

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 30th November 2005

Name of Public Authority: Thanet District Council

Address of Public Authority: P.O. Box 9
Cecil Street
Margate
Kent
CT9 1XZ

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint which states that on 5 January 2005 the following information was requested from Thanet District Council ("Thanet DC") under section 1 of the Freedom of Information Act 2000 (the "Act"):

Please inform me when I can view the legal advice that TDC sought regarding the night flying policy at KIA [Kent International Airport - also known as Manston Airport].

It is alleged that Thanet DC refused to disclose this information to the complainant citing the exemption under section 42 of the Act ('legal professional privilege'). The complainant contends that this exemption is not valid.

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

In reaching this decision, the Commissioner has taken a number of factors into account, including all of the submissions of both the complainant and the public authority.

Validity of section 42 exemption

Turning first to the question of whether the information requested is exempt information under section 42 of the Act, the Commissioner has seen a copy of the information in question and following this review, the Commissioner has concluded that legal professional privilege is attached to the requested information.

The Commissioner is satisfied that the information contained within the document dated 12 January 2005 does constitute legal advice which has been provided to Thanet DC. The document discusses various points of law in relation to the night flights at Kent International Airport ("Manston Airport").

After reviewing the requested information, the Commissioner is satisfied that it was provided to Thanet DC by Legal Counsel. The document itself is in the standard format used to provide Counsel's Opinion, including the name of the barrister who provided the advice and the name of the Chambers where he practices from.

Further, the Commissioner is satisfied that the Legal Adviser was competent to provide the Opinion and as such this advice is subject to legal professional privilege.

In determining whether legal professional privilege continues to apply to the requested information, the Commissioner has carefully considered whether Thanet DC has waived legal professional privilege by publicly disclosing the legal advice. Thanet DC has provided an assurance that the advice has not been disclosed to the public. The Commissioner is satisfied with this assurance and believes that privilege has not been waived.

The public interest test

The Commissioner believes that, in this case, there are a number of arguments both for and against disclosing the requested information.

The Commissioner recognises that there is an inherent public interest that public authorities are transparent in the decisions they take in order to promote accountability. If reasons for decisions are made public, there is a strong argument that this should improve the quality of future decisions.

The Commissioner accepts that there is a strong public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately.

It is in the public interest to disclose information where this would help further the understanding of and participation in the public debate of issues of the day. This would assist in increasing the public's understanding of how public authorities' decisions affect them and, where appropriate, allow the public to challenge these decisions.

However, the Commissioner also acknowledges that there is a strong public interest in protecting the established principle of confidentiality in

communications between lawyers and their clients. This promotes respect for the law, encourages clients to seek legal advice and allows for full and frank exchanges. This is a compelling reason that the information should not be disclosed.

There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future.

It is vital that public authorities are able to obtain full and frank legal advice to aid in compliance with their legal obligations and conducting their business accordingly. As legal advice has to be fair, frank and reasoned, it is inevitable that it will highlight the strengths and weaknesses of any course of action. If legal advice were to be routinely disclosed, public authorities may be reluctant to seek advice as it could contain information which may damage their position. Subsequently, public authorities not seeking legal advice may be less able to properly comply with their legal obligations.

Thanet DC sought Counsel's Opinion for a specific and legitimate purpose. In this particular case, the advice was sought to enable Thanet DC to ensure that they were complying with their legal duties relating to night flights at Manston Airport. It is critical that Thanet DC, as well as other public authorities, are able to fulfil their current, and any future, legal obligations. The Commissioner recognises the importance of Thanet DC being able to obtain thorough, confidential legal advice.

Taking into account the public interest in Thanet DC complying with their legal obligations and the public interest in protecting the established principle of legal professional privilege, the Commissioner believes that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested by the complainant.

Summary of Commissioner's decision

After careful consideration of all the relevant facts of this case, the Commissioner concludes that the section 42 exemption is valid and that the public interest in maintaining this exemption currently overrides the public interest in disclosing the requested information. Section 42(1) of the Act 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.

Therefore, Thanet DC is not obliged to disclose the information requested.

Action Required

In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he does not require any remedial steps to be taken by Thanet DC.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

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

Dated the 30th day of November 2005

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF