

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 18 December 2007**

**Public Authority:** Housing Corporation  
**Address:** Maple House  
149 Tottenham Court Road  
London  
W1T 7BN

### Summary

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The complainant requested information from the Housing Corporation, principally letters from a named firm of solicitors acting for a housing association, which the Housing Corporation refused to disclose, citing the section 41 exemption under the Act. The complainant had delayed for almost a year before putting his complaint to the Commissioner. The Commissioner decided that, while there had been delay, in the circumstances of the case the interests of justice were best served by his considering the complaint about information in the letters to the Corporation from the housing association's solicitors. Having done so, he decided that the Housing Corporation had acted correctly in withholding the information.

### The Commissioner's Role

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

### The Request

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2. On 1 August 2005 the complainant asked the Housing Corporation (the Corporation) for information relating to his communications with it in respect of a named housing association (the Association) which is regulated by the Corporation, the Association's responses to his queries and the Corporation's contacts with the Association referring to him. The complainant mentioned problems with the Association and its predecessor organisation which he said dated back to 1974. He indicated that he himself had not been a tenant of the Association.

3. On 3 August 2005, while acknowledging receipt of the complaint, the Corporation told the complainant that it was likely that correspondence over three years old would have been destroyed in line with its records management and disposal policies.
4. In a refusal notice of 2 September 2005 the Corporation told the complainant that it held a number of internal documents containing information about his communications with it concerning the Association:
  - Most of these documents also contained third party personal data; much of this information was subsequently disclosed, with the third party personal data redacted.
  - The Corporation said that it also held internal information about the seeking and giving of internal advice; this was exempt from disclosure under section 42 of the Act (Legal professional privilege).
  - The Corporation said that it held some letters and minutes from the Association containing relevant information which had been supplied in confidence to help inform its regulatory role, which was therefore exempt under section 41 of the Act (Information provided in confidence). The Corporation added that this information included some personal data which was exempt from disclosure under section 40 of the Act (Personal information).
  - The Corporation said that it also held information generated as a result of a 2002 subject access request that the complainant had made under the Data Protection Act 1998, much of which was exempt from disclosure under section 42 of the Act.
  - There had also been minimal contacts with the Association, including information in correspondence from a named firm of solicitors acting on the Association's behalf (the Solicitors). This had been provided in confidence and was exempt from disclosure under section 41 of the Act (Information provided in confidence). In addition the Corporation said that it held a copy of a committal order in respect of the complainant and an application notice, both of which had been obtained in confidence and were being withheld under section 41 of the Act. It added that the court records were additionally exempt from disclosure under section 32 of the Act (Court records, etc) and said that section 36 (Prejudice to effective conduct of public affairs) could also apply.
5. On 8 September 2005 the complainant told the Corporation that he could see some errors in the data that it had sent to him. On 13 September 2005 the Corporation told the complainant that it was happy to place any corrections to disputed factual information on its file.
6. On 9 December 2005 the complainant wrote to the Corporation, making a formal request for information in letters which the Corporation was withholding from him and which had come from the Solicitors. He said that he was concerned that the Solicitors who acted for the Association had been offering advice to the Corporation. On 21 December 2005 the Corporation replied to the complainant, saying that his letter had been treated as an appeal against its decision not to disclose the information. The Corporation confirmed that there had been some minimal contacts with the Solicitors and that the information would continue to be

withheld under section 41 of the Act. It said that it had relied on the section 42 exemption solely in relation to correspondence with its own Solicitors.

7. Almost a year later, on 14 November 2006, the complainant wrote to the Corporation saying that the intervening period had been taken up in dealing with the civil litigation caused by the Association. He asked again for information in letters to the Corporation from the Association's Solicitors. He said that the relevant letters from the Solicitors to the Corporation were not minimal contacts and that they ran to a page of A4 on each of at least three occasions. He said that the argument of solicitor/ client privilege was not relevant and that a named member of the Solicitors had a history of 'cover-ups' so that it was therefore in the public interest for the information to be disclosed to him. The Corporation treated the complainant's letter as a request for a further review of its decision not to provide the information and, on 8 December 2006, affirmed that the decision given previously, on 21 December 2005, was final so far as the Corporation was concerned.

## The Investigation

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### Scope of the case

8. On 21 December 2006 the complainant wrote to the Commissioner. He said that he had received a lot of information from the Corporation which had been helpful, but that some very problematic information had been withheld, which he found very suspicious. In supporting documentation he specifically asked the Commissioner to note that all legal activity involving himself and the Association had now ceased and to consider whether the Corporation was being disingenuous in referring to only minimal contacts with the Solicitors. He repeated that there had been at least three communications from the Solicitors to the Corporation, each one of which had been a minimum of one page of A4 in length. He said that he was worried that the Association, both directly and through the Solicitors, had provided the Corporation with 'errors, falsehoods and lies', some of a serious nature.
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology of the case

10. On 30 January 2007 the Commissioner invited the Corporation to comment on the complaint. The Corporation replied on 19 February 2007 noting that the complainant had waited for nearly a year before appealing to the Commissioner; it drew attention to the provision in section 50(2)(b) of the Act which directs the Commissioner to make a decision unless it appears to him that there has been "undue delay in making the application".
11. On 13 March 2007 the complainant provided the Commissioner with further supporting information about his complaint. He reiterated his concern to have

disclosed to him information which he believed to be contained in letters to the Corporation from the Solicitors. He said that he was concerned as he believed that the Solicitors had obtained information about him by what he believed to have been improper means, an allegation he said that he was pursuing elsewhere. He added that he believed that the Solicitors had previously disseminated false information about him to other organisations.

12. On 6 June 2007 the Corporation provided the Commissioner with an outline chronology of events leading up to the complainant's letter to it of 14 November 2006.
13. In a further letter to the Commissioner of 23 August 2007 the complainant clarified his complaint, saying that he was not seeking information held by the Corporation relating to legal advice from its own legal advisers but rather the information that he believed it to have received from the Solicitors acting for the Association. He again indicated that there had been related civil litigation between himself and the Association and repeated his belief that the Solicitors had obtained his personal information by improper means, allegations which he repeated again and amplified in a second letter sent on the same day.
14. On 5 September 2007 the Commissioner asked the Corporation for its response to the complaint. On 1 October 2007 the Corporation replied and provided the Commissioner with the information that it was withholding from the complainant. The Corporation said that it had responded fully to his correspondence and concerns. It noted that the complainant had been corresponding for some 25 years with both the Association and its predecessor organisation on various matters. The Corporation said that it held a large amount of information relating to the complainant, much of which it had already disclosed to him.

### **Findings of the case**

15. The Commissioner found that during much of 2006 the complainant and the Association were engaged in connected proceedings.
16. The Commissioner has seen that papers sent to him by the Corporation include two letters to the Corporation from the Association's Solicitors dating from 2001 and 2002. A chronology provided by the Corporation lists other letters from the Solicitors, dated between 1994 and 1997. The Corporation has confirmed that the files in which these earlier letters were once held are no longer held, having been destroyed in accordance with the Corporation's document retention and disposal policy.

### **Analysis**

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

## Section 50 - Application for decision by Commissioner

18. The Commissioner noted that, having been denied access to information by the Corporation following its review of his complaint, the complainant then waited for almost a year before he made his complaint to the Commissioner. The Commissioner therefore needed to consider whether this amounted to 'undue delay' as set out in section 50(2)(b) of the Act (Application for decision by Commissioner). In the normal course of events the Commissioner would have been minded to decide that such delay was indeed undue. However, in deciding the question on the facts of this particular case, the Commissioner noted that, during the period of delay, the complainant had been actively pursuing connected matters in other proceedings. Accordingly he decided that, in spite of the passage of time, the interests of justice were best served on this occasion by his agreeing to consider the complainant's principal concern which was that the Corporation had wrongly denied him access to letters to it from the Association's Solicitors. The Commissioner did not go on to consider other matters raised by the complainant.

## Exemptions

### Section 41 – Information provided in confidence

19. Section 41 provides that:

“(1) 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.

(2) 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.

20. Whether or not a breach of confidence is actionable is dependent on a number of factors. The most commonly cited statement of the constituent elements of an 'actionable breach' is the judgment of Megarry J in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 which reads:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself [...] must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it...”

21. The Commissioner has reviewed the letters sent by the Solicitors to the Corporation and is satisfied that the information was obtained by the Corporation from the Solicitors and that it was the clear intention of both the Solicitors and the Corporation that these reports would be accorded strict confidence. He is satisfied that the information has the necessary quality of confidence: the

information is not trivial or generally accessible. He recognises that the information was imparted in a situation where an obligation of confidence existed. He is therefore satisfied that disclosure by the Corporation of this information, against the clear and strongly expressed wishes of the Solicitors, could be damaging to the reputation and standing of both to them, damaging to the Solicitors in their future relationships with clients and their other correspondents as trusted legal advisers and also damaging to the Corporation as a trusted regulator. A detriment would result if the information were to be disclosed against their wishes.

22. He has seen that the preservation of confidences is recognised by the courts to be strongly in the public interest. However, the duty of confidence is not absolute and there are circumstances in which confidential information may be disclosed, which are; with consent; when required by law; and, where there is an overriding public interest. The Commissioner is satisfied that the first two of these conditions do not apply on the facts of this matter.

### **Defence of public interest**

23. As to the question of whether or not there is an overriding public interest in disclosure, the Commissioner has been guided, inter alia, by the decision of the Information Tribunal in the *Derry* case (*Derry City Council v Information Commissioner EA/2006/0014*). He also believes that the presumption that confidence will be maintained should not lightly be overridden on public interest grounds.
24. The Commissioner recognises that there is a strong public interest in maintaining trust and in the free flow of information between regulators and the bodies they regulate and is satisfied that this presumption may, on occasion, extend to information received from the legal advisers of regulated bodies. The public interest in disclosure is the need for public authorities to be transparent and accountable to individuals in explaining decisions that affect them. However, in his review of the letters from the Solicitors, the Commissioner has seen nothing to suggest that there is a public interest matter which should override the importance of preserving confidences. The complainant has not provided reasons which are so compelling that it would be in the public interest for the Commissioner to override the confidence exemption. The complainant has said that he is concerned that what he describes as 'errors, falsehoods and lies' may have been passed to the Corporation by the Solicitors. However, the Commissioner has seen that much relevant information has been made available to the complainant both directly and through relevant court proceedings. The Commissioner has also seen that the Corporation has offered to place on its file any information the complainant wishes to offer about himself.
25. Accordingly the Commissioner is satisfied that disclosure of the withheld information would be an actionable breach of confidence and that the section 41 exemption has been correctly applied.
26. The Corporation also relied upon the exemptions in sections 32 and 36 of the Act. The Commissioner accepts that these exemptions may well be engaged but, having decided that the information has been properly withheld under section 41

of the Act, which is engaged and is absolute, he has not gone on to consider their applicability.

## **The Decision**

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27. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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28. The Commissioner requires no steps to be taken.



## Right of Appeal

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

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

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

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

**Dated the 18<sup>th</sup> day of December 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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



## 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.”

## Application for decision by Commissioner

**Section 50(1)** provides that -  
“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.”

**Section 50(2)** provides that -  
“On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

...

(b) that there has been undue delay in making the application,  
...”