

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

18 August 2010

**Public Authority:** Somerset County Council  
**Address:** County Hall  
Taunton  
Somerset  
TA1 4DY

### Summary

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The complainant requested the Council to disclose the recorded information it holds relating to its decision to cover the court costs that may or may not be awarded to a named party in particular proceedings should the appellants' appeal succeed. The Council responded to this request refusing to disclose any information relating to the court case under section 42 of the Act. During the Commissioner's investigation it was established that the Council holds two pieces of information relevant to the complainant's request. These are referred to as item 1 and item 2 throughout the Notice. In respect of item 1, the Commissioner concluded that this information was exempt from disclosure under section 42(1) of the Act. However, in respect of item 2, the Commissioner decided that the Council had waived its right to claim legal professional privilege to this information. He therefore concluded that section 42(1) of the Act did not apply to this information and requested the Council to release this information to the complainant within 35 days of this Notice.

### 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. In 2005 the Council laid proceedings in Yeovil Magistrates' Court against a member of the public (referred to as the 'appellants' in the body of the Notice) alleging they had unlawfully obstructed a public right of way by erecting gates across it. The member of the public was convicted of wilful obstruction but was not ordered to remove the gates, despite being invited by the Council to make such an order. At this time no further action was taken.
3. However, in 2007, another member of the public (referred to as the 'unnamed person' throughout the Notice) brought proceedings in the same court under section 130B of the Highways Act 1980 seeking an order that the Council, as highways authority, fulfil its statutory duty to remove the obstruction to the public right of way. At the conclusion of this hearing the Council was ordered to remove the gates. It was, however, unable to do so as an appeal had been lodged.
4. The appeal was heard in Taunton Crown Court in December 2008. At the appeal the Council was ordered to remove the gates and costs were awarded against the appellants. Again the Council was unable to comply because the appellants had lodged a further appeal in the High Court. This appeal was heard in January/February 2010.

## The Request

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5. On 8 September 2009 the complainant contacted the Council to request that the following information be disclosed under the Act:

"I would like to know what progress has been made in the above case and whether the County Council is still prepared to indemnify [name redacted] from public funds if he loses his case?"

The Background section details the case referred to in the complainant's request. At the time of the information request, an appeal had been lodged at Taunton Crown Court and this was due to be heard. The first element requested to know what progress had been made and the second element of the request concerned the Council's decision to cover any of the appellants' costs that may be awarded against the 'unnamed person' if the appellants' appeal were to succeed.

6. The Council responded on 2 October 2009. In terms of recorded information that is held relevant to the request, it confirmed that it

does hold information about the legal proceedings in question. However, it was unwilling to disclose any of this information, as it considered that it was exempt from disclosure under section 42 of the Act.

7. As the complainant remained dissatisfied, he wrote to the Council on 12 October 2009 to request an internal review.
8. The Council responded on 4 November 2009. It provided a further more detailed explanation concerning the court case in question; what progress had been made and what costs it had agreed to cover. In terms of recorded information, it advised the complainant that it remained of the opinion that the recorded information it holds relating to the legal proceedings in question is exempt from disclosure under section 42 of the Act.

## The Investigation

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### Scope of the case

9. On 17 November 2009 the complainant contacted the Commissioner to complain about the way the second element of his information request (court costs) had been handled. Specifically, the complainant was unhappy with the explanations he had received from the Council regarding the issue of court costs and the Council's decision to withhold recorded information relating to this matter under section 42(1) of the Act. He advised the Commissioner that he does not agree with the Council's decision to indemnify the 'unnamed person' and required access to any recorded information relating to this decision to understand more fully why such an assurance has been made at the expense of the taxpayer.
10. The Commissioner explained to the complainant that the Act only provides a right of access to recorded information. It does not require a public authority to provide explanations or answer questions unless these explanations or answers are already held in recorded information it holds. This Notice will therefore focus on what recorded information is held relevant to the request and whether the Council were correct to withhold this information under section 42(1) of the Act.
11. The Commissioner was satisfied that the wording of the second element of the complainant's request would include recorded information to explain why the decision to indemnify the 'unnamed

person' was made. During the investigation it was established that the following recorded information is held:

1. advice received from Counsel regarding the issues of costs
  2. a document referred to by the Council as the "letter of comfort", which was sent to the 'unnamed person's' solicitor detailing the costs it would cover if the appellant's appeal were to succeed.
12. The complainant confirmed in writing to the Commissioner on 6 May 2010 that he wishes to pursue access to both documents.

### **Chronology**

13. The Commissioner wrote to the Council on 30 November 2009 to confirm he had received a complaint from the complainant and to request a copy of the withheld information.
14. The Council responded on 23 December 2009 providing a detailed explanation of the background to this request. Regarding the Commissioner's request to receive a copy of the withheld information, the Council asked him to clarify exactly what information the complainant was seeking.
15. The Commissioner wrote to the Council on 10 February 2010. He informed the Council that he requires a copy of all recorded information that is held which addresses or answers the second element of the complainant's request and asked again that this be provided. The Commissioner also requested the Council to explain in further detail why it is of the view that this information is exempt from disclosure under section 42(1) of the Act.
16. The Council responded on 25 February 2010. It described the recorded information it holds (item 1 and 2, as outlined in paragraph 11 above) and provided a copy to the Commissioner. It also explained in more detail why it considers section 42(1) of the Act applies in this case. It confirmed that item 1 had not been shared, copied or disclosed to any other party and remained confidential. However, item 2 was inadvertently disclosed by the 'unnamed person's' solicitor during the court hearing as part of the court papers.
17. The Commissioner wrote to the Council on 20 April 2010 to request some additional information concerning item 2 and the circumstances surrounding the disclosure during the court process.
18. The Council responded on 21 April 2010 providing the additional information requested.

## Analysis

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### Exemptions

#### Section 42(1) – legal professional privilege

19. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
20. There are two categories of legal professional privilege – advice privilege and litigation privilege. Advice privilege applies to information created for the dominant purpose of seeking or giving legal advice. Litigation privilege applies to information created for the dominant purpose of obtaining legal advice on the litigation or for lawyers to use in preparing a legal case. Litigation privilege only applies when litigation is underway or anticipated.
21. In this particular case the Council has claimed that the information is subject to litigation privilege. The Commissioner will therefore first consider whether items 1 and 2 as outlined in paragraph 8 above fall within this category of legal professional privilege.
22. Item 1 is legal advice the Council received from Counsel on the issue of court costs and its ability to offer assurance to the ‘unnamed person’ should the appellants’ appeal succeed. It is apparent that this document was created for the dominant purpose of obtaining advice relating to the litigation which was underway. It was created shortly after a court hearing when it was known to the Council or at least strongly anticipated that the appellants would appeal. Item 2 is a letter issued by the Council to the ‘unnamed person’s’ solicitor detailing the assurance in place regarding costs should the appellants’ appeal succeed. It contains some legal advice obtained by the Council concerning the potential outcome of the appeal. The legal advice contained in this document is different to the legal advice the Council received in item 1. Item 2 is a confidential communication between the Council and the ‘unnamed person’s’ solicitor, which was created for that solicitor to use in preparing for the appeal.
23. The Commissioner has reviewed the requested information and he is satisfied for the reasons explained above that the information falls within the category of litigation privilege and is therefore subject to legal professional privilege.

24. Although not claimed by the Council, the Commissioner is also satisfied that advice privilege applies to items 1 and 2, as both documents contain legal advice obtained by the Council concerning the appeal.
25. As the Commissioner is satisfied that the requested information is covered by legal professional privilege, it is now necessary for him to consider whether the Council has waived its right to claim such privilege to either document.
26. Privilege belongs to the client, in this case the Council. Only the client can waive privilege. It is generally considered that a public authority has waived its right to claim privilege if it has shared, copied or disclosed privileged information to the public or to another party free of restriction.
27. In the Information Tribunal hearing of *Kirkaldie V Information Commissioner and Thanet District Council (EA/2006/001)* The Tribunal stated  
  
"...waiver is an objective not subjective principle. Whether a party intended to waive privilege in a particular document is not the question. What matters is an objective analysis of what the party has done (Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529)" (*para 42*).
28. The Commissioner will first consider item 1; Counsel's advice. The Council has confirmed that this document has not been shared, copied or disclosed to any other party or to the public free of restriction. It stated that it has remained a confidential communication between the Council and its legal adviser.
29. The Commissioner is satisfied that Counsel's advice has not been shared, copied or disclosed to any other party or the public free of restriction and therefore that the Council has not waived its right to claim legal professional privilege to this document.
30. However, he does not consider that the same argument applies to item 2; the "letter of comfort" sent by the Council to the 'unnamed person's' solicitor. The Council confirmed that this information was inadvertently disclosed by the 'unnamed person's' solicitor during the court process despite the information being clearly marked as privileged. As stated above, privilege does belong to the client i.e. the Council and the Council did not choose to waive privilege at this point, as the disclosure was made by another party's solicitor. However, the Commissioner notes that once the error was brought to the Council's attention it made a conscious decision not to withdraw the information from the

court papers. It is the Commissioner's view that by taking this course of action the Council failed to reassert privilege, which would have prevented the further use of this information. The Council therefore effectively decided at this point to waive its right to claim privilege.

31. To conclude, the Commissioner is satisfied that legal professional privilege applies to item 1 and that for this information section 42(1) of the Act is engaged. However, it is the Commissioner's view that the Council has waived its right to claim legal professional privilege to item 2 and therefore section 42(1) of the Act does not apply to this information.
32. As the Commissioner is satisfied that section 42(1) of the Act does apply to item 1 of the withheld information is it now necessary for him to consider the public interest test for this part of the withheld information.

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

33. No public interest arguments in favour of disclosure were put forward by the Council. However, it is the Commissioner's view that disclosure would promote transparency and accountability within the Council and assist the public in understanding more fully the decisions it makes. It would also promote transparency and accountability in the Council's spending of public money, in this case, the public funds already directed to the legal proceedings underway. It would also assist the public in understanding more clearly what arrangements have been made between the parties concerning court costs; and why such arrangements were agreed and considered necessary.
34. Disclosure would also assist public debate and allow members of the public to challenge the decisions made by the Council. In this particular case, disclosure would assist the public in understanding the obligations of the Council under the Highways Act 1980 in relation to an alleged obstruction of a highway and why in this case legal action and specific arrangements in terms of court costs are considered necessary.

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

35. The Council argued that there is a strong public interest in maintaining the exemption. It stated that at the time of the request litigation was underway and therefore the matter to which the requested information relates is very much "live".

36. It also stated that there was evidence available to it to suggest that the complainant was campaigning on behalf of the appellants in this legal case. If the requested information was disclosed it would be passed to the appellants in this case which could be then used to their advantage.
37. The Council also argued that disclosure would adversely affect the interests of the 'unnamed person' in this legal challenge and any other person who opposes the obstruction of the highway in this case.

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

38. The Commissioner has given the arguments for and against disclosure careful consideration. He accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. In this particular case the Commissioner understands that the complainant requires access to the requested information to understand more fully why the Council has agreed to cover certain court costs should the appellants' appeal succeed. The complainant feels that the Council has already used a significant amount of public funds and resources in this legal challenge and wishes to know why in this particular case it has agreed to offer monetary assurance to the 'unnamed person'. The Commissioner accepts that there is a strong public interest in knowing how public funds are spent and ensuring that value for money is achieved.
39. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.
40. However, the Commissioner is of the view that there is a stronger public interest in maintaining this exemption due to the importance of the concept of legal professional privilege. There is a public interest in public authorities being able to obtain free and frank legal advice which goes to serve the wider administration of justice. If disclosure of legal advice were ordered this would undermine a public authority's ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated:  
  
"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak



frankly to the lawyer if there were a possibility that disclosure might later be ordered."

41. It is also the Commissioner's view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice were routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the Act. This view was supported by the Information Tribunal in the case of *Creekside Forum v Department of Culture, Media and Sport (EA/2008/0065)*. The Tribunal stated that:

"Disclosure under [the Act or Regulations] puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis."

42. There must be a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing. The Commissioner considers that this is particularly important when litigation is underway or contemplated. In this case, litigation was underway. Disclosure would upset the delicate balance of fairness between legal adversaries.
43. The Commissioner accepts that the legal advice in question is live; it discusses the legalities of offering monetary assurance to the 'unnamed person' should the appeal go a particular way and the merits of the appeal and what Counsel's view is on the likely outcome. At the time of the request litigation was underway and this advice was still being relied upon. Disclosure prior to the appeal being heard would place the Council at an unfair disadvantage. As stated above, only the Council could be compelled to disclose the information under the Act being a public authority. The appellants are private individuals who are not subject to the same provisions and would not be compelled to release their advice. If one party were unfairly disadvantaged this would adversely affect the administration of justice in this case and this would not be in the public interest.
44. In the case of *Calland V Financial Services Authority (EA/2007/0136)* the Information Tribunal stated:
- "What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential".
45. In this particular case, it is the Commissioner's view that no compelling arguments have been presented to justify the disclosure of privileged

information. He has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **The Decision**

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46. The Commissioner's decision is that the Council dealt with request in accordance with the Act in that:
- it correctly relied upon section 42(1) of the Act for the non disclosure of item 1 of the withheld information.
47. The Commissioner's decision is that the Council did not deal with the following element of the request for information in accordance with the Act:
- it incorrectly relied upon section 42(1) of the Act for the non disclosure of item 2 of the withheld information;

## **Steps Required**

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48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- the Council is requested to release item 2 of the withheld information to the complainant. Any personal data should be redacted.
49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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50. 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.

## Right of Appeal

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51. 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 sent

**Dated the 18<sup>th</sup> day of August 2010**

**Signed .....**

**Rachael Cragg  
Group Manager Complaints Resolution**

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

## **Legal Annex**

### **Freedom of Information Act 2000**

#### **Section 1(1)**

Provides that –

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

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

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

#### **Section 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.”