

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 September 2009

Public Authority: The London Borough of Camden
Address: Camden Town Hall
Judd Street
London
WC1H 9JE

Summary

The complainant asked the Information Commissioner (“the Commissioner”) to consider whether the London Borough of Camden (“the Council”) had correctly refused to provide information relating to two properties in London. During the Commissioner’s investigation, the Council agreed to disclose a significant proportion of the information it had been withholding. The Commissioner investigated the Council’s decision to withhold the remaining information and was satisfied that some of the information was exempt under section 40(1), 40(2) and 42(1). However he decided that the remaining information had been incorrectly withheld in this case. The Council is required to disclose this information within 35 days. The Commissioner found breaches of section 10(1), 1(1)(b) and 17(1).

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 FOIA”). This Notice sets out his decision.

Background

2. The complainant is the Company Secretary of a particular company. The complainant’s wife is the Director of the company. At the time of the request, the company was both the freehold owner and the lessee of two properties in London.

3. In 2006, the Council served four Enforcement Notices relating to these properties. Three of the Notices related to one of the properties. The first two Notices were issued under the Town and Country Planning Act 1990. The third Notice was issued under the Planning (Listed Buildings and Conservation Areas) Act 1990.
4. Another Notice was issued under the Planning (Listed Buildings and Conservation Areas) Act 1990 relating to the second property.
5. The complainant appealed to the Planning Inspectorate on 23 January 2007 about all of the Notices above. On 12 December 2007, one appeal was dismissed, one allowed, and two were partly allowed.
6. In 2007, the Council also sought to prosecute the complainant and the company for offences under the Housing Act 1985 following inspection of the properties. Proceedings were issued against the freehold owner of the properties, the company, because it was the “manager” of the properties. Proceedings were also issued against the complainant pursuant to section 613 of the Housing Act 1985 because he was the Company Secretary and it was alleged that the offences committed by the company were attributable to the complainant’s neglect in his role. The complainant and the company were both successfully prosecuted and fined for failing to keep the properties fit for their occupants.

The Request

7. On 22 March 2007, the complainant wrote to the Council and requested information in the following terms:

“I have repeatedly asked your Environment Department for copies of the files relating to [addresses of the two properties], and have been refused on the basis that they are exempt from providing this since they are investigating... Since they have now served the Enforcement Notices and commenced prosecution proceedings this information should now be sent to me forthwith please”.
8. On 4 April 2007, the Council replied to the complainant referring to the complainant’s letter dated 22 March 2007 in which, it said, the complainant had made a request to see “the Enforcement files for [addresses of the two properties]”. It confirmed that it had considered the request under the Environmental Information Regulations 2004 (“the EIR”). It stated that the complainant had previously requested the same information on several occasions and the Council had refused to provide the information. It stated that it had attached copies of its previous refusals dated 14 March 2006, 12 June 2006, 7 July 2006 and 12 February 2007. The Council stated that the exemptions cited in these previous refusals still applied and that the public interest did not favour disclosure. The Council added that it wished to clarify that no prosecution proceeding had commenced relating to the enforcement files but the information may still be used to bring a future prosecution. It stated that it understood the complainant was currently pursuing an appeal to the Planning Inspectorate.

9. On 12 April 2007, the complainant complained directly to the Commissioner stating that he had not been offered an internal review by the Council. On 16 May 2007, the Commissioner telephoned the Council to ascertain whether it would carry out an internal review. The Council agreed to conduct an internal review of its response dated 4 April 2007.
10. On 21 June 2007, the Council completed its internal review. The Council stated that it had decided to uphold the refusal. It explained that the information related to ongoing enforcement action and may be used for the purposes of bringing a prosecution. It stated that the information was exempt under regulation 12(5)(b) because releasing it would prejudice "the course of justice, the ability of a person to obtain a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature". It added that it did not believe that it was in the public interest for the Council to be prejudiced in its ability to enforce planning legislation. The Council also advised that the complainant had greater rights of access under the rules of legal disclosure than under the EIR and that it would be more useful for him to approach the Planning Inspectorate about disclosure of information.

The Investigation

Scope of the case

11. The complainant initially complained about the Council's handling of his request on 12 April 2007. He specifically asked the Commissioner to consider whether the Council had correctly refused to provide the information he had requested. However, as the Commissioner required the Council to conduct an internal review before he could accept the complaint, the complainant complained to the Commissioner again on 3 July 2007 following the outcome of the internal review.
12. It became apparent during the Commissioner's investigation that a large amount of information falling within the scope of this request had already been made available to the complainant. In light of this, the Commissioner's investigation only concerns the information that was withheld from the complainant.
13. Some of the information contained on the planning enforcement file consisted of the council tax records of the properties' residents. The complainant confirmed to the Commissioner that he was not seeking disclosure of this information. This information was therefore excluded from the Commissioner's investigation.
14. During the course of the Commissioner's investigation, the Council disclosed some information falling within the scope of the request. The following Chronology, Analysis and Decision sections of this Notice do not therefore concern this information.

Chronology

15. On 28 April 2008, the Commissioner telephoned the Council to ask whether there had been any change of position since the internal review. In particular the Commissioner asked whether the Council knew if any information had been disclosed to the complainant following the legal action referred to.
16. On the same day, the Commissioner also wrote to the complainant stating that he would be considering whether the Council was correct to refuse the complainant's request dated 22 March 2007. The Commissioner also asked the complainant whether he had obtained any information through the legal disclosure rules.
17. On 1 May 2008, the complainant telephoned the Commissioner and stated that he had not received information following his request and therefore wished to pursue his complaint.
18. The Commissioner wrote to the Council on 6 May 2008. The Commissioner noted from the documentation provided by the complainant that it appeared some relevant information had already been disclosed to the complainant following a subject access request under the Data Protection Act 1998 ("the DPA"). The Commissioner clarified that his investigation only concerned the information being withheld from the complainant. He asked the Council to provide copies of this information for inspection and provide full rationale for withholding the information. He also asked the Council to provide some background information to help him to put the request into context.
19. During June, various items of correspondence passed between the Commissioner and the Council while the Commissioner sought to obtain the withheld information from the Council and a response to a number of background questions to help him to put the request into context.
20. The Council wrote to the Commissioner on 26 June 2008 supplying a CD containing the withheld information. The Council provided rationale for relying on regulation 12(5)(b) and also sought to rely on regulation 13(1) for the first time.
21. The Commissioner telephoned the Council on 27 June 2008 to discuss points raised in the Council's letter. The Commissioner also attempted to contact the Council on 25 July 2008 and 4 August 2008 to make some further queries. However, the Council did not contact the Commissioner until 12 August 2008. By this time, the council officer who had been dealing with the Commissioner's correspondence had left the Council's employment. The Council advised the Commissioner that it was experiencing difficulties understanding the records that had been left relating to this case. It also stated that it had been unable to locate a copy of the CD that it had supplied to the Commissioner containing the withheld information.
22. On 26 August 2008 the Commissioner wrote to the Council supplying a duplicate of the CD it had previously supplied. The Commissioner referred to the fact that in a telephone conversation with the Commissioner, the Council had indicated that it was reviewing the information and may now disclose all of the withheld

information to the complainant. There then followed various correspondence and telephone conversations between the Council and the Commissioner while the Commissioner awaited confirmation from the Council about whether it was able to disclose any further information to the complainant. It was not until 10 November 2008 that the Council informed the Commissioner that it had now completed its review and it had decided not to disclose any information.

23. On 12 November 2008, the Commissioner telephoned the complainant and provided an update on the Council's position. He also wrote to the complainant on 13 November 2008. As the Commissioner had inspected some of the withheld information by this stage, the Commissioner highlighted that some of the information on the enforcement files was council tax records of the residents of the two properties. He asked the complainant to confirm whether he actually wanted this information.
24. On 11 December 2008, the complainant confirmed during a telephone conversation with the Commissioner that he was not interested in the council tax records. In a further telephone conversation on 17 December 2008, the complainant explained to the Commissioner that there were two branches to his request. He said he wanted information concerning the planning enforcement action relating to the properties and also information concerning a prosecution by the Council's Environmental Health Department. At this stage, the Commissioner advised the complainant that it appeared to him that the request had not been interpreted in this way but had been limited only to information concerning the planning enforcement files.
25. On 17 December 2008, the Commissioner telephoned the Council and asked it whether the complainant had been prosecuted for environmental health reasons and whether the Environmental Health Department held information about this. On 19 December 2008, the Commissioner also sent a letter to the Council explaining that he believed the request had been incorrectly interpreted. He asked the Council to investigate and confirm what further information it holds and to consider its disclosure. The Commissioner also sent an email to the Council to ask some additional questions.
26. On 19 January 2009, the Council responded to some of the Commissioner's questions and advised that it had not received the Commissioner's letter dated 19 December 2009. The Commissioner replied on the same day enclosing a copy of the letter.
27. On 3 February 2009, the Commissioner wrote to the Council stating that he had not received the Council's response. He warned the Council of the Commissioner's powers to issue a formal Information Notice if the information was not received by 17 February 2009.
28. On 17 February 2009, the Council sent an email to the Commissioner confirming that it had decided to disclose to the complainant all the information it had found on its environmental health files concerning the properties.

29. On 26 February 2009, the complainant telephoned the Commissioner and stated that although he had received the information from the environmental health files, he was not satisfied that this represented all the information held by the Council. He explained that when he went to court, the Council had two large files. The complainant explained that he thought the Council would hold legal advice relating to the prosecution, photographs taken of the properties, details of contact with the residents and emails between the Planning Department and the Environmental Health Department. The Commissioner explained that some of the information the complainant expected to be held on the files provided to him actually formed part of the information that the Council had withheld from the Planning Department's files. However, the Commissioner agreed to check with the Council whether it held any more information relating to this matter, particularly with regard to legal advice.
30. On 4 March 2009, the Commissioner wrote to the Council about the information being withheld under regulation 12(5)(b) and 13(1) relating to the planning enforcement action. He also explained that the complainant had queried whether he had in fact been provided with all the relevant information held concerning the environmental health prosecution. The Commissioner stated that he would write separately about this.
31. On 20 March 2009, the complainant telephoned the Commissioner. During this conversation, the Commissioner explained the likelihood that legal advice held by the Council about this matter would be exempt and he asked the complainant whether he still wished to pursue this information. The complainant confirmed that he did. He also explained that he believed the Council should consider disclosing more information in view of the fact that the planning enforcement action and the prosecution had concluded some time ago. The Commissioner confirmed that he had raised this point with the Council concerning the planning enforcement files and was awaiting its response.
32. In a letter incorrectly dated 23 September 2009 that was received by the Commissioner on 1 April 2009, the Council responded to the Commissioner's letter dated 4 March 2009. The Council provided some further rationale supporting its application of 12(5)(b) and 13(1).
33. On 2 April 2009, the Commissioner wrote to the Council and asked a number of questions designed to establish whether the Council held any more information concerning the environmental health prosecution.
34. In another letter incorrectly dated 23 September 2009 that was received by the Commissioner on 17 April 2009, the Council replied to the Commissioner's letter dated 2 April 2009. The Council confirmed that it did hold "court files" relating to the environmental health prosecution. The Council explained that it had been required to comply with its statutory obligations of disclosure under the Criminal Procedure and Investigations Act 1996. It confirmed that it had disclosed all the information that it was required to disclose including a large number of photographs of the properties and a redacted bundle containing complaints received from residents. The Council confirmed that it had not located any other information relating to this matter.

35. On 27 April 2009 the Commissioner wrote to the Council about the planning enforcement information being withheld under 12(5)(b) and 13(1). He asked for more information to support the Council's position. The Commissioner also sent another letter to the Council having reviewed the details of the four enforcement notices. The Commissioner expressed the view that it did not appear to him that the notices fell within the description of "environmental information" in the EIR. He asked the Council to review this in light of the Commissioner's comments.
36. The Council responded on 10 June 2009. The Council agreed with the Commissioner that the information was not "environmental" and it stated that it was now seeking to rely on section 42(1) of the FOIA for the same reasons. It provided further supporting argument. The Council stated that it would not seek to rely on section 40(2) although the Commissioner understood that this comment related only to information that the Commissioner had asked the Council to consider disclosing. It also added that it wished to rely on section 30(2)(a)(iv) in respect of some draft witness statements.
37. On 15 June 2009, the Commissioner wrote to the Council asking the Council to provide for inspection copies of any information it wished to withhold from the legal files relating to the environmental health prosecution. He asked the Council to provide full rationale for applying any exemptions and to provide some background information.
38. On 13 July 2009, the Council responded to the Commissioner. It stated that it had enclosed a bundle of information that it wished to withhold from the legal files concerning the environmental health prosecution. It confirmed that none of this information had previously been provided to the complainant. The Council provided some supporting arguments for applying section 42(1) of the FOIA to the information being withheld from the legal files.

Analysis

Substantive Procedural Matters

39. As described in the above Chronology, the Commissioner considered that the planning enforcement information in this case was not "environmental". The planning enforcement notices to which the withheld information relates largely concern alterations to the internal structure of the properties with some external alterations. The Commissioner did not consider that the nature of any of the alterations meant that the information should be considered under the EIR.
40. The Commissioner also considered whether the information being withheld concerning the environmental health enforcement action met the technical definition of "environmental information" in regulation 2 of the EIR. Having considered the nature of the enforcement action in this case, the Commissioner did not consider that the nature of any of the problems that the notices were

designed to address meant that the information should be considered under the EIR.

Exemptions

Section 40(1)

41. Although the Council did not rely upon the exemption under section 40(1) of the FOIA the Commissioner has decided that it is appropriate for him to consider its application in this case.
42. Section 40(1) provides that any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject. "Personal data" is defined by section 1(1) of the DPA as any information which relates to a living individual who can be identified.
43. The Commissioner considered whether any of the information being withheld by the Council concerning planning enforcement for the properties constitutes the complainant's personal data. The Commissioner noted that, as Company Secretary, the complainant had acted as the company's main representative throughout the planning enforcement action. As such, there are many references to the complainant throughout the withheld information. However, the Council confirmed to the Commissioner that the planning enforcement action was taken against the company and not the complainant as an individual. The Commissioner therefore considers that the information relates to the company, and should not be treated as representing the complainant's personal data.
44. However, the Commissioner reached a different conclusion in respect of the environmental health enforcement information. It is clear that this information relates to the prosecution that was taken against the complainant and his company as described in the Background section to this Notice. In the Commissioner's view, information concerning the prosecution clearly relates to the complainant as an individual and should therefore be treated as his personal data. Therefore this information was exempt under section 40(1) of the FOIA.
45. The Council had also sought to withhold an email from external solicitors dated 7 June 2006 (BW to AV). The Council had supplied this information to the Commissioner in the bundle of information that it had stated related to the environmental enforcement prosecution only. As this email concerned an information request made by the complainant, the Commissioner decided that this information is the complainant's personal data and was therefore exempt under section 40(1).

Section 40(2)

46. Section 40(2) provides that third party personal data is exempt if its disclosure would breach any of the Data Protection Principles set out in the DPA. The Commissioner found that the most relevant Data Protection Principle in this case is the first Principle that provides that personal data shall only be disclosed to the

public if its disclosure would be fair and lawful and shall only be disclosed if one of the conditions in Schedule 2 of the DPA is met.

47. The Council initially applied this exemption to withhold details of contact it had with residents of the properties owned by the company but it subsequently agreed to disclose the information with any information that would identify the residents of the properties redacted. The Commissioner has therefore only considered whether the Council correctly withheld any information that would identify the residents. The Council explained to the Commissioner that the residents would not have expected the details of this contact to be disclosed to the general public. Having considered the circumstances of this contact and the nature of the information, the Commissioner was satisfied that the information represented the personal data of the residents. Although the Council conceded that the information was relatively innocuous in content, the Commissioner agreed with the Council that disclosure of information identifying the residents would not be fair in view of the reasonable expectation of confidence that they would have had.
48. The Council also applied the exemption under section 40(2) to information relating to an out of hours telephone call made by the complainant to a planning officer at the Council. The information withheld consisted of a file note dated 2 August 2006 and an email from the planning officer dated 2 August 2006. Having considered the contents of the planning officers' email dated 2 August 2006, the Commissioner was satisfied that the email represented the personal data of the planning officer. He was also satisfied that the officer would have written the email with an expectation of confidence and that this was a reasonable expectation for her to have had in view of the fact that the problem discussed occurred outside work.
49. It will not necessarily be unfair to disclose information if the person did not expect disclosure however it will be unfair if there are no other circumstances that suggest disclosure would be fair. The Commissioner was satisfied that there were no circumstances in this particular case that would mean it would be fair to override the reasonable expectation that the planning officer would have had. The Commissioner therefore agreed with the Council that section 40(2) had been correctly applied to this email as disclosure in these circumstances would be unfair. The Commissioner reached the same conclusion in respect of the file note as the Commissioner considered that it recorded details of a confidential discussion about the problem and what action the Council had decided to take.
50. The Council claimed draft witness statements it held were exempt under section 30(2)(a)(iv) and section 42(1) of the FOIA. Although the Council did not rely upon section 40(2) in relation to the draft witness statements, the Commissioner decided that it was appropriate for him to consider its application in this case. The Commissioner decided that it would not be necessary to consider the application of the other exemptions claimed by the Council relating to this information if he was satisfied that section 40(2) was engaged.
51. The Commissioner was satisfied that the witness statements constitute the personal data of the council staff members involved. The Council advised the Commissioner that the witness statements had never been put into the public

domain and the Commissioner was satisfied that the statements were given purely for the purposes of obtaining a warrant to enter the properties. He therefore concluded that the witnesses would not have expected public disclosure and that this was a reasonable expectation for them to have had. In these circumstances disclosure would be unfair. The Commissioner accepts that this information was exempt under section 40(2).

Section 42(1)

52. The exemption under section 42(1) provides that information is exempt if it is covered by Legal Professional Privilege. This principle is based on the need to protect a client's confidence that any communication with his/her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is contemplated or pending). In this case, the Council argued that the information was covered by advice privilege.
53. The Council applied this exemption to the information that the Commissioner found was actually exempt under section 40(1) of the FOIA. It also applied this exemption to some information that the Commissioner found was exempt under section 40(2) (the draft witness statements). The Commissioner therefore did not find it necessary to consider whether section 42(1) also applied to this information.
54. When the Commissioner examined the bundle of documentation provided by the Council relating to the planning enforcement action, he also noted that some of the material was duplicated and he has disregarded this material.
55. Regarding the remaining information, the Council explained that it had sought some external legal advice relating to the planning enforcement. It referred the Commissioner to 23 pages of information. Having inspected this information, the Commissioner was satisfied that the information did represent external legal advice.
56. The Council explained that some of the information constituted advice sought by its "client" departments, Planning and Environmental Health, and received from its internal legal team. It identified a number of "legally qualified persons" who had given the legal advice that was being withheld. For clarity, the phrase "legally qualified person" refers to solicitors, barristers, licensed conveyancers or qualified legal executives. The Commissioner inspected the information and he was satisfied that the following emails were covered by legal advice privilege within this category:
 - Email from LR to SG on 26 August 2004
 - Email from SG to LR on 25 August 2004
 - Email from LR to LM and SG on 19 August 2004
 - Email from SG to LM dated 19 August 2004
 - Email from SB to RK dated 20 December 2006
 - Memo from RK dated 15 December 2006
 - Email from SB to NR dated 27 February 2006

- Email from SB to NR on 6 March 2006
 - Email from AV to DF on 24 January 2006
 - Email from AB to DF on 17 January 2006
 - Email from DF to AB on 17 January 2006
 - Email from SG to RK on 23 June 2005
 - Email from NR to SB and HH on 8 March 2006
57. The Commissioner found that some emails, even though they were between a council officer and a legally qualified person at the Council, did not attract legal advice privilege because the dominant purpose of the communication in the Commissioner's opinion was not to seek or give legal advice. He found this was the case in relation to an email from LM to SG dated 19 August 2004 an email from DF to RK dated 13 November 2006 and an email from RK to DF dated 8 November 2006.
58. The Commissioner was not satisfied that the remaining information was covered by legal advice privilege. The Council had applied the exemption under section 42(1) to a large amount of correspondence that did not represent legal advice being sought from or provided by one of the legally qualified persons named by the Council. The Council argued that this information was also covered by legal advice privilege because the individuals concerned were discussing and deliberating on legal advice given by qualified legal persons. The Commissioner advised the Council that it was not enough that the information related to the Council's "legal position" and that it would need to show that the information discusses advice received from a legally qualified person. The Council did not provide any evidence to show that any of the correspondence related to advice given by a legally qualified person and for this reason, the Commissioner was unable to conclude that this information was covered by legal advice privilege.
59. The Council also sought to withhold a number of drafts of the planning enforcement notices. The Council argued that the drafts were covered by legal advice privilege because it believed that they were all provided to a legally qualified person to approve. It pointed out that some of the drafts are annotated and although the Council could not be certain that all the annotations were made by a legally qualified person, it believes that this was most likely the case. It explained that this is the usual policy when departments request legal advice on the drafting of documents. The Council also added that the annotations looked as if they had been made by a legally qualified person or were at least made in the presence of one. The Commissioner was not prepared to accept that the drafts were covered by legal advice privilege simply because they were copied to a legally qualified person to approve as the notices were created for another purpose. The Commissioner was also not prepared to accept that the associated annotations were covered by legal advice privilege when the Council was unable to provide any convincing evidence that the annotations were made by a legally qualified person.
60. The Council also applied the exemption to a letter from Asserton Cramer Law Offices dated 14 December 2006 and a copy of a letter addressed to the complainant dated 14 January 2005. The Commissioner understands that Asserton Cramer Law Offices were opposing counsel. The Commissioner did not

therefore accept that this information was covered by legal advice privilege. He also does not accept that the letter to the complainant was exempt as it was clearly created for another purpose even if it was copied to a legal person for advice.

61. The Council also provided another bundle of documents to the Commissioner that it stated related to the environmental health issues concerning the properties. It applied the exemption under section 42(1) of the FOIA. The Commissioner concluded that the majority of this information was exempt under section 40(1). However, having examined the bundle, the Commissioner considered that there was some information that was not exempt under section 40(1) because it related to the planning enforcement action rather than the environmental health enforcement action. He identified this information as follows:
- Letter to the complainant dated 3 August 2006
 - Email from RK to SH and AV dated 4 October 2006
 - Email from DF to AB dated 4 October 2006
 - Email from AB to MD and AV dated 3 August 2006
 - Email from MD to AB dated 3 August 2006
 - Email from AB to MD dated 3 August 2006
 - Email from BW to AV dated 13 June 2006
 - Email from AV to BW dated 31 May 2006
 - Email from BW to AV and SH dated 31 May 2006
62. The Commissioner concluded that the letter to the complainant was not covered by legal advice privilege. If it was copied to a solicitor, this would not in itself mean that it was exempt as it was created for a purpose other than seeking legal advice.
63. Having considered the two emails dated 4 October 2006, the Commissioner was satisfied that the first email (RK to SH and AV) was not covered by advice privilege because it was not a communication made for the dominant purpose of seeking or giving legal advice. The Commissioner was however satisfied that the second email of this date (DF to AB) represented legal advice sought from two of the legally qualified persons named by the Council. The Commissioner therefore accepts that this information was covered by legal advice privilege.
64. The Commissioner inspected the chain of emails dated 3 August 2006, and the emails dated 13 June 2006 and 31 May 2006 (two) and he was satisfied that the communications were made for the dominant purpose of giving or seeking legal advice and were therefore privileged.
65. Having satisfied himself that some of the information withheld by the Council using the exemption under section 42(1) was covered by legal advice privilege, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived. Even if information was privileged, this can be lost (waived) if the client has shared the information with third parties and it has lost its confidentiality. The Commissioner was satisfied that waiver did not apply to the information covered by legal advice privilege in this case.

Public interest arguments in favour of disclosing the requested information

66. As section 42(1) is a qualified exemption, the Commissioner also needed to consider whether he agreed with the Council that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
67. The Commissioner recognises that there exists within the FOIA itself a general presumption in favour of disclosure. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This allows the public to understand the decisions taken by public authorities and can assist them in challenging those decisions.
68. Disclosure of the information in this case would provide a fuller picture of the way in which the Council generally pursues planning enforcement problems and the way in which it pursued these problems in this case.

Public interest arguments in favour of maintaining the exemption

69. The Commissioner's guidance on section 42(1) states the following:

“Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice”.
70. In light of the above, there will always be strong arguments in favour of maintaining the public interest for this exemption because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the case of *Bellamy v Information Commissioner* (EA/2005/0023; 4 April 2006) when it stated that:

“...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”
71. The above does not mean however that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.
72. The argument in favour of disclosure can increase in cases where the matter in question affects a large number of people. There is nothing in the circumstances of this case that would lead the Commissioner to suppose that a large number of people were affected by the enforcement decision. It seems likely that the decision only affected the complainant and his company and the residents of the properties.

73. The Commissioner has also taken into account the timing of the complainant's request. The request was made on 22 March 2007 but the complainant's appeal to the Planning Inspectorate did not come to an end until 12 December 2007. There was therefore a risk that disclosure of the legal advice could have prejudiced the Council's position in this case because the matter in question was arguably still "live" until the complainant had exhausted his routes of appeal.

Balance of the public interest arguments

74. The Commissioner appreciates that there is a public interest in public authorities being as accountable as possible in relation to planning enforcement issues to help the public to understand the decision that was taken. However, the Commissioner notes that the Council places planning enforcement notices on its website so that the public are informed about where enforcement is taking place and for what reasons. Admittedly though, disclosure of the legal advice would give a fuller picture of the process involved.
75. The Commissioner also appreciates that disclosure of this type of information can assist individuals in challenging decisions. However, there is already a route available for such challenges through the independent Planning Inspectorate and the Commissioner notes that this route of appeal was pursued by the complainant in this particular case. This lessens the public interest in disclosing this type of information to help individuals to challenge decisions.
76. Although the Commissioner understands that the complainant and his company have a particular interest in this information as well as the residents of the properties, he does not consider that the wider public interest weighs heavily in the balance.
77. The Commissioner also considers that the timing of the request increased the public interest in preserving the Council's right to seek confidential legal advice without prejudice to its position.
78. In view of the above, the Commissioner considers that the public interest in maintaining the exemption in this case outweighed the public interest in disclosing the information. Protecting the right to seek confidential legal advice in the circumstances of this case outweighs the public interest in helping the public to understand more about this particular issue.

Procedural Requirements

79. The Council did not realise, until the Commissioner made it aware during his investigation, that the complainant was seeking access to both information about the planning enforcement action and the environmental health enforcement action relating to the properties. In view of this, the Commissioner considered whether he thought that the request had been unclear.
80. The Commissioner has outlined how the request was phrased in paragraph 7 of this Notice. He notes that the complainant does not refer to the planning enforcement files or environmental health enforcement files specifically but asks

only to see “copies of the files relating to [addresses of two properties]”. He also notes that the complainant refers specifically to the fact that the Council had commenced prosecution proceedings. The Commissioner considers that this ought to have made the Council realise that the complainant was also seeking access to the environmental health enforcement information and not just the planning enforcement information.

81. The Council had also initially relied upon exceptions under the EIR so it had not, within 20 working days or by the date of its internal review, applied the exemptions under the FOIA which it subsequently relied upon. In view of this, the Commissioner finds that the Council breached section 17(1) of the FOIA.
82. The Commissioner found that the Council had incorrectly withheld some information using the exemption under section 42(1). In respect of this information, the Commissioner finds that the Council breached section 10(1) for failing to disclose this information within 20 working days and 1(1)(b) for failing to disclose this information by the date of its internal review.
83. Although the complainant complained to the Commissioner that the notice issued on 4 April 2007 did not contain details of the Council's internal review procedure, the Commissioner decided not to find a breach of section 17(7) in this case because the previous notices enclosed with the notice had referred to the internal review procedure.

The Decision

84. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the FOIA:
 - It correctly applied the exemption under section 40(2) to an email dated 2 August 2006 and a file note dated 2 August 2006 and to information identifying the residents' of properties who had been in contact with the Council.
 - It correctly applied the exemption under section 42(1) and correctly determined that the public interest in maintaining the exemption outweighed the public interest in disclosing the information to the information that the Commissioner agreed was exempt in this Notice.
 - It did not breach section 17(7) by failing to provide details of its internal review procedure in its refusal notice dated 4 April 2007.
85. However, the Commissioner also decided that the following elements of the request were not dealt with in accordance with the FOIA:
 - It failed to rely on the exemptions under section 40(2), 42(1) and 30(2)(a)(iv) within 20 working days or by the date of its internal review. This was a breach of section 17(1).
 - It failed to disclose a large amount of other information that it had sought to withhold under section 42(1) when this information was not exempt. The Council

therefore breached section 10(1) by failing to provide this information within 20 working days and 1(1)(b) for failing to provide it by the date of its internal review.

Steps Required

86. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:
 - Disclose to the complainant all the information that it has been withholding apart from the information that the Commissioner has found to be exempt under section 40(1), 40(2) and 42(1) as described in this Notice.
87. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

88. 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

89. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
90. The Commissioner was particularly concerned by the severity and the frequency of the delays during his investigation partly as a result of the Council not providing information to the Commissioner in a timely manner. Unfortunately, the Commissioner found it necessary to warn the Council of his powers under section 51 to issue an Information Notice. The Commissioner trusts that the Council will carefully consider the delays in this case and take steps to improve its cooperation with the Commissioner's investigations in the future.
91. Section 7 of the DPA gives an individual the right to request copies of personal data held about them. This is referred to as the right of Subject Access. The Commissioner notes that the Council did not identify that some of the information it was withholding constituted the complainant's personal data. The Commissioner will now go on to consider whether or not to make an assessment under section 42 of the DPA. However, this consideration will be dealt with separately and will not form part of this Notice because any assessment under section 42 that might take place would be a separate legal process from the consideration of a complaint under section 50 of the FOIA.

Right of Appeal

92. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 24th day of September 2009

Signed

**David Smith
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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.”

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.”

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.”

Investigations and proceedings conducted by public authorities

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

Law enforcement

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

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.”

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) provides that in these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

–

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or

likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(5) provides that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect

–

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;