

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 12 February 2007

Public Authority: Vale of Glamorgan County Borough Council
Address: Civic Offices
Holton Road
Barry
Vale of Glamorgan
CF63 4RU

Summary Decision

1. The complainant requested a copy of a Counsel's opinion that the public authority had obtained in relation to the enforcement of restrictive covenants. The public authority refused the request, citing the exemption at section 42 of the Act. This section allows public authorities to withhold information to which a claim of legal professional privilege could be maintained in legal proceedings, subject to a public interest test. The Commissioner finds that the information in question does attract legal professional privilege. Furthermore, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosure. Accordingly, the Commissioner has decided that the public authority applied the Act correctly in citing the section 42 exemption. However, the Commissioner has decided that the public authority initially breached the requirements of section 17 of the Act by issuing an inadequate refusal notice.

The Commissioner's Role

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

The Request

3. The complainant spoke on the telephone to officers at the public authority on 28 November 2005 and 1, 5 and 12 December 2005. During these conversations the complainant requested four specific documents. These were:

- An extract of the minutes of the full Council meeting 28 November 1994;
 - An extract of the minutes of the Housing Committee on 13 September 1995;
 - An extract of the minutes of the full Council meeting 30 October 1995; and
 - A copy of Counsel's advice [in relation to the enforceability of certain restrictive covenants].
4. The public authority treated these verbal requests as a single request for information under the Act, and regarded the request as having been received on 28 November 2005. The Commissioner notes that the request for information was not made in accordance with section 8 of the Act. However, given the particular circumstances of the case, he accepts that it was appropriate for the public authority to treat the complainant's request as valid.
 5. The public authority then wrote to the complainant on 16 December 2005, providing items 1 and 2 and stating that item 3 is not held by the public authority. The complainant was advised that item 3 could be obtained from the Glamorgan Record Office, and was provided with its contact details. In terms of the Counsel's advice, the public authority informed the complainant that it was considering applying an exemption which required the application of the public interest test.
 6. On 26 January 2006 the public authority issued a refusal notice to the complainant, stating that the Counsel's advice was exempt from disclosure by virtue of section 42 of the Act. It also stated that some information contained within the document consisted of personal data and was thus exempt by virtue of section 40 of the Act.
 7. The complainant submitted a complaint to the Commissioner on 21 February 2006. Following advice from the Commissioner's office, on 7 April 2006 the complainant requested an internal review of the public authority's decision to withhold the Counsel's advice. The public authority responded on 24 April 2006, upholding its original decision to exempt the information. The complainant then submitted a further complaint to the Commissioner on 11 May 2006.

The Investigation

Scope of the case

8. On 11 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether or not the public authority applied the Act correctly in withholding the information by virtue of the exemptions cited.
9. Whilst the public authority has cited the exemptions at sections 42 and 40, it has not sought to rely on the section 40 exemption to withhold the entirety of the document, but only those sections which relate to third parties. Because the Commissioner has concluded that the public authority applied the Act correctly in withholding the entirety of the Counsel's opinion by virtue of the section 42

exemption, the applicability of the section 40 exemption has not been considered in this Notice.

10. Although not specifically requested to do so by the complainant, the Commissioner has also considered the procedural aspects of the public authority's handling of the request for information.

Chronology of the case

11. The Commissioner contacted the public authority on 15 May 2006, requesting a copy of the information withheld. The public authority replied on 3 July 2006, providing the information requested.
12. The Commissioner contacted the public authority again on 25 October, seeking further information about the status of the information withheld. The public authority replied on 21 November, providing additional information about the information and reiterating its view that the document attracts privilege.
13. The Commissioner has also spoken to the complainant at length about the background to his dispute with the public authority, and the factors that the complainant believes should be taken into account when weighing up the public interest arguments.

Findings of the case

14. The Commissioner finds that the Counsel's advice is held by the public authority. Furthermore, he finds that it was written by a professional legal advisor who was instructed by the then Vale of Glamorgan District Council to advise it on legal matters.

Analysis

15. The Commissioner has considered the public authority's response to the complainant's request for information.

Procedural breaches

Section 17

16. Section 17 of the Act sets out the requirements a public authority must meet when refusing a request for information. Section 10(3) of the Act allows public authorities to extend the time for comply with a request for information in order to consider the public interest arguments. However, it does not extend the time for issuing a refusal notice under section 17(1).
17. In this case the public authority's letter of 16 December 2005 stated that it needed to extend the time for compliance in respect of the Counsel's opinion, and a full refusal notice was not issued until 26 January 2006. The public authority's letter

of 16 December 2005 did not meet the requirements of sections 17(1) and 17(3), in that it did not state which exemption was being considered and why that exemption applies, and it did not include an estimate of the date by which the authority expected to reach a decision on the public interest test.

Exemptions

18. Section 42(1) of the Act allows public authorities to exempt information to which a claim to legal professional privilege could be maintained in legal proceedings. Legal professional privilege is a common law concept developed by the courts. It exists to protect a client's confidence that any communication with his or her professional legal advisor will be treated in confidence and will not be revealed without consent. Privilege may not be claimed where communications are made with a professional legal advisor with the intention of furthering a criminal purpose or are directed to the commission of a crime or a fraud.
19. In order to determine whether the Counsel's opinion is covered by the section 42 exemption, the Commissioner has considered whether the information originated from a professional legal advisor and for what purpose it was created. Having studied the information withheld, it is clear that the information in this case did originate from a professional legal advisor (in this case Counsel) acting in a professional capacity. Furthermore, it is also clear that the information was created for the purpose of seeking advice on a point of law. Therefore the Commissioner has concluded that the section 42 exemption is engaged in this case.

Public Interest Test

20. Section 42 is a 'qualified' exemption and is therefore subject to a public interest test. This means that the public authority can only rely on the section 42 exemption if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
21. It is widely recognised that there is a very strong public interest inherent in legal professional privilege. It exists to protect the confidentiality of communications with legal advisors and is a central concept in the justice system. The Information Tribunal, in the case of *Bellamy vs the Information Commissioner* (EA/2005/0023), ruled 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."
22. In effect, the Tribunal has ruled that there is a strong public interest in withholding any information that attracts privilege, because the concept itself is so important to ensuring access to justice. The Tribunal went on to state:

"It may well be that in certain cases ... for example where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight."

23. There are parallels between the Tribunal's comments quoted above, and this complaint. The Tribunal has argued that the public interest in maintaining the exemption may be weaker if the legal advice in question was 'stale' (i.e. was no longer relevant or 'live'). Whilst the dispute between the complainant and the public authority in matters relating to the restrictive covenants has been ongoing for many years, the Commissioner understands that the issues covered within the opinion remain very much alive and there remains the possibility of litigation. In these circumstances, therefore, there remains a very strong public interest in maintaining the exemption.
24. In terms of the public interest in disclosure, on the other hand, the Commissioner has considered the public interest in ensuring robust scrutiny and accountability of the public authority's actions. Information such as that withheld in this case could, if disclosed, provide a better public understanding of the decision making process, and better inform the public as to why the public authority has followed the path it has in what appears to be a controversial local issue.
25. Having looked closely at these arguments, the Commissioner has weighed the public interest in maintaining the exemption with the public interest in disclosure. Whilst accepting a public interest in disclosure, the Commissioner does not believe that it outweighs the public interest in maintaining the exemption in this particular case. In reaching this decision, the Commissioner has placed particular weight on the Tribunal's conclusions in the case referred to above (EA/2005/0023):

"... 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 ...".

The Decision

26. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, by virtue of applying the exemption at section 42 of the Act appropriately. However, the Commissioner also decides that the public authority initially breached the requirements at sections 17(1) and 17(3) by failing to issue an adequate refusal notice within the time for compliance.

Steps Required

27. The Commissioner requires no steps to be taken.

Other Matters

28. Although it was not raised by either the complainant or the public authority, the Commissioner has considered to what extent the information withheld could be classed as 'environmental information', within the definition set out in the Environmental Information Regulations 2004.
29. The Commissioner accepts that matters relating to planning would normally be classified as environmental. However, in this case the Commissioner believes that the Counsel's advice, which relates to the enforceability of restrictive covenants, is too far removed from the definition of environmental information to be classified as such. The Commissioner therefore believes that the public authority was correct to apply the Act rather than the regulations in this case.
30. Furthermore, the Commissioner believes that the outcome of the case would not have been different if the information were to fall within the definition of environmental information, because the exception at regulation 12(5)(b) would have applied.

Right of Appeal

31. 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 12th day of February 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

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

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

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“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.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Time for Compliance

Section 10(1) provides that –

“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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“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.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“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.”

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(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, on a claim 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 public 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.”

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.”