

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 29 March 2007

Public Authority: Bury Metropolitan Borough Council
Address: Town Hall
Knowsley Street
Bury
BL9 0SW

Summary

A number of letters requesting information were sent by the complainant to Bury Metropolitan Council between January and April 2005. The request concerned material held about a dispute over a right of way claim, including legal advice relating to the claim, evidence considered as to its existence, ownership of a property and other internal information relating to this matter. In response, the council released some information, but chose to rely on a number of exemptions to withhold other documents. Sections 21, 36, 41, 42 and 43 were applied and in turn considered by the Commissioner. As a result of the Commissioner's enquiries, the Decision Notice requires further information to be disclosed but does uphold the decision to withhold the majority of the information.

The Commissioner's Role

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

The Request

2. Following correspondence prior to the implementation of the Act, the complainant submitted an information request to Bury Metropolitan Borough Council (the "Council") on 12 January 2005, resubmitted this on 11 February 2005 and again on 1 March 2005. The request was resubmitted a final time on 10 April 2005.

3. The information that the complainant sought access to was:
 - i) Counsel's opinion relating to a [right of way] claim to a footpath at Osborne Walk, Radcliffe,
 - ii) evidence considered by investigating officers in connection with the claim [as to whether a right of way exists] pursuant to Section 53 of the Wildlife and Countryside Act 1981,
 - iii) the housing file in respect of Osborne Walk, and
 - iv) evidence of the Council's ownership of Homer Street.
4. On 22 April 2005, the Council responded to the information request of 10 April 2005. The Council summarised the complainant's request for information made under the Act as above and set out its response to the request, including the relevant contact details for both its internal review process and the Information Commissioner.
5. The Council provided all of the information it held in respect of point iv) above, and advised the complainant to contact the Land Registry for copies of the official versions of the document, indirectly applying the exemption under section 21 of the Act. In relation to point i), it stated that Counsel's opinion was subject to legal professional privilege and was therefore exempt under section 42 of the Act. In relation to point ii), the Council stated that all of the evidence considered by the investigating officers had already been disclosed, except for that which was subject to legal professional privilege and was being withheld under section 42 of the Act. Finally, information relating to the housing file – point iii) above – was disclosed to the complainant, apart from that which was also considered to be the subject of legal professional privilege and therefore also withheld under section 42 of the Act.
6. Following this, the complainant contacted the Commissioner, rather than pursue internal review.

The Investigation

Scope of the case

7. On 13 May 2005, the complainant contacted the Commissioner to complain about the way his/her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - that the required documents were not released under the Freedom of Information Act within the statutory twenty day period,
 - that information is still being withheld, and
 - the use of exemptions for withholding that information.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

9. The Commissioner is aware that the complainant did not exhaust the internal review process offered by the Council, but, for reasons outlined in the procedural matters section of this Notice (below), the Commissioner decided to exercise his discretion and look at the complaint. It is important to note that the Commissioner would normally expect the internal review process of public authorities to be exhausted and it is only the exceptional circumstances of this case which prompted this action to the contrary.

Chronology

10. On 7 June 2005, the Commissioner contacted the complainant to clarify the scope of the complaint, in view of the extensive number of documents which had been generated at that point in relation to the request.
11. The complainant responded on 14 June 2005 and did not contradict the Commissioner's view of the scope of the complaint. He raised some other matters which are not addressed in the Notice because they are not requirements of Part 1 of the Act.
12. Following this, the Commissioner contacted the Council on 27 June 2005. In this letter, the Commissioner asked the Council for copies of the withheld information, an explanation of the exemption applied to the information under section 42 of the Act and a full explanation as to how it had balanced the public interest in this matter.
13. The Council responded to this letter on 21 July 2005, providing copies of the withheld information as requested. In relation to the issue of Counsel's opinions, it submitted that the information in question was subject to legal professional privilege and provided a brief explanation as to how it had applied the public interest test in this matter. Further, the Council considered that the copy of Counsel's opinions sought by the complainant was also subject to an exemption under section 41, in that its publication may result in an actionable breach of the confidence in which the opinions were provided.
14. The Council went on to provide an explanation as to how the evidence considered by investigating officers in connection with the claim pursuant to Section 53 of the Wildlife and Countryside Act 1981 ("section 53 evidence") was exempt under section 42 of the Act. Essentially, the information withheld under section 42 of the Act in this regard was felt to be legal advice from one of the Council's legal advisers to a Council officer. In addition to this, the Council stated that it now considered that some of the documents contained in the evidence were exempt from disclosure under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Act. The information which was exempt under section 36 referred to records of a meeting which Ward Councillors had requested in confidence to discuss the various options open to the Council in respect of Osborne Walk. The Council supported its position by submitting that disclosure of this information could inhibit future deliberations, expressions of opinions and recommendations, which would weaken the ability of the Council to candidly assess its options in the future. There was also a concern raised that disclosure of information considered to be potentially sensitive would mean that the Council would have to divert

resources to dealing with this issue and would, as such, be unable to offer an effective public service for the duration of this period.

15. Finally in relation to the section 53 evidence, the Council explained that not all of the documents supplied to the Commissioner relating to this matter were considered exempt. Some had already been disclosed as part of the Housing File and other documents had not been considered as evidence as they did not contain any actual facts/evidence within them and would not therefore have been taken into account by the investigating officers.
16. In response to the issue of the housing file in respect of Osborne Walk (the "housing file"), the Council again explained the application of the section 42 exemption to the information in question. As with the section 53 evidence above, the information withheld under section 42 of the Act was felt to be legal advice from one of the Council's legal advisers to a Council officer. The Council also felt that an exemption under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Act applied to some of the information in the housing file, namely records of a meeting which Ward Councillors had requested in confidence to discuss the various options open to the Council in respect of Osborne Walk. The supporting explanation was the same as that provided in respect of the section 53 evidence.
17. The Council also provided information relating to evidence of the Council's ownership of Homer Street. It submitted that the deed had been previously supplied to the complainant and that he had been directed to the Land Registry for up to date register entries.
18. On 16 September 2005, the Commissioner contacted the Council again. In this letter, the Council was asked to provide clarification as to the withheld information which had been supplied to the Commissioner. The Commissioner returned some of the information to the Council and asked it to return the documents with the relevant exemption clearly marked on them. In addition to this, the Commissioner also asked the Council to provide further details surrounding the application of the section 36 exemption.
19. The Council responded on 22 September 2005. This letter contained an explanation that the exemption under section 36 of the Act had been considered by the Council's Monitoring Officer, who acts as the 'qualified person' for the purposes of that section of the Act. As evidence of this, the Council provided some documentary evidence that the Monitoring Officer had considered the application of the exemption.
20. On 5 October 2005, the Commissioner wrote to the Council, returned the remainder of the information which he required the Council to photocopy again (due to the poor quality of some of the copies) and/or clearly mark which exemption had been applied to the documents. In addition, he provided the Council with an indication that the exemption applied under section 41 of the Act to the Counsel's opinions would be unlikely to be valid, and he asked the Council for further comments on this exemption or whether it was content to rely on the section 42 exemption.

21. In a letter dated 31 October 2005, the Council responded, returning the withheld information in a format which clearly displayed the exemption that had been applied to the various pieces of information. It also stated its belief that the exemption under section 41 was applicable to the Counsel's opinions and that publishing the opinions would be an actionable breach of the confidence in which they were obtained. It was also clear that the Council now considered some parts of the information withheld to be exempt under section 43 of the Act.
22. On 27 March 2006, the Commissioner wrote to the Council asking for clarification of a number of points. In relation to the exemption under section 42 of the Act, the Commissioner asked for an explanation as to how various pieces of information fell under the provisions of legal professional privilege, and whether any of the information could be released with redactions. The Commissioner also sought clarification of how the section 36 exemption applied to a number of documents as there was no evidence that the qualified person had considered the exemption was appropriate to this information. In addition to this, the Commissioner also raised the issue of a section 43 exemption, and asked for an explanation as to how this exemption applied to the information in question.
23. The Council responded to this request in a letter dated 13 April 2006, although the response was not received by the Commissioner until 27 April 2006. In this letter, the Council addressed some of the points raised by the Commissioner. In particular, it agreed that some of the information withheld under section 42 could be redacted and disclosed to the complainant.
24. The Commissioner felt it necessary to meet with an officer of the Council in order to discuss issues relating to some of the remaining documents and whether these could be considered properly exempt under the Act. The details of this meeting were confirmed in an email to the Council dated 30 June 2006 and, on 11 July 2006, the meeting took place. This clarified a number of the outstanding issues and identified some documents which could be released to the complainant.
25. A further telephone conversation of 20 March 2007 to the Council further clarified issues relating to the deeds mentioned in point iv of the request and the role of the investigating officers in analysing the section 53 evidence.

Analysis

26. In reaching the decision outlined in this Notice, the Commissioner has taken into account all of the available, relevant submissions and evidence, and has sought internal advice where appropriate.

Procedural matters

27. The Council confirmed that it had received the complainant's email of 1 March 2005 in an email of 14 April 2005. This had not been looked at / treated as an FOI request by the recipient as she had been on leave. Upon returning to the

office, she believed that someone else had dealt with the correspondence, but later became aware that this was not in fact the case.

28. The Council's letter of 22 April 2005 which served as a refusal notice under section 17 of the Act was supposed to act as a refusal to the requests contained in the complainant's email of 1 March 2005 and his letter of 10 April 2005.
29. In investigating this case, the Commissioner is concerned at the number of FOI requests which the complainant had to submit in order to receive a response. In the early stages of the investigation, the Council submitted that it had not received the complainant's requests before 1 March and 10 April 2005. However, the evidence provided to support the application of the section 36 exemption is dated 28 January 2005. The Council suggests that this apparent discrepancy can be explained by the fact that another individual had requested information from the Council in relation to this matter in January 2005.
30. It is unclear whether the requests made prior to 1 March 2005 were ever received by the Council (but this matter is further considered in the Other Matters section towards the end of this Notice). However, the number of requests submitted and the general handling of the matter by the Council during the early stages of this request led to the Commissioner taking the unusual step of not requiring the complainant to go through internal review before considering this case.

Exemption

31. For ease of reference the Commissioner has split the analysis in this section of the exemptions applied under the Act into the separate parts of the complainant's request. These are divided according to the order in which the request was set out in paragraph 3 above.

Counsel's opinion relating to a claim to a footpath at Osborne Walk, Radcliffe

32. The Council has argued that the information requested is subject to legal professional privilege, for which an exemption is provided in the Freedom of Information Act at section 42
33. The Commissioner has firstly considered whether the information is subject to legal professional privilege. The Commissioner has seen the barrister's advice and is satisfied that the information contained within it constitutes legal advice to the Council. The Commissioner has identified that the advice provided by Counsel relates to points of law in relation to a claim under section 53 of the Wildlife and Countryside Act 1981.
34. The Commissioner is satisfied that the information was supplied by legal counsel. The document itself is in the standard format used to provide Counsel's Opinion, and includes the name of the barrister who provided the advice and the name of the Chambers where he practices from. The Commissioner is therefore satisfied that the legal adviser was competent to provide the Opinion.

35. In determining whether legal professional privilege continues to apply to the requested information, the Commissioner has considered whether the Council has waived legal professional privilege by publicly disclosing the legal advice. The Council has provided an assurance that the advice has not been disclosed to any third parties. There is no evidence to suggest that this is not the case therefore the Commissioner is satisfied with this assurance.
36. The Commissioner therefore believes that this advice is subject to legal professional privilege and that the privilege has not been waived.

Public interest

37. The exemption under section 42 is subject to a public interest test. So, it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest – in favour of disclosure

38. The Commissioner recognises that there is an inherent public interest in public authorities being transparent in the decisions they take in relation to rights of way matters in order to promote accountability. If reasons for decisions are made public, there is a strong argument that this should improve the quality of future decisions.
39. The Commissioner accepts there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them were taken by public authorities and in them having the ability to challenge those decisions. In this case, access to the legal advice contained in the barrister's advice as to the application of section 53 of the Wildlife and Countryside Act 1981 and the nature of the evidence obtained under this section, as well as peripheral matters relating to this matter, would give the public a better understanding of the basis of the Council's position.
40. The Commissioner accepts that there is a public interest in disclosing information which will help determine whether public authorities are acting appropriately. In this case the complainant is involved in a dispute as to whether the right of way exists. So, it is in the public interest that as much information relating to the dispute as possible be available for public scrutiny, so as not to undermine public confidence in the Council.

Public interest – in favour of maintaining the exemption

41. However, the Commissioner also acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In case EA/2005/0023 *Bellamy v the Information Commissioner and the DTI* (para. 35), the Tribunal stated that "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".

42. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. This reflects the decision in Bellamy (para. 35) where the Tribunal observed "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 cut case..."
43. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the Act. English law considers "privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned" (Bellamy, para. 8). Therefore, there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.
44. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exemption under section 42 of the Act because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of legal professional privilege in this case outweighs the factors in favour of disclosure.
45. This advice relates to a number of issues concerning a claim to a right of way and so could be considered to constitute environmental information and fall within the scope of the EIR. Following the decision of the Tribunal in case *EA/2006/001 Kirkaldie v IC and Thanet District Council*, the Commissioner has given some consideration to this point. However, as the Tribunal's decision in this case was that regulation 12(5)(b) was equivalent to section 42 of the Act, the Commissioner believes that if this matter were to be considered under the EIR, the outcome would be the same. Indeed, the Tribunal noted that where an initial refusal has been issued under the wrong legal instrument it would be reluctant to prevent a public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime (Bellamy, para. 44).

Evidence considered by investigating officers in connection with the claim pursuant to Section 53 of the Wildlife and Countryside Act 1981

46. In reaching a decision as to whether the Council were correct to withhold this part of the requested information under the Act, the Commissioner has found it necessary to consider the nature of the investigation undertaken by the investigating officers to determine whether the exemptions applied are indeed appropriate.
47. The Commissioner has established that it is the function of the Council to examine the evidence. The examination of the evidence leads to the submission

of a planning control committee report, which contains the findings of the investigating officers.

48. As the investigating officers are Council officers and are performing a duty which the Council must carry out, the section 53 evidence is not viewed by a third party (unless the Council discloses the evidence either in full or in part at any stage).
49. Some of the evidence has been disclosed, but a portion has been withheld by the Council. It has in the main sought to rely on an exemption under section 42 of the Act to withhold the information, but it has also raised a section 36 exemption against some of the information and subsequently claimed that section 43 was also applicable to a small part of the information.

Section 42

50. The Commissioner has begun the analysis of this part of the request by considering whether the section 42 exemption is applicable to the information. Following a review of the information, he is satisfied that the information to which the exemption has been applied constitutes either requests for legal advice or correspondence from internal legal advisers with the dominant purpose of the communication being to provide legal advice (with the exception of a very small number of documents, discussed further below at paragraph 52).
51. As in paragraph 35 above, the Commissioner has considered whether the Council has waived legal professional privilege by publicly disclosing the legal advice. The Council has provided an assurance that the advice has not been disclosed to any third parties. There is no evidence to suggest that this is not the case therefore the Commissioner is satisfied with this assurance.
52. The exception to this is an email exchanges between two council officers and an email from a legal advisor to a council officer and b) a letter from a firm of solicitors acting for a third party. In relation to a), the dominant purpose of the correspondence is not seeking / providing legal advice (the first email relates to a meeting and the second is essentially a telephone note) so the information contained within the exchange cannot be subject to legal professional privilege. As for b), the Council stated that this document attracted legal professional privilege. The Commissioner does not consider this to be the case as the Council was not in a client / lawyer relationship with the other party, but that instead the document may be subject to an implicit duty of confidentiality, given the content and format of the letter. However, the Commissioner believes that it would be possible to redact the personal data of the third party from the letter so that any confidentiality would not be breached.

Public interest

53. As the exemption is therefore appropriate to the information in question, the Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

54. The arguments laid out in favour of disclosure and those in favour of maintaining the exemption have already been set out in paragraphs 38-44 above. The information in question is related to the subject of the right of way, though is often more focused on the day to day involvement of the Council in the matter rather than the overriding legal principles which Counsel's opinion addresses. Therefore the Commissioner does not consider it necessary to restate the public interest arguments as they are essentially the same.
55. In view of this, the Commissioner is again satisfied that there is a strong public interest in maintaining the exemption under section 42 of the Act because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of legal professional privilege in this case outweighs the factors in favour of disclosure.
56. The comments in paragraph 45 relating to whether the information should be governed by the EIR are also applicable to the section 53 evidence.

Section 43

57. During discussions with the Commissioner, the Council applied an exemption under section 43 of the Act to a small number of documents. Following the meeting of 11 July 2006, the Council agreed that there would be no prejudice to its commercial interests for this information to be released. It was however suggested that the internal codes to which work is charged should be redacted as these could, under certain circumstances, be used to defraud the Council.
58. The Commissioner is satisfied that the information withheld under section 43 should now be released as the Council has been unable to demonstrate any prejudice to its commercial interests. The Commissioner cannot agree that there is a reasonable likelihood of prejudice to the Council's commercial interests through disclosure of these work codes, as external parties would very likely need access to Council systems to use them. Having established that no prejudice would or would be likely to occur, it is not necessary for the Commissioner to consider the public interest in this matter.

Section 36

59. The Council has stated that a small number of documents covered by the complainant's information request is covered by the exemption under section 36 of the Act.
60. Section 36 requires a 'qualified person' to make the assessment that information should be withheld under this provision and the Council has provided evidence that the Monitoring Officer applied this exemption in an email dated 28 January 2005. In that email, the qualified person clearly states that, in her view, disclosure of the documents in question would inhibit future free and frank provision of advice to Council Members. While the qualified person failed to

specify a subsection of section 36, it is clear that she was referring to section 36(2)(b)(i).

61. The Council subsequently claimed that the information was also exempt under section 36(2)(b)(ii) and (c) of the Act, though it did not provide any evidence that the qualified person had made this assessment at the time the request was made. As a consequence, the Commissioner has focused his deliberations on whether the information is exempt under section 36(2)(b)(i).
62. Firstly, the Commissioner notes that the qualified person considered only 5 documents to be exempt, but that the Council has stated further documents should be withheld under this section of the Act. This issue was addressed during the meeting between the Commissioner and the Council of 11 July 2006 and the Council agreed that the documents not covered in the qualified person's email of 28 January 2005 should be disclosed as they could not be considered to be exempt.
63. This leaves the issue of the five remaining documents. The Commissioner considers that the opinion of the qualified person given was one which any reasonable person would make on the basis of the same facts and can therefore be considered to be objectively reasonable and reasonably arrived at. In view of this, the Commissioner has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest

64. The Council has stated that to disclose information of this type would affect the future provision of advice. However, the Council did not provide any further public interest arguments either in favour of disclosure or maintaining the exemption apart from a comment to the effect that it is in the public interest that Council officers and members are able to provide full and frank advice. Anything which detracts from this and weakens the Council's ability to consider all options before taking appropriate action would not be in the public interest.
65. The Commissioner has taken this into account when considering the competing public interest factors.

Public interest – in favour of disclosure

66. There is a strong public interest in the public understanding the decision-making process of local government and the functions of council officers and members in this process. This will enhance the knowledge of those who are affected by such decisions and allow the public to assess the effectiveness of the current system. Disclosure of the requested information would therefore satisfy the public interest in ensuring that the Council is both accountable and transparent in its operations.
67. In turn, this would ensure that the public is able to make a constructive contribution to important local issues and there is clearly a strong public interest in ensuring that local communities are engaged in debate prior to decisions being

taken which will affect them. This is likely to increase public confidence in the local authority's ability to perform its role, especially as it will be required to take decisions that leave some members of the public dissatisfied. However, if the public are able to see the steps that have been taken to deal with a situation in a fair and considered manner, this dissatisfaction is likely to be reduced.

68. The Commissioner notes that the information being withheld under section 36 of the Act is subject to its sensitivity altering due to the passage of time. While the information was created in the relatively recent past, the Commissioner is aware that the situation regarding the right of way has been ongoing for a number of years. Furthermore, he recognises the situation has changed a number of times and events have moved on considerably since the documents were created.
69. Having considered these documents at length, the Commissioner believes that the information contained within them is likely to be less sensitive than it would have been when the documents were created. Its release at the time the request was made would therefore have been less likely to affect the ability of officers to refrain from providing future free and frank advice if, as is the case here, there were a delay between the provision of the advice and it being made public after the relevant decision had been made.
70. The Commissioner is aware that Council officers are obliged to perform the function of providing full and frank advice on issues which the Council must decide upon. He is therefore not convinced that the disclosure of this information would prevent officials from carrying out their duties to the usual standard in the future. In reaching this view, the Commissioner has taken into account the seniority of the figures involved in providing the information, none of whom appear to occupy junior posts.

Public interest – in favour of maintaining the exemption

71. As stated above, no more than generic public interest arguments have been advanced in favour of maintaining the exemption.
72. Clearly, it would not be in the public interest for the Council to be unable to receive full and frank advice from its officers. However, the Council has not provided any strong public interest arguments to support this view and therefore maintain the exemption.

Balancing the public interest

73. In view of the above, the Commissioner concludes that the public interest in this matter lies in disclosure in view of the dearth of public interest arguments submitted in favour of maintaining the exemption and the readily apparent arguments in favour of disclosure.

The housing file in respect of Osborne Walk

74. When investigating this part of the request, it became clear to the Commissioner that there is significant duplication of some of the documents on the housing file

and that which was considered as section 53 evidence by the investigating officers. This is, the Council states, because the whole of the housing file was submitted as evidence in relation to the right of way claim. However, the Council explained that this was an error as large parts of the file are irrelevant to the claim and so information on the file which did not go to the heart of the right of way claim was subsequently ignored by the investigating officers.

75. Therefore, many of the withheld documents considered to be section 53 evidence also appear on the housing file. So the Commissioner has, in this section of the analysis, only considered those withheld documents which have not previously been dealt with as section 53 evidence.
76. The Council has again applied exemptions under section 42, 43 and 36 of the Act to the requested information and the Commissioner has analysed these in turn. However, there are a number of documents which are in the Housing File which were not considered as section 53 evidence and this would appear to be the reason given for not disclosing this information. The Commissioner has considered these carefully and believes that there is no exemption applied or appropriate to these documents and they should therefore be disclosed, albeit with the appropriate redactions made for information which constitutes personal data.

Section 42

77. The Commissioner has considered the whether the information to which the exemption has been applied constitutes either requests for legal advice or correspondence from internal legal advisers with the dominant purpose of the communication being to provide legal advice.
78. Once again, he is satisfied that legal professional privilege attaches to the majority of these documents and he has therefore gone on to consider the public interest. The minority of documents to which legal professional privilege does not apply or has been waived is dealt with below at paragraph 82-85.

Public interest

79. The arguments laid out in favour of disclosure and those in favour of maintaining the exemption have already been set out in paragraphs 38-44 above. The information in question is related to the subject of the right of way, though is often more focused on the day to day involvement of the Council in the matter rather than the overriding legal principles which Counsel's opinion addresses. Therefore the Commissioner does not consider it necessary to restate the public interest arguments as they are essentially the same.
80. In view of this, the Commissioner is again satisfied that there is a strong public interest in maintaining the exemption under section 42 of the Act because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. Potentially limiting the effectiveness of the current system of

legal professional privilege in this case outweighs the factors in favour of disclosure.

81. The comments in paragraph 45 relating to whether the information should be governed by the EIR are also applicable to the section 53 evidence.

Information to which legal professional privilege does not apply

82. An email containing legal advice and a record of a subsequent telephone call (document 20 in the housing file) demonstrate that the legal professional privilege attached to the advice set out in the email of 1 March 2001 has been waived. The telephone record shows that the advice in the email had been disclosed to [named individual] who is a third party and involved in the right of way dispute. As the privilege has been waived, the information should now be disclosed.
83. There is an email dated 11 December 2002 from a legal adviser to a council officer in which the dominant purpose of the communication cannot be said to be providing legal advice. Essentially, the email consists of a record of a telephone conversation with the complainant and cannot therefore attract legal professional privilege.
84. There is a further email chain (document 266 in the housing file) in which the dominant purpose of the report does not appear to be the request or provision of legal advice. The purpose of the emails appears to be the finalising of a draft report and therefore the correspondence does not attract legal professional privilege.
85. A further document (numbered 152 in the housing file) should also be disclosed as, although it was created by a legal adviser, the dominant purpose of this document is to summarise previous events rather than to provide and specific legal advice. This document was also withheld under section 36.

Section 36

86. The information withheld under section 36 of the Act overlaps with the information held in relation to part ii of the complainant's information request. As above in paragraph 61, the qualified person applied the exemption in relation to only part of the information and the other information cannot therefore be considered to be exempt under section 36(2)(b)(i).
87. In relation to the information covered by the qualified person's assessment, the Commissioner has already assessed the public interest in whether the exemption can be maintained in paragraphs 64-73 and the analysis there applies to the duplicated information in the housing file under consideration here.

Section 43

88. During discussions with the Commissioner, the Council applied an exemption under section 43 of the Act to a small number of documents. Following the meeting of 11 July 2006, the Council agreed that there would be no prejudice to its commercial interests for this information to be released.

Evidence of the Council's ownership of Homer Street

89. The complainant contends that the deeds sent by the Council in response to part iv of the request is not the document he requires.
90. Review of the correspondence between the parties shows that the Council instructed the complainant to contact the Land Registry for copies of official deeds to the land. While the Council did not at that stage explicitly cite the exemption under section 21 of the Act (that information is reasonably accessible to the complainant by other means), it was clearly that the Council applied this exemption, albeit indirectly. The telephone call of 20 March 2007 to the Council clarified that this had been the Council's intention.
91. In view of this, the Commissioner has gone on to consider whether the Council were right to apply this exemption. The full text of section 21 can be found in the Legal Annex attached to this Decision Notice.
92. The Commissioner has considered the role of the Land Registry in supplying this information to the public. It is possible to obtain copies of title plans which define the property and title registers which show who owns the house or the land and other information such as any rights of way over the land. A small fee is payable to obtain this information. Other information is also available such as leases and other relevant documents held by the Land Registry in electronic format for the payment for an additional fee.
93. The Land Registry holds the official title for the land which the complainant is interested in. The Commissioner is satisfied that the information requested in part iv of the request is available to the complainant from the Land Registry and that this information should be considered 'reasonably accessible' in that it can be obtained relatively swiftly, inexpensively. Furthermore, it can be obtained via the Land Registry's website.

The Decision

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94. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the Act insofar as:
 - a) It correctly withheld the information requested under point i of the information request under section 42 of the Act.
 - b) It correctly withheld the majority of information requested under point ii of the information request under section 42 of the Act.
 - c) It correctly withheld the majority of information requested under point iii of the information request under section 42 of the Act.
 - d) It correctly dealt with the information requested under point iv of the request by applying section 21 of the Act.

95. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act insofar as:

- e) It breached section 17 of the Act by not responding to the complainant's information request of 1 March 2005 within 20 working days.
- f) It breached section 1 of the Act by incorrectly applying an exemption under section 42 to some information requested under point ii and iii of the information request.
- g) It breached section 1 of the Act by incorrectly applying an exemption under section 43 to the information requested and thereby failing to supply the information relating to point ii and iii of the information request.
- h) It breached section 1 of the Act by incorrectly applying an exemption under section 36 of the Act and thereby failing to supply the information requested under points ii and iii of the information request.

Steps Required

96. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose the documents listed in Schedule 1 of the Decision Notice.

97. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

98. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

99. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

100. The Commissioner takes this opportunity to remind the Council of its obligation to ensure that all Freedom of Information requests are dealt with promptly and in any event within 20 working days of receipt of the request. The Council should ensure that it has the proper procedures in place to recognise requests which should be dealt with under the Act and that these are handled accordingly. The Commissioner is aware that this matter took place during the early days of the

Act, but he will be monitoring the future performance of the Council and will consider what action may be required if similar matters arise.

101. During the investigation, the Council tried to rely on a section 41 exemption in order to prevent disclosure of the Counsel's opinions (as well as the exemption under section 42 of the Act which is addressed in the main body of the Decision Notice). In arguing this point, the Council argued that the opinions had been obtained in confidence and the Council owed a duty of confidence to the Counsel providing the advice. The Commissioner does not agree that such an exemption can be applicable to this type of information. Where a public authority pays for advice from legal professionals, it is an established principle that each authority becomes the owner of the advice and can do with it what it wishes, including disseminating the advice to third parties if it so chooses. While this exemption was eventually withdrawn by the public authority which chose instead to rely on the more appropriate section 42 exemption, the Commissioner is keen that public authorities should only rely on the most appropriate exemption when withholding information.

Right of Appeal

102. 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

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 29th day of March 2007

Signed

Graham Smith
Deputy Commissioner

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

Legal Annex

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.”

Section 17(2) states –

“Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible 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.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Prejudice to effective conduct of public affairs

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,

- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

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

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”