

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 26 April 2010**

**Public Authority:** St Neots Town Council  
**Address:** Council Offices  
The Priory  
St Neots  
Cambridgeshire  
PE19 2BH

### Summary

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The complainant requested a copy of a report held by St Neots Town Council ("the Council") concerning an incident in November 2007 in St Neots involving the Christmas light display. The Council provided a copy of the report with redactions and it also withheld all the appendices to the report. It stated that it wished to rely on the exemption under section 43(2) of the Freedom of Information Act 2000 ("the FOIA") and it also referred to section 7(5) of the Data Protection Act 1998 ("the DPA"). During its internal review, the Council also cited section 41(1). It did not explain why any of the exemptions applied and it did not address the public interest test relevant to section 43(2). During the Information Commissioner's ("the Commissioner") investigation, the Council sought to rely on section 42(1) and section 43(2) of the FOIA. The Commissioner investigated and agreed that the withheld information was exempt under section 42(1) because it was covered by Legal Professional Privilege. He found that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in all the circumstances of the case. He also found that the Council breached section 17(1), 17(1)(b), 17(1)(c) and 17(3)(b).

### The Commissioner's Role

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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 FOIA. This Notice sets out his decision.

## Background

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2. On 29 November 2007, a cross-street Christmas lights display in St Neots High Street collapsed which caused injury to some pedestrians and damage to a passing car.

## The Request

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3. On 16 January 2009, the complainant wrote to the Council and requested information in the following terms:

*"Can you send me a copy of the report carried out by St Neots Town Council into the accident in St Neots High Street in November 2007 when a cross street Christmas light display fell onto a pedestrian/pedestrian [sic] and a vehicle or vehicles?"*

*Can you tell me how much compensation was paid out by the council and to how many individuals?*

*Can you tell me whether the council had insurance against the Christmas lights, and if so how much of the compensation did the insurance company pay out?*

*Can you tell me whether the relevant insurance documents had been properly filled in and signed?"*

4. The Council responded on 13 February 2009. It stated that the complainant had requested a copy of "the St Neots Town Christmas lights Report" which it had enclosed with redactions. It stated that it considered that the exemption under section 43(2) applied and also referred to "the Data Protection Act 7(5)". The redacted report itself was annotated to show where information had been withheld. Upon inspection, the Commissioner noted that the annotations stated that some information had actually been withheld using the exemptions under section 41(1) and 42(1) although these exemptions had not been mentioned in the refusal notice itself. The Council did not expressly acknowledge the other requests that had been made. The Council failed to explain why any of the withheld information was exempt and it also failed to set out its considerations in respect of the public interest test that is relevant to section 43(2).
5. On 19 February 2009 the complainant wrote to the Council complaining about its response. He acknowledged that the DPA may apply to some

information but he did not consider that it could be used to withhold information concerning council staff, council members or businesses. He also questioned whether section 43(2) was engaged and pointed out that the Council had not considered the public interest test. He argued that there was considerable public interest in putting this information into the public domain.

6. The Council replied on 13 March 2009. The Council stated that the request had been reconsidered by an appeal panel who had “reaffirmed that there should be no further release of the Christmas lights failure report in the public domain”. The Council explicitly stated that it considered that section 41(1) applied although it did not explain why and it failed to acknowledge within the review the fact that it had redacted material from the report itself using the exemption under section 42(1). It did not attempt to explain the reasons why any of the information was exempt or address the public interest test. There was also no attempt to address the other requests made by the complainant.

## **The Investigation**

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### **Scope of the case**

7. On 23 March 2009 the complainant contacted the Commissioner and specifically asked him to consider the Council’s refusal notice. During the investigation, the Commissioner clarified that the complainant wished the Commissioner to investigate the Council’s failure to respond to his requests concerning compensation and insurance as well as its refusal to supply a copy of the full report he had requested.
8. During the course of the Commissioner’s investigation the Council accepted that it had failed to respond to the other requests made concerning compensation and insurance. It sent a response to the complainant which the complainant accepted. As this matter was resolved informally, it has not been addressed in the Analysis and Decision sections of this Notice.

### **Chronology**

9. On 4 August 2009, the Commissioner contacted the Council explaining that there had been a complaint about its handling of the requests. He asked for a copy of the withheld information and relevant arguments supporting the Council’s position that any of the information was exempt.

10. The Council sent a reply on 14 August 2009. The Council provided some rationale supporting its position and a copy of the withheld report (although it did not supply the appendices to the report).
11. The Commissioner wrote to the Council on 25 September 2009. He specifically pointed out that it had not responded to the other requests made concerning compensation and insurance. He asked the Council to respond in accordance with its obligations under section 1(1) of the FOIA. Regarding the report, the Commissioner stated that he had understood from the Council's internal review that the redacted parts of the report were being refused under sections 43(2), 41(1) and section 40(2). (The Commissioner explained that he understood that where the Council had cited section 7(5) of the DPA, it actually meant to refer to section 40(2) of the FOIA). He also noted that having inspected the report which contained annotations relating to the different exemptions applied, it appeared that the Council was also claiming that some information was exempt under section 42(1). He asked the Council to provide copies of the appendices to the report to the Commissioner if it wished to withhold them or else to disclose them directly to the complainant. The Commissioner also pointed out that the Council had not provided sufficient explanation for relying on the various exemptions claimed and he provided it with another opportunity to do so.
12. On 25 September 2009, the Commissioner also wrote to the complainant setting out his understanding of the complaint.
13. The complainant responded on 7 October 2009 confirming that the Commissioner had correctly understood the nature of the complaint.
14. On 22 October 2009 a solicitor acting for the Council wrote to the Commissioner. It stated that the Council accepted that it had not dealt with the requests concerning compensation and insurance and it enclosed a copy of the response that had recently been supplied to the complainant concerning these requests. The solicitor stated that the Council could legitimately claim legal professional privilege in relation to the entire report and he explained why. In relation to the public interest test he stated that it is essential to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice which in turn is fundamental to the administration of justice. He stated that the disclosure of the report would prejudice the Council's position. The solicitor also confirmed that the Council still wished to rely on section 43(2) as well and stated that he had contacted the contractors involved to obtain their views.

15. On 26 October 2009, the complainant emailed the Commissioner stating that he had now received answers to his requests concerning compensation and insurance.
16. On 6 November 2009, the Commissioner telephoned the Council's solicitor. He noted that the recent correspondence had only referred to the exemptions under section 42(1) and 43(2) and the solicitor confirmed that these were the only exemptions upon which the Council now wished to rely. The Commissioner also asked the solicitor to explain whether he believed that legal advice privilege or litigation privilege applied to the report and he stated that both applied. The Commissioner also pointed out that he had still not been supplied with a balanced analysis of relevant public interest considerations. The solicitor also confirmed that he had not yet heard from any of the contractors involved.
17. On 10 November 2009 the Commissioner sent a letter to the Council's solicitor. He pointed out that the appendices had still not been supplied and he reiterated his request to be supplied with a copy of this information. He stated that he understood that the Council would also wish to withhold the appendices using the exemption under section 42(1). The Commissioner set out his view that the relevant branch of Legal Professional Privilege in this case was litigation privilege rather than advice privilege because the information did not represent legal advice. It was a report prepared by a third party. He asked a number of questions designed to help him to consider whether litigation privilege applied to the report. He also set a deadline for responses from the contractors regarding the exemption under section 43(2).
18. On 10 November 2009 the Commissioner also wrote to the complainant. He stated that as it appeared that the Council had now responded to the requests concerning compensation and insurance, the Commissioner therefore now only intended to consider the withheld parts of the report. He set out the Council's new position regarding the withheld information.
19. On 16 November 2009 the complainant replied to the Commissioner stating that he was happy for the Commissioner to limit his investigation only to the withheld parts of the report.
20. The Council's solicitor wrote to the Commissioner on 25 November 2009. He stated that he had now enclosed a copy of the appendices to the report for the Commissioner's inspection and he confirmed that the Council wished to withhold these using the exemption under section 42(1). He responded to the questions that had been posed by the Commissioner. He also confirmed that the contractors had been informed of the deadline for their response.

21. On 11 December 2009, the Council's solicitors wrote to the Commissioner again. He stated that he had enclosed the responses he had received from the contractors. One letter contained an objection to the disclosure of a company name and the second letter contained an objection to the disclosure of a company name and "any associated commercial sensitive material".
22. On 4 January 2010 and 21 January 2010, the Commissioner contacted the Council's solicitor to discuss the circumstances at the time of the request. The Council replied to the Commissioner on 3 February 2010.
23. On 11 February 2010, the Commissioner wrote to the Council's solicitors to ask some additional questions to help him to consider the application of section 42(1) to the information.
24. On 24 February 2010, the Commissioner received a response from the Council itself asking for more time to consider its position.
25. The next day the Commissioner telephoned the Council. The Council confirmed that its solicitors were no longer acting on its behalf. The Commissioner and the Council agreed an extension of time.
26. On 11 March 2010, the Council provided its response. It confirmed that it wished to maintain its position that all of the information was exempt under section 42(1) and that the public interest favoured maintaining that exemption.

## **Analysis**

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### **Exemptions**

#### **Section 42(1) – Legal Professional Privilege**

27. Section 42(1) provides an exemption for information that is protected by Legal Professional Privilege. The 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).
28. Having inspected the withheld information within the report, which was produced by a third party, the Commissioner does not accept that it

represents or contains legal advice and he therefore does not accept that legal advice privilege is relevant to his considerations.

29. The Council's solicitors also argued that litigation privilege was relevant in this case. Litigation privilege applies when litigation (legal action before a court) is underway or anticipated. There must be a reasonable prospect of litigation – a real likelihood, not just a fear or possibility. For information to be covered by litigation privilege, it must generally have been created for the “dominant purpose” of obtaining legal advice on the litigation for lawyers to use or in preparing the case. Litigation privilege can cover a wide variety of information, including advice, correspondence, notes, evidence, reports and other documents. It will for example include confidential communications with third parties outside the lawyer-client relationship, as long as those communications were made to assist the lawyer with the preparation of the case.
30. The Council's solicitor confirmed that the report was prepared for the main purpose of obtaining legal advice on litigation and/or for lawyers to use in the preparation of the case. The solicitor also confirmed that at the time of the request there was a real likelihood of litigation concerning claims from the public for injuries or damage to property and in relation to contractual issues. He also explained that the incident was being investigated by the Health and Safety Executive (“The HSE”) at the time of the request and that this remains the case. The solicitor explained that the HSE is expected to make the final decision about whether to prosecute soon.
31. Having considered the above circumstances at the date of the request, and the remit of the report as described in the report itself and its contents, the Commissioner accepts that the information was covered by litigation privilege.
32. Even though the Commissioner accepts that the information was privileged, he has also considered the fact that Legal Professional Privilege will no longer apply if information loses its confidential character by being put into the public domain. Having considered the circumstances of this case the Commissioner was satisfied that, as at the date of the request, the withheld information had not lost its confidential character and that privilege therefore still applied. .

### **Public interest arguments in favour of disclosing the requested information**

33. The Commissioner has taken into account 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 in turn can help increase public understanding and participation.

34. The Commissioner notes that disclosure of this information would help the complainant and other members of the public to understand more about the reasons behind the incident concerning the Christmas lights display. He accepts that informed public debate has the potential to influence the actions of public authorities.
35. The public interest in transparency and accountability is also strengthened in this case in view of the fact that the problem which occurred affected the safety of the general public. The Commissioner accepts that the public interest is served by disclosing information which can show whether or not public authorities or contractors engaged by public authorities are to blame for problems, particularly problems that risk lives. This would be in the public interest in terms of accountability, and also because informed debate on this issue could influence the actions of this and other public authorities in relation to ensuring the safety of the public in the future.

### **Public interest arguments in favour of maintaining the exemption**

36. 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".*

37. In light of the above, there will always be a strong argument in favour of maintaining the 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..."*

38. 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.

39. As well as the above, the Commissioner has taken into account the timing of the complainant's requests. He notes that at that time, the HSE had begun an investigation with a view to making a decision on whether to prosecute. He also notes that there was a significant risk of litigation ensuing in respect of contractual problems and claims being made by members of the public affected by the incident. The public interest in allowing the Council to consider its legal position in confidence had therefore not been diminished by the passage of time in this case.

### **Balance of the public interest arguments**

40. The Commissioner appreciates that there is a significant public interest in disclosure of this information because it concerns an incident that clearly affected public safety and he accepts that the incident will have caused legitimate concern amongst the public. He also accepts that disclosure could assist public authorities in ensuring the safety of the public in the future. He considers that regardless of the HSE investigation there remains a public interest in disclosure under FOIA to encourage further public understanding of the issues and public participation in the debate. However, he does not consider that the public interest in disclosure weighs as heavily in the balance when compared to the strong public interest inherent in maintaining the Council's right to consult with its lawyers and prepare its legal case in confidence. This is particularly so in view of the fact that the issue of liability for this incident was unresolved at the time of the request and remains so. He notes that the incident, although serious, affected relatively few people.
41. In view of the above, the Commissioner therefore concludes that in the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Procedural Requirements**

42. In its refusal notice on 13 February 2009, the Council cited the exemption under section 43(2) of the FOIA but it failed to explain why the exemption was applicable in the circumstances of the case. This represented a breach of section 17(1) because the Council should state why an exemption applies to information within 20 working days of a request in accordance with section 17(1)(c). As the Council had not rectified this failing by the date of its internal review, this was a breach of section 17(1)(c).

43. The Council also failed to state within 20 working days, or within a reasonable amount of time, any reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption under section 43(2) outweighed the public interest in disclosing the information. This was a breach of section 17(3)(b).
44. The Council also relied on section 42(1) during the Commissioner's investigation. This exemption had not been cited in either the Council's initial refusal notice or its internal review. For clarity, the Commissioner does not consider that it was sufficient to quote this exemption only in an annotated version of the report. As this exemption was not claimed within 20 working days of the request, the Council breached section 17(1). As it had still not claimed this exemption by the date of its internal review, it breached section 17(1)(b) for failing to state that the information was exempt for this reason. It also breached section 17(1)(c) for failing to state why the exemption applied.
45. The Council also failed to state within 20 working days, or within a reasonable amount of time, any reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption under section 42(1) outweighed the public interest in disclosing the information. This was a breach of section 17(3)(b).

## The Decision

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46. 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 relied upon section 42(1) as the withheld information was covered by Legal Professional Privilege.
  - It correctly determined that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in all the circumstances of the case.
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:
  - The Council breached section 17(1) for failing to explain why the exemption under section 43(2) applied to the information within 20 working days of the request.
  - As it had not rectified the above failing by the date of its internal review, it also breached section 17(1)(c).

- It breached section 17(3)(b) for failing to set out its considerations in respect of the public interest test relating to section 43(2) within 20 working days or within a reasonable amount of time in the circumstances.
- The Council breached section 17(1) for failing to specify within 20 working days that it wished to rely on section 42(1) and for failing to explain why the exemption applied within 20 working days.
- As the above failings were not rectified by the date of the internal review, the Council breached section 17(1)(b) and 17(1)(c).
- It also breached section 17(3)(b) for failing to set out its considerations in respect of the public interest test relating to section 42(1) in accordance with section 17(3)(b).

## **Steps Required**

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48. The Commissioner requires no steps to be taken.

## Right of Appeal

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49. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 26<sup>th</sup> day of April 2010**

**Signed .....**

**Lisa Adshead  
Group Manager**

**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.”

### Effect of Exemptions

Section 2(2) provides that –

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

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

### 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."

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 -

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

#### 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."

#### 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)."