include background papers attached to Agendas whereas working papers would not. The Commissioner and LBRT assert that this is just an example of Mr Berend’s verbose style and “belt and braces” approach.

88. The Tribunal considered whether there was any obvious grammatical or syntactical solution to the 2 apparent meanings. Whilst it would be possible to limit the request to a single objective interpretation:

- for example to number or use bullet points to separate “working papers” and “documents attached to Agendas” to support Mr Berend’s intention or
- for example to repeat the use of “attached to Agendas” so that it specified “working papers attached to Agendas” to support LBRT’s reading,

this is said with the benefit of hindsight when both readings have been clearly identified. The Tribunal is satisfied that in the specific circumstances of the facts of the case there are 2 ways that the request can be read objectively and upon one of the objective readings, the original request included a request for “all working papers”.

89. LBRT and the Commissioner suggest that Mr Berend is seeking to expand his request during the process of appealing to the Tribunal, now that it is clear that documents that he expected to exist do not exist. The Tribunal considers that this is a subjective approach. To reject this objective reading, the Tribunal would have to look at Mr Berend’s motivation and intention in making the request. This is not in keeping with the “motive blind” approach that the Tribunal is satisfied is the correct one. In a case where 2 objective readings **were apparent to a public authority** (which it is accepted was not the case here) they would be entitled to seek clarification of which one applied and then rely upon any clarification received in considering the request. In the absence of any such clarification the public authority is bound by the terms of the request as read objectively.

90. In the event that the Commissioner and LBRT suggest that there was a form of clarification in Mr Berend’s failure to further itemise his request during the extensive correspondence that ensued between LBRT and Mr Berend, the Tribunal rejects this suggestion because:

- Mr Berend did add “alternatively allow me to inspect the files together with my colleagues”. Which whilst phrased in the alternative and not superseding the original request expanded the ambit rather than reduced it.
- Until Mr Berend had received the letter of 28th July 2005 with the attachments, he was not in a position to know that his request was being read as “working papers attached to Agendas” rather than as a request for “working papers”.
- Shortly after he realized that he was not being provided with all working papers he articulates his expectation that his request had encompassed “all working papers” as his reference in his letter dated 10th August 2005 to the draft report and papers circulated to the Group members (both referred to outside the context of being attached to Agendas) makes plain.

91. The Tribunal does not criticize LBRT for the reading that they have attributed to Mr Berend’s request, as stated above if the request read objectively appears clear there is no duty to search out an alternative meaning. However, under section 1(1) FOIA Mr Berend is entitled to be informed by LBRT whether they hold the information of the description specified in the request and if that is the case to have that information communicated to him (subject to the application of any exemptions). In light of this Tribunal’s findings as to the ambit of the request, LBRT have not completed their obligations under section 1(1) FOIA in that no consideration has been given to working papers which were not attached to Agendas.

92. Mr Berend in his arguments appears to suggest that he was entitled to a list of what information LBRT had in relation to the Task Group.

Section 1 FOIA provides that:

(1) 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.

(The emphasis is that of the Tribunal). The extent to which there has been a breach of section 1 FOIA is dependant upon the reading of the request. However, it is clear that LBRT were not required to provide a list of material that they had which was **not specified in the request**, but was in the file, or linked to it or in which they thought the Applicant might be interested.

93. In relation to the rest of the material covered by the first request, Ms Collins’ evidence is that she considered that what she prepared were “Notes” not Minutes because they were not entitled thus. The Tribunal does not consider that Minutes have to be so entitled to be “Minutes”, within the ordinary use of the phrase, neither do they have to be approved or prepared in accordance with guidance given under LBRT’s Constitution. The Tribunal further considers that in disclosing the

“Minute-like Notes” LBRT appear to be conceding that these were in fact Minutes.

94. Ms Collins also draws a distinction between the “Minutes” that were prepared from her contemporaneous notes and circulated (of which there were 5 sets) and the contemporaneous notes that she took at the meetings, none of which have been disclosed. Her evidence was that her handwritten contemporaneous notes were, in addition to her aide memoire for her own actions, the raw material from which “minute like” Notes could be prepared. The “minute like” Notes would be in a readable format for circulation to members and contain the Task Group’s conclusions, action points and certain formalities; the handwritten, contemporaneous notes would contain a semi-continuous record of the points made in the debate and other information the writer felt it was necessary to record at the time.
95. The Tribunal is satisfied therefore that the contemporaneous notes are not themselves “Minutes”. The Tribunal has considered the question that much of the information that would be contained in “Minutes” is contained within the contemporaneous notes. We are satisfied that the information in “Minutes” would be the subject of summary, editorial control, explanation and might include points remembered by the author of the “Minutes” but not actually noted down. Consequently the Tribunal is satisfied that redacting or summarising the notes to provide the information that would have been contained in Minutes is going beyond the scope of FOIA, it would require the LBRT to prepare a fresh document and consequently the information which has been requested does not exist.
96. The Tribunal was told however, that some of the contemporaneous notes took the form of annotations to documents that were being drafted, additionally Ms Collins used the contemporaneous notes to remind herself of action points and at times she would refer to them in emails to other Task Group members. The Tribunal is therefore satisfied that the contemporaneous notes (including those from which Minutes were derived) are “working papers” and should therefore have been considered for disclosure within the terms of part c) of the first request.
97. In relation to Agendas it was accepted by all parties that only 5 formal Agendas had been circulated. Mr Berend argued that there was a chain of email and memo correspondence which indicated to Task Group members the items that would have been included in an Agenda, namely:
- The date, time and location of the meeting,
 - The topics to be discussed at the meeting,
 - The documents that would be referred to at the meeting.
- Mr Berend’s witnesses (members of the Task Group) confirmed that they were provided with the date/ time/ purpose and documents for

consideration of the meeting through this chain of email correspondence.

98. The Tribunal's attention was drawn to the following examples (amongst others):

- an email of 21st June 2002 which detailed the date and time of a meeting and enclosed background reading,
- a Note dated 20 May 2003 which gave the date, time and location of the meeting and attached documents asking for comments. It did not specify Agenda items,
- an email dated 8th March 2005 which listed issues to be resolved "this evening", which Task Group members treated as an Agenda. Again this did not specify Agenda items (e.g. apologies) or give complete details relating to the time and place of the meeting.

99. Argument was also sought upon whether the references to the topics under discussion in Ms Collins' contemporaneous notes was capable of constituting an Agenda where they were in the form of e.g. "Topic 1 correspondence".

100. In defining what constituted an Agenda, Ms Collin's evidence was that an Agenda would be headed as such and would include certain formalities (such as the consideration of the Minutes and apologies). The Tribunal does not accept that for a document to be an Agenda, it must be so entitled, or that there is a pre-requisite format for an Agenda wherein certain items must be scheduled for discussion to constitute an Agenda. However, the Tribunal was satisfied on the evidence that whilst there may have been the material upon which an Agenda would have been based, and treated as such by Task Group members, the emails or references to topics under discussion in contemporaneous notes were not in fact Agendas and as such did not fall to be disclosed under that heading. Mr Berend has recently had access to the files of the task force through his witnesses and was not able to point to a single additional document therein that the Tribunal was satisfied constituted an Agenda beyond those already disclosed.

101. The Tribunal notes that some of these documents and their attachments would appear to be working papers of the Task Group and that consideration will need to be given to their disclosure as such.

102. Ms Collins gave evidence that she considered items to be attached to Agendas if they were physically affixed by way of industrial staple or an elastic band or by email attachment. She accepts that she gave no consideration to the position of documents already circulated but directly referred to in an Agenda item, or documents that were referred to in an Agenda item but were to follow, and that perhaps she should have. The Tribunal is satisfied that these documents are "attached by reference" in that the Agenda item requires consideration of the document referred to and it is for administrative convenience that they are not re-duplicated or have not yet been copied. The Tribunal is

satisfied that the position is different in relation to a document which is produced at a meeting to which there is no reference in the Agenda, and thus does not fall to be considered under this part of the request, (although it might still be disclosable as a “working paper”, but not if its status was that of a “background paper”.)

103. At present documents emanating from Mr Berend would prima facie be disclosable if they were considered by the Task Group as working papers or if they were attached to Agendas (as the Tribunal knows some were). LBRT have not yet claimed any exemption and would need to disclose that they held such documents and either provide them or indicate that they were not being provided in reliance upon an exemption in order to fulfil their obligations under section 1(1) FOIA.

LBRT’s handling of the information request

104. Having heard and read extensive evidence on LBRT’s handling of the information request, the Tribunal feels that it is appropriate to comment upon the way LBRT dealt with the request. Notwithstanding the Tribunal’s finding that their reading of part “c” of the original request was objective and not in itself subject to criticism, in their dealing with the request the Tribunal finds that the attitude of LBRT and its officers and employees was unhelpful and that they did not take their obligations under FOIA seriously.

105. Ms Collins’ evidence was that she had attended a ½ day presentation on FOIA and read up on the Act. She was aware of her obligations under the Act and yet it is clear that following the information request on 17th March 2005, she looked out 8 letters in April 2005 and did nothing substantive to progress the matter until July 2005. She told the Tribunal that:

- All her handwritten, contemporaneous notes made during the Task Group meetings were in a single box file, as were the Agendas and their physical attachments and the “minute like notes”.
- Her computerised and manual filing systems were very organised,
- On her reading of the request she was only looking for Prepared Notes (quasi Minutes), Agendas and documents physically attached to them, the correspondence with the 8 people and any responses.

There was no consideration by her of her contemporaneous notes, the rest of the working papers seen by the Task Group, background documents, the email traffic, or any documents attached to Agendas by reference.

106. Ms Collins gave evidence that she did not disclose to Mr Ginn that she had kept contemporaneous notes for the other meetings which she had not typed up into “Minutes”. She considered that this would be

self evident. Contrary to what Mr Chesman and Mr Mellor asserted in their reviews this was not a substantial amount of information and it was all located in the same place. The Tribunal heard that Ms Collins looked in her Task Group correspondence file on her Computer , but not the miscellaneous file (where the record of the call with Ms Trimmer was stored).

107. Despite Ms Collins having co-workers to whom tasks could be delegated, she only produced the 8 letters covered by part (a) of the first request on the 21st working day and claimed she “did not have the time” to look in her filing for the other information which would form part of this request until more than 19 weeks had elapsed. Ms Collins’ evidence was also that she did not provide access to her files to Mr Ginn in order that he could consider the information, partly on the grounds that he would also have lacked the contextual background (“as there were other documents therein that were not attached to agendas”). Mr Ginn’s evidence was that he had no view as to what constituted Minutes or Agendas having “no background of that”.

108. When Ms Collins did provide the information not all of it was copied to Mr Berend. On the evidence of Mr Ginn, substantial quantities of physically attached documents did not find their way to him and Ms Collins gave evidence that she had sent all the documents. Despite her evidence to the Tribunal that all attached information was copied to Mr Ginn:

- she now appears to accept (by way of written clarification submitted after the oral hearing) that she chose not to copy correspondence emanating from Mr Berend, but listed as attached to Agendas. She did not tell Mr Ginn at the time of disclosure, that this was what she had done.
- on inspecting her files to make copies of the documents identified as “not copied” by Mrs Adshead, Ms Collins found 3 additional documents that were physically attached to an addendum to an Agenda, which she had not previously disclosed to Mr Ginn or Mr Berend.

109. When the original request was dealt with Ms Collins asserted that all responses under “b” had been disclosed in the 28th July 2005 material. Subsequently in relation to a direct assertion from Mr Berend that there had been a telephone call, Ms Collins emailed him on 2nd August 2006 to confirm that she had taken a call from one of the eight people to whom letters had been sent (Mrs Trimmer) on 12th November 2003, and that the conversation was “off the record”. At this stage Mr Berend was not told of the existence of the note of the telephone call, neither was a copy provided. A copy was provided on the day of the oral hearing, again in response to Mr Berend having asserted that he believed that one existed.

110. Ms Collins gave evidence that the note of the telephone call had been filed in the “miscellaneous” Task Group computer file rather than

that labelled “correspondence”. She stated that she had not checked the “miscellaneous” Task Group file on her computer prior to her search for the telephone note because her files were well ordered and she did not think it would contain anything relevant. She was categorical in her evidence that she had not withheld the telephone note in reliance upon any exemption (e.g. confidence). Indeed it is not clear that any breach of confidence issue relating to the disclosure of a note of an off the record conversation has ever been considered by LBRT prior to its disclosure to Mr Berend. Ms Collins was not able to provide satisfactory evidence to explain:

- Why she did not recall the conversation when making the disclosure in July 2005,
- Whether she could recall if she “knew of” the written record in August 2006,
- If she recalled the record why she did not disclose it then,
- If she did not recall it at that stage, how she was able to remember the fact of the conversation, its date and that it was off the record in August 2006.
- Why despite her recall in August 2006 as to the fact of the call she nevertheless did not check the rest of her files to see if a note existed.

111. LBRT initially considered it necessary to write to the 8 recipients of the letters before their names and addresses could be disclosed, as part of assessing the Section 40 FOIA exemption. Mr Ginn and Ms Collins both left it to the other to contact the 8 data subjects identified in “a” of the request, and in the end both having been tasked to do it by the other, neither bothered. Mr Ginn’s evidence was that he had intended to do a mail merge and having only some of the names and addresses had not at that stage contacted the data subjects. He did not explain why he did not do this subsequently or require Ms Collins to do it prior to 28th July 2005.

112. Mr Ginn does not appear to have subjected any of the material or information he received from Ms Collins in relation to the first request to any scrutiny beyond applying (mostly incorrectly in the opinion of the Commissioner) data protection principles.

113. The Tribunal received no satisfactory explanation of why on two separate occasions the information relating to the second request was not copied to Mr Berend. In his evidence Mr Ginn explained that upon having been notified that the documents were not attached he had delegated their sending out in his absence and this had not been done. However, this does not explain why they were not included initially, or why there were no provisions in place to confirm that this had occurred upon his return.

114. In relation to the first request Mr Ginn:

- Did not contact the Data subjects despite having apparently identified that they needed to be contacted as part of his

balancing exercise, and notwithstanding the desirability of such a course being identified in the section 45 Code.

- Undertook the balancing exercise in the absence of this information,
- Relied upon the absence of consent (which he had failed to obtain) as a reason for withholding the information.
- Never considered any other exemption.
- Did not consider whether all documents alleged to be physically attached were in fact provided,
- Did not consider whether any documents attached by reference should have been provided,
- Did not ask Ms Collins if he could see the files in order to progress the matter.
- Was perfunctory in his chasing of the matter, notwithstanding his understanding of LBRT's obligations under the Act,
- Appeared to be working to the outside time limit of 20 working days on each occasion rather than taking into consideration the fact that this was the deadline, but the obligation was to comply promptly,
- Let his own deadlines pass with no explanation to Mr Berend or revised assessment of when a substantive response would be available.
- Improperly used the section 17 notice to "buy more time" asserting that the extension was required to consider the public interest test when in fact he had not seen the information, identified any exemptions applicable, or satisfied himself that there was in fact a public interest test to consider.
- Did not provide such information as he did have to Mr Berend when he first had it (the fact that there were no Minutes as such only notes was clearly something he was obliged to communicate to Mr Berend under section 1(1) FOIA or under the section 45 Code or in relation to his duties to provide advice and assistance). The first time Mr Berend was notified of this was in relation to Mr Chesman's review which was not the appropriate forum for section 1(1) FOIA disclosure.

115. In relation to the second request, Mr Ginn compounded the difficulties by not specifying in his letter of 3rd June 2005 to which of Mr Berend's requests he was responding, nor the number, nature or type of information being sent.

116. The Tribunal is also concerned that Mr Berend's request was subject to three internal reviews, which skirted around the real reasons for LBRT's delay and dealt selectively with the facts in dismissing the majority of Mr Berend's complaints. In the third internal review LBRT conceded that staffing and resources were the predominant reason for the delay and failure to comply with the Act, but even that review:

- did not acknowledge that the reason for the delay was Ms Collins' failure to look for the documents,

- still appears to rely upon the quantity of “personal information” as causing some of the delay, when in fact this amounted to little more than the redacted information from the 8 letters.

117. In his review Mr Chesman noted that.

- *“The reference to an extension of 20 working days in the email of 19th April, was an estimate and in the event was not achieved, and that a renewed estimate was provided”.*

He did not comment that this revised estimate (3 days later) was exceeded, no explanation or revised estimate furnished and that in fact at the date of the review there was no indication from LBRT as to when Mr Berend could expect a substantive response to his information request.

- *“There are no Minutes as such, rather a series of notes of meetings of the Group taken by Ms Collins... which will be likely to need to be redacted in a similar way to the remainder of the documents to which your refer ..”*

This was said when Mr Chesman purportedly had not seen the documents concerned, had no independent idea of how voluminous they were or whether they would in fact need to be redacted because as yet Ms Collins had not looked in her files for the documents.

- The request related to *“material of public importance with 2 detailed investigations. It therefore seems to me that LBRT **has inevitably to consider the public interest test** before responding to your request. In addition a substantial element in the request deals with personalised matters concerning specific individuals”*,

From the syntax Mr Chesman appears to be referring to an additional public interest test beyond the data protection issue. Yet the information from the first request had not yet been identified or reviewed and neither had any exemption and consequently any public interest test that would be applicable.

118. In rejecting the complaint without having looked at the information himself, Mr Chesman is clearly speculating and asserting as fact that which he does not yet know for a fact. The Tribunal heard evidence that the Officer responsible had not yet checked what information was held and consequently LBRT did not yet know which, if any, exemptions might apply.

119. Mr Mellor’s review was after the information had been located and considered:

- *LBRT was not in a position to give this information [the exemption relied upon] because of the sensitive nature of the issues involved, the past history of the matter (with two detailed investigations previously) and the amount of documentation.*

In light of the evidence that the Tribunal heard as to the limited consideration given to a limited amount of the information with no exemption considered beyond that of data protection (and legal

professional privilege in relation to the second request); this analysis of the reasons for the delay cannot be accurate.

- *You were or ought to have been aware of progress [of the request for information]*

This finding did not take into account that Mr Berend was not given any realistic deadline of when he might expect a substantive response, or contacted to provide renewed estimates when LBRT let their own self imposed deadlines expire.

- *The letter of 3 June was not inappropriately delayed and , as explained by Mr Ginn in his email of 8th June, the delay was simply due to him being away from the office.*

This ignored the fact that it took another “chasing letter” and a further 20 days for the attachments to be forwarded.

Other Matters

120. In his final submissions Mr Berend asserted that some documents attached to Agendas have not been disclosed to him. The Tribunal considers this assertion to be fresh evidence that could have been aired at the oral hearing and in relation to which there would appear to be a factual dispute and consequently does not find it appropriate to make any finding of fact upon this material. The Tribunal would observe that if any of this material (documents that LBRT purport to have disclosed but which have not been copied to Mr Berend) remains outstanding it should of course be disclosed to Mr Berend forthwith.

Dated this 12th day of July 2007

Fiona Henderson
(Deputy Chairman)