



# Tribunals Service

Information Tribunal

Information Tribunal Appeal Number:

Case No. EA/2006/0020

Information Commissioner's Ref:

FS50153564

Heard at the Finance & Tax Tribunal

Bedford Square London

On 13<sup>th</sup> September 2007

Decision Promulgated

4 October 2007

**BEFORE**

**DEPUTY CHAIRMAN**

**Peter Marquand**

**and**

**LAY MEMBERS**

**Gareth Jones**

**Steven Shaw**

**BETWEEN :**

**MR GEORGE RALPH**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**THE LONDON BOROUGH OF BEXLEY**

**Additional Party**

**Representations:**

**For the Appellant:**

**In person**

**For the Respondent:**

**Paul Nichols, Counsel**

**For the Additional Party:**

**James Cornwell, Counsel**

## **DECISION**

The Tribunal dismisses this appeal. The Tribunal's conclusion is that the London Borough of Bexley does not hold the information sought by Mr Ralph and has made available to him the information that it does hold.

### **Reasons for Decision**

#### **Summary Background**

1. Mr Ralph is an architect and in 2004 was acting for a client in relation to a piece of land known as Builders Yard, No. 1 Parsonage Lane in Sidcup. On behalf of his client, Mr Ralph had made various applications for planning permission in relation to No. 1 Parsonage Lane and the London Borough of Bexley ("the Council") had raised "abandonment" as a relevant issue when considering the applications. When the agenda was produced for the Council's Planning Control Committee, Mr Ralph believed that it did not refer to the issue of abandonment and therefore asked the Council for the information concerning this issue. Mr Ralph also sought to defer the consideration of the planning applications, but on the 21<sup>st</sup> April 2005, the Planning Committee refused planning permission.

#### **The Request for Information**

2. By letter dated the 2<sup>nd</sup> February 2005, Mr Ralph requested the following information:

*"I confirm my request for access to the documentation, which raised doubts about the lawful use of my client's land at Parsonage Lane, and for a copy of your response to the Planning Department on the obscure issue of abandonment"*

3. This letter was written to Mr Maughan, Assistant Director of Legal Services for the Council. Mr Maughan responded by letter of the 24<sup>th</sup> February 2005 refusing to disclose any confidential legal advice and recording his understanding that Mr Ralph had already received copies of documentation raising doubts about the lawful use of the land. It will be necessary to return to this exchange of correspondence in detail later on in this Decision. On the 1<sup>st</sup> March 2005 Mr Ralph repeated his request referring to the Freedom of Information Act (FOIA). Mr Maughan replied by letter dated the 24<sup>th</sup> March, again refusing access to legal advice.
4. By letter dated the 6<sup>th</sup> April 2005 Mr Ralph applied to the Information Commissioner enclosing correspondence, which again will be considered later in the Decision. Referring to a meeting of the Planning Control Committee on the 13<sup>th</sup> January 2005, Mr Ralph's letter stated:

*“... the issue of abandonment was omitted from the report to the Planning Committee, and the legal advice and the instigating letter were missing from the planner's file.”*

5. The Information Commissioner issued a Decision Notice dated the 11<sup>th</sup> April 2006, the conclusions of which can be summarised as follows:
  - (1) At the time Mr Ralph made his requests for information on the 2<sup>nd</sup> February and 1<sup>st</sup> March, the Council did not hold legal advice in a recorded form. Therefore, there was no obligation to provide it under FOI.
  - (2) Written legal advice had been received by the Council in the form of an email dated the 18<sup>th</sup> March 2005 (i.e. after Mr Ralph's request) and the Council had failed to comply with their obligation to provide advice and assistance under section 16 FOIA as it had not explained in its letter of the 24<sup>th</sup> March 2005 that a relevant email was in existence.

The Commissioner did not feel it necessary to address whether the Council had correctly relied upon the exemption in section 42 FOIA in relation to the legal privilege of the information in the email of the 18<sup>th</sup> March 2005.

## The First Appeal

6. By letter dated the 18<sup>th</sup> April 2006, Mr Ralph appealed to the Information Tribunal referring to various exchanges of correspondence concerning the information that Mr Ralph sought. The letter included the following:

*“To obtain the information taken into account on the legal position I wrote to Bexley on the 1<sup>st</sup> March 2005 under the Freedom of Information Act”*

7. The Information Commissioner’s Reply, served as part of the appeal, dated the 10<sup>th</sup> May 2006 dealt solely with the question of the email of the 18<sup>th</sup> March 2005 and at a Case Management hearing on the 6<sup>th</sup> July 2006 the Tribunal understood that the only information in issue was the email of the 18<sup>th</sup> March 2005. In accordance with the Directions, the parties exchanged factual evidence, again the evidence from the Commissioner and Mr Maughan for the Council, dealt with the issue only of the legal advice of the 18<sup>th</sup> March 2005. However, when the parties provided skeleton arguments (i.e. a summary of the arguments that they were going to put before the Tribunal) in advance of the final hearing planned for the 2<sup>nd</sup> November 2006, Mr Ralph expressly stated that he did not want access to the email of the 18<sup>th</sup> March 2005.
8. The final hearing was therefore adjourned and in its place a Case Management hearing took place. The Council, the Commissioner and the Tribunal had understood Mr Ralph’s appeal only to be in relation to the legal advice. However, it was evident from the letters that Mr Ralph had referred to in his Notice of Appeal, in particular the letter of the 1<sup>st</sup> March 2005, that his original request for information was wider than just a request for legal advice. As Mr Ralph was acting in person, the Tribunal decided that it would not be fair to make Mr Ralph commence the proceedings all over again. Accordingly further Directions were made.
9. As neither the Commissioner nor the Council had carried out an investigation into the existence of information other than the email of

the 18<sup>th</sup> March 2005 the Tribunal set a timetable, with the consent of the parties, to enable the Council to look for information and for the Information Commissioner to prepare a further Decision Notice in the light of the Council's response to Mr Ralph. It was also hoped that a final hearing might be avoided if the Council was able to satisfy Mr Ralph's request in any subsequent response.

10. The Tribunal also took the opportunity of asking the parties to formulate precisely what information it was that Mr Ralph was seeking (this is set out in the paragraph below).

### The Information Relevant to the Second Appeal

11. For convenience, the Tribunal will refer to the procedure subsequent to the Case Management hearing on the 2<sup>nd</sup> November 2006 as the "Second Appeal". Included as the Schedule to the Order made following the Case Management hearing on the 2<sup>nd</sup> November 2006, was a record of the information that was the subject matter of the Second Appeal. This is as follows:

*"Mr Ralph seeks the following information:*

- a. *Information provided to Bexley Council raising allegations about the abandonment of the lawful use of the land; and*
- b. *Information relating to the clarification of the issue of abandonment of the land, other than the legal advice referred in the recital to this Order [the email dated 18<sup>th</sup> March 2005]; and*
- c. *Information taken into account by planning officers in formulating their recommendations to Bexley Council's Planning Committee relating to the application for planning permission made by Mr Ralph's client in relation to the land, save insofar as the information appears on the planning file."*

*"The land" means a builders yard at the rear of No. 1 Parsonage Lane, Sidcup.*

*“Mr Ralph client” means Mr David Wells [Mr Ralph’s client’s name].”*

In this Decision the information requested will be referred to as “the information in paragraphs (a), (b) and (c) of the Schedule.”

12. Mr Ralph, following detailed discussions with the Tribunal, had confirmed that he no longer sought access to the legal advice in the email of the 18<sup>th</sup> March 2005.
13. Having made this Order, Mr Ralph made an application to the Tribunal in the belief that paragraph (c) to the Schedule was too restrictive. However, in a ruling of the 30<sup>th</sup> November 2006, the Tribunal held that Mr Ralph was incorrect in his interpretation and no order was made. A copy of the ruling dated the 30<sup>th</sup> November 2006 appears at the end of this Decision.
14. By letter dated the 16<sup>th</sup> November 2006 Mr Maughan, on behalf of the Council, wrote to Mr Ralph providing him with copies of various letters, which he said were on the planning file in any event and open to inspection and was information covered under paragraph (a) of the Schedule. The Council confirmed that it did not have any information which fell within paragraph (b) of the Schedule. In relation to the information that would be covered by paragraph (c) of the Schedule, Mr Maughan provided photographs of the land and also a computer print-out of the full history of the relevant land. Again, the details of this will be referred to in the Decision below. However, Mr Maughan referred to a letter (“the letter of 15<sup>th</sup> February 2005”) that had been provided in confidence and the Council claimed the exemption in section 41 of FOIA in respect of that information. Namely, as the information was confidential and its disclosure would constitute an actionable breach of confidence, Mr Maughan stated that the Council was not obliged to provide it to Mr Ralph.
15. The next step that the Directions had envisaged was that if Mr Ralph was not content with the response from the Council, he would trigger an application to the Information Commissioner. Unfortunately, it seems there was some misunderstanding as to the next step and post went astray, leading to a period of delay. However, in any event, the

Information Commissioner issued a Decision Notice dated the 28<sup>th</sup> March 2007 and the conclusions can be summarised as follows:

- (1) The Commissioner was satisfied that all information held by the Council had been provided to Mr Ralph in accordance with FOIA;
  - (2) The letter of 15<sup>th</sup> February 2005 that had been withheld in fact did not come within paragraphs (a), (b) or (c) of the Schedule. Therefore there was no need to consider whether section 41 applied to it; and
  - (3) As the information sought concerned planning matters it fell potentially to be dealt with under the Environmental Information Regulations (EIR), but it would have made no difference to the Commissioner's conclusions to have followed that regime as opposed to the regime in FOIA.
16. By letter dated the 29<sup>th</sup> March 2007 to the Tribunal, Mr Ralph confirmed that he did not accept the conclusion of the Decision Notice.
17. Accordingly, a further oral Case Management hearing was held on the 25<sup>th</sup> April 2007. This hearing determined the issues in the appeal and also a timetable to reach the final hearing. At that Case Management hearing Mr Ralph made it clear that he would wish to have evidence from the Chairman of the Planning Control Committee, Mrs Tonya Kelsey and Mr David Smith, the Planning Officer who had dealt with the planning applications and written key correspondence. It became clear that the Council did not intend to call either of those individuals. Furthermore, both of those individuals had refused Mr Ralph's request to attend the hearing voluntarily, and, therefore, the Tribunal issued summonses requiring their attendance at the final hearing, on Mr Ralph's application.
18. The final hearing took place on the 13<sup>th</sup> September 2007 and the Tribunal heard from Mr Ralph and evidence was taken, on oath, from the following individuals:
- (1) Mrs Tonya Kelsey, Chairman of the Planning Control Committee at the relevant time;

- (2) Mr David Smith, Planning Assistant at the Council at the relevant time;
- (3) Mrs Susan Clark, Head of Development Control at the Council; and
- (4) Mr Andrew Maughan, Assistant Director of Legal Services at the Council.

The Tribunal also had the benefit of an agreed bundle of documents including witness statements from Mrs Clark and Mr Maughan and in advance of the hearing, the written submission of the parties.

### The Issues for the Tribunal

19. As Mr Ralph was acting in person, at the hearing on the 25<sup>th</sup> April 2007 the Tribunal took time to identify the potential issues that Mr Ralph could bring forward before the Tribunal at the hearing of the appeal. Those issues were determined as:

- (1) Was the Information Commissioner correct in determining that the Freedom of Information Act was the relevant regime to determine this application rather than the Environmental Information Regulations 2004?
- (2) Was the Information Commissioner correct in deciding that the letter dated 15<sup>th</sup> February 2005 was not relevant to the information sought by Mr Ralph as set out in paragraphs (a), (b) and (c) of the Schedule? In the event that it is relevant, was the Council correct in the application of the exemption in section 41 of the Freedom of Information Act?
- (3) Was the Information Commissioner correct in concluding that the Council does not hold any further information of the type sought by Mr Ralph, as set out in paragraphs (a), (b) and (c) of the Schedule?

### The Legal Basis for the Tribunal's Jurisdiction

20. The Tribunal's remit is governed by FOIA and in particular section 58, which is also applied to appeals concerning environmental information by regulation 18 of EIR. Section 58 is set out below:



*“58 – Determination of Appeal.*

- (1) If on an appeal under section 57 the Tribunal considers –*
- a. that the Notice against which the appeal is brought is not in accordance with the law, or*
  - b. to the extent that the Notice involves an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- The Tribunal shall allow the appeal or substitute such other Notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
- (2) On such an appeal, the Tribunal may review any finding of fact on which the Notice in question was based.”*

21. The starting point for the Tribunal is the Decision Notice of the Commissioner, but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence, may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA has been correctly applied. In cases involving the public interest test, a mixed question of law and factors involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts, that would involve a finding that the Decision Notice was not in accordance with the law. The Tribunal’s powers are the same under FOIA and EIR.

Does the Council hold any Further Information (see paragraph 19(3) above)?

22. It is convenient to take this issue first. Mr Ralph’s view that the Council does hold further information rests predominantly upon two pieces of correspondence. First, a letter dated the 1<sup>st</sup> December 2004 from Mr David Smith and secondly, the letter from Mr Maughan to Mr Ralph dated the 24<sup>th</sup> February 2005. These letters are discussed in detail below. In relation to No. 1 Parsonage Lane, Mr Ralph had originally submitted a planning application to build two semi-detached properties. However, on the 19<sup>th</sup> August 2004, by letter, Mr Ralph requested the withdrawal of that application and to substitute an application for a single dwelling. On the 18<sup>th</sup> October 2004 Mr Ralph

also submitted an alternative application for planning permission for commercial use of the land. Due to a misunderstanding at the Council in relation to the substitution of the single dwelling proposal, that application was not registered by the Council until the 18<sup>th</sup> October, the same time as the alternative application. In any event, that did not make any difference as the registration was back-dated to the 19<sup>th</sup> August 2004.

23. Mr Smith explained in his oral evidence that the planning officer's role is to deal with correspondence and to prepare a report on the planning application that has been made. This report is included in what is known as the "Agenda", which is prepared for the Planning Control Committee meeting at which the planning application is to be considered (the "Agenda Report"). Mr Smith explained that at his level of experience at the time, the Agenda Reports that he had completed would have been reviewed and amended by various senior individuals, including Mrs Clark. Mr Smith said that the planning file is where all the documents relating to the planning application are kept, except any legal advice. The Planning file includes the application form, letters of notification to consultees and the responses. The letters both in support and opposing the planning application are included on the file as well as any plans and maps. Mrs Clark said that correspondence is filed chronologically and at the end of the file is the decision of the Planning Control Committee. All documents that are relevant to the application, except legal advice, would be included on the file. Mrs Clark explained that she would expect to have a full picture of the case if she considered a planning file and if a planning officer did not include any material on the file, it would be a disciplinary matter. Mrs Clark explained that the Council does not instruct officers to keep other records, although some officers will make draft notes, however, there are no such documents on the files in relation to No. 1 Parsonage Lane.

24. Mrs Clark explained that occasionally the planning department will receive letters before a formal planning application has been made, when a resident has "got wind" of a development. In those circumstances, the letters are not placed on a planning file, as there is not one, but they are kept in a pending file and then filed in the

planning file when an application for planning permission is received and a planning file is created.

25. Mr Smith recalled that in the process of preparing the agenda for the planning applications (i.e. of August and October), he had on the file a letter dated the 21<sup>st</sup> August 2004 from a Mrs W , which referred to the proposed development of No. 1 Parsonage Lane. The letter was one of the documents provided to Mr Ralph by the Council accompanying their letter dated 16<sup>th</sup> November 2006. The letter dated 21<sup>st</sup> August 2004 recorded the writer's understanding that the original application had been withdrawn (the one for semi-detached properties), but that there were proposals to develop an oast house design or to develop the land for commercial use. The letter included the following:

*"I wish to add one further point. I challenge the developer's view that this land has been in continuous use as a builder's yard. I believe that the use of the land as a builder's yard has primarily been through the "custom and use" process. In this respect, for the last 10 years the yard space has been full of old vehicles, rubble and detritus. The photos attached to the developer's original application shows some of the story, but if I tell you that they represent the yard in a much better light than it has been until now, perhaps that will indicate to you what the previous situation was.*

*The same is true of the buildings, many of which contain old fridges that cannot be easily disposed off because of their CFC content.*

*I therefore put to you that as it has been impossible to trade or operate any recognised business from these premises and especially impossible to use it as a builder's yard, that use for those purposes has lapsed."*

26. Mr Smith confirmed in his oral evidence that it was this letter, together with the history files on the land and indeed, the submissions from Mr Ralph himself that raised issues in his mind about the authorised use of the site (i.e. the issue of "abandonment"). By letter dated the 1<sup>st</sup>

December 2004 Mr Smith wrote to Mr Ralph that the two planning applications were to be taken out of the agenda for the Planning Control Committee on the 9<sup>th</sup> December 2004. Mr Smith included the following in his letter:

*“The reasons for this are twofold. Firstly, I have sought further guidance from the Council’s Legal Department regarding issues of abandonment of the commercial use of the site. Whilst I anticipated that that consultation response would have been forthcoming before the finalisation of the report, this unfortunately was not the case. Given that the very special circumstances that you put forward to allow the oast house application relates specifically to the relative acceptability of a residential dwelling as compared to a “Builders Yard” it is considered essential to receive advice on the abandonment issues before a fair and complete assessment of the proposals can be achieved. This would also prove relevant in the determination of the outline application. Therefore, it was decided necessary to withdraw both applications from the Planning Control Committee agenda – not just the outline application as initially indicated.*

*Further to this, it was also considered prudent that form TP2 be completed prior to determination. This is considered necessary regarding the oast house application so as to enable reasonable assessment of the impact of the development on the openness of the Green Belt relative to current circumstances. I appreciate that you are currently compiling the required information and look forward to receiving it.”*

27. Mr Smith explained in his oral evidence that referring to the issue of abandonment as “essential” was, with hindsight, perhaps not the best phrase to use. At the time his inexperience on the issue of abandonment meant that he thought it necessary to go to the legal department and obtain clarification. He explained that if the issue was raised in the Planning Control Committee, without it being explored in

advance, it could have resulted in a deferral of the application, he felt for that reason, further advice on the issue was necessary.

28. Mr Ralph wrote to Mrs Clark on the 3<sup>rd</sup> December 2004 expressing his concern about the deferment of the planning applications and also the fact that it had been suggested that “existing land use has been abandoned”. In particular, Mr Ralph raised the issue that the Council was still levying non-domestic rates on the land, confirming that it had been rated for commercial purposes. Mr Ralph also wrote to his client on the 6<sup>th</sup> December 2004, including an explanation of abandonment as follows:

*“It seems that the applications are diverted into the Council’s legal department under an obscure process challenge of “abandonment”. The argument being that there has been a cessation of the commercial use, which is not a principle embodied in planning law, but based upon historic court cases.”*

29. On the 13<sup>th</sup> December 2004 Mr Ralph wrote to Miss Philippa Gask, a lawyer in the Council’s legal department. Mr Ralph included various pieces of correspondence, including his letter to Mrs Clark, a letter from Bexley’s Revenue Officer confirming the commercial rates (a point referred to above) a letter from the previous owner setting out the commercial use of the land and a further letter dealing with the non-domestic rates.
30. The applications came again onto the agenda of the Planning Control Committee, but on the 13<sup>th</sup> January 2005 Mr Ralph wrote to Mrs Clark requesting that the applications were taken out of the agenda “*to allow some corrections to be planning report [Agenda Report], and the inclusion of information missing from the report and your file.*” Mr Ralph referred to an inaccurate and misleading comparison about floor area and also indicated that the issue of abandonment was omitted from the Agenda Report and that “*all related letters and legal opinion are missing.*” Mr Ralph’s concern was that those missing documents would prevent a balanced view of the application being seen by the Planning Control Committee. Mrs Clark explained that the planning

applications were deferred at Mr Ralph's request (i.e. not for another reason).

31. Mr Ralph wrote again to Mrs Clark by letter dated the 31<sup>st</sup> January 2005, including the following:

*"... the planning agenda report on the 13<sup>th</sup> January 2005 excluded any reference to the abandonment issue, which delayed my client's application, and the documents which raised such an issue, and the legal clarification which you obtained, were all missing from the planning file on the 13<sup>th</sup> January 2005.*

*It is a gross injustice to my client that the agenda report included and emphasised letters of objection to an earlier application, for a completely different scheme, withdrawn on the advice of your department."*

32. On the 2<sup>nd</sup> February 2005 Mr Ralph wrote to Mr Maughan as indicated in paragraph 2 above, requesting access to documentation concerning the issue of abandonment. Mr Maughan's reply dated 24<sup>th</sup> February 2005 was as follows:

*"I note your request for access to documentation raising doubts about the lawful use of the above land and a copy of this department's legal advice to the planning department on the issue of abandonment.*

*As previously discussed in our telephone conversation of 13 January 2005 any advice from this department on this legal issue is confidential legal advice and is therefore exempt information immune from disclosure to the public. The advice is therefore not kept on the planners file, which is available for public inspection.*

*I can, however, confirm that the supporting information (up-to-date rates etc) you sent to this office together with all other information provided by the planning department has been taken into account in the assessment of the legal*

*position and subsequent advice to the planning department.*

*I understand that you have already been provided with copies of the documentation raising doubts about the lawful use of the land which contributed to the planning department's decision to request legal advice."*

33. At the hearing Mr Ralph confirmed that at the time he had not received copies of any documentation, as the last paragraph of that letter claims. Mr Maughan, in oral evidence, said that when he received Mr Ralph's letter he spoke to Miss Gask on the telephone and he believed that at the time she had provided the legal advice. However, Mr Maughan explained that in fact at this time she had only been asked for the advice, but had not provided any written advice. Mr Maughan's letter was really dealing with the issue of release of legal advice per se. Mr Maughan cannot recall how he came to write the last paragraph quoted above, but he speculated that he had spoken to Philippa Gask, or perhaps the planning officer, and thought that Mr Ralph had already received the information on the planning file or perhaps had looked at the planning file himself.
34. In fact, Mrs Clark confirmed that at the relevant time, the planning file was only available by calling at the Council's offices. Anyone could look at the application forms and any technical detail, but not at third party correspondence unless the inspection of the file was approximately three days before the publication of the agenda that was to be considered by the Planning Control Committee. Therefore, the correspondence from third parties (supporting and/or objecting to the application) would have been available to Mr Ralph on the planning file at some time in January 2005 before the application that was due to take place on the 9<sup>th</sup>. Mrs Clark said her understanding was that Mrs Ralph had been sent the documents that were on the planning file, including the third party correspondence.
35. Mr Maughan explained that he asked Miss Gask whether she had looked at all the information that Mr Ralph had provided and that she replied "yes". Mr Maughan explained that at the time he did not have a view one way or the other as to whether abandonment was essential to

the determining of the planning application. It was simply that a colleague had been asked to give advice on this issue and that he was trying to be helpful and believed that Mr Ralph would have had access to the planning file.

36. Mrs Clark explained that the planning application in January was re-scheduled because she thought it was important not to delay the application and was satisfied that the Agenda Reports dealt with all of the issues sufficiently. She explained that over this period there had been some discussion amongst planning officers about the case. She had indeed had a discussion with the lawyer and received verbal advice, although nothing in writing. Mr Ralph had also complained previously about the time that the applications were taking and her view was, on the basis of her appraisal of the situation, and the discussions with senior legal advisers that the planning applications could go ahead. Mrs Clark confirmed that there were no notes of these conversations. However, Mr Maughan explained that this was perfectly usual practice in the context of the Council's legal advisers. Mr Maughan explained that the lawyers were not separate from the Council and did not receive formal instructions in the way that outside solicitors might do. The lawyers went to meetings and gave advice orally all the time to officers and councillors. The issue was discussed with Miss Gask, as senior lawyer and part of the legal team and it would not have been done terribly formally. In the lawyers mind, the advice is given and then it is, in this case, Mrs Clark's responsibility to form a conclusion about how best to act and then act accordingly. Mr Maughan again confirmed that the advice that Miss Gask had given was verbal and was not followed up in an email until the 18<sup>th</sup> March 2005. This is the email that was the subject matter of the "first appeal" and Mr Ralph does not seek access to it.
37. Mrs Clark wrote to Mr Ralph by letter dated the 18<sup>th</sup> April 2005 confirming that both applications were scheduled to go before the Planning Control Committee for a decision on the 21<sup>st</sup> April 2005 and she enclosed copies of both Agenda Reports. Included in that letter is the following text:

*"... whilst you seek guidance on a form of residential development that might receive the Council's support, I*



*think it is important at this stage to clarify that the Council do not at present share your opinion of the established use of the site. Any commercial use of the site is historical and has never received formal planning permission or gained established use rights. The site itself is derelict and run down, with several dilapidated buildings/sheds scattered randomly. On the basis of the information and evidence available, the Council believe that there is no substantive argument that the premises has been operating in recent times as a full builder's yard with associated workshop."*

38. There is also reference to Mrs Clark's opinion that the proposed residential development is unlikely to be consistent with the development in the Green Belt.
39. On the 21<sup>st</sup> April 2005 Mr Ralph wrote to Mrs Clark again requesting that the two planning applications were not put before the Planning Control Committee on that day. Documentation implies that Mr Ralph had not provided the reasons for wanting to have the applications again postponed, but Mrs Clark accepted in oral evidence that he had provided reasons and apologised to Mr Ralph that the documentation did not reflect this position. However, in any event, the planning applications did go before the committee and the planning officer's recommendations were accepted and the applications rejected.
40. The Tribunal had before it a copy of the Agenda Reports for the two relevant planning applications. It is common ground that neither of those reports include the word "abandonment" or "abandon". Mr Smith stated that he did not consider it necessary to include the word within the report. He explained that he had considered the issue and drafted the report to reflect the legal advice that he had been given. Mr Ralph queried how that could be the case when, in his letter of the 1<sup>st</sup> December, he had referred to the issue of abandonment as being "essential". Mr Smith explained that he would have drafted the initial report but that other officers would have amended it following briefings and advice. However, he believed it was substantially the same as the report he had prepared in January. Mr Smith said that even in retrospect he thought the report was balanced and dealt with the issue of abandonment, although the word was not mentioned.

41. Mr Smith explained that both Agenda Reports set out the history of the use of the site and have sections about the “relevant planning history”. For example, in the residential use application the following is included:

*“There are no current planning restrictions that would control activity on site as any commercial use is historical and it has never received formal planning permission nor gain established use rights. The site itself is derelict and run down, with several dilapidated buildings/sheds scattered randomly.”*

In the report on the commercial application it includes a section headed “Relevant Planning History” and in the section entitled “Special Circumstances” sets out Mr Ralph’s argument of the use as an established builder’s yard. It refers to the non-domestic rates and the letter from the previous owner about the use of the land. The conclusion however, is *“any commercial use of the site is historical and has never received formal planning permission or gained established use rights”*. These are examples and there are other references to change of use.

42. Mrs Clark explained that the Agenda Reports clearly set out the Council’s view as to the previous use of the land and the planning officer’s judgement. Mrs Clark said that she believed the Agenda Reports stated that there was no planning permission nor established use and referred to the state of the site. Her view was that the site had “no use” and that an application to the Planning Control Committee was not the correct forum for establishing the legal use of the land. Mrs Clark specifically said that she deliberately avoided using the word “abandonment” in Planning Committee Agenda Reports as it was a specific legal term. It carried with it legal ramifications and therefore she was concerned not to use it. The issue was what can the site be used for and that is what was set out in the Agenda Reports. Mrs Clark said she also had in mind that she did not want to cause the Council difficulties by apparently coming to a conclusion on the lawful use of the land by using the word “abandonment” as it could be alleged that the Council had made up its mind about a particular use, when in fact

that was not the correct route to establish the legal use of the land. The correct application was to make an application for a “legal use certificate” which indeed, was now taking place in relation to No. 1 Parsonage Lane. Mrs Clark was concerned that “abandonment” should not be used as shorthand, meaning the use of the land has changed. Mrs Clark also confirmed that the Agenda Reports did reflect the advice that she had received.

43. The Tribunal heard evidence from Mrs Kelsey, who was the Chairman of the Planning Control Committee on the 21<sup>st</sup> April 2005. Mrs Kelsey could not recall this planning application, as such, although she did recall the events of the 21<sup>st</sup> April 2005.
44. Mrs Kelsey explained that prior to the Planning Control Committee there would have been a briefing meeting with the Chair of the Committee, planning officer, the opposition spokesman and the Vice-Chair of the Committee. The Agenda, including the Agenda Reports, would have been available in draft form. The planning officer would have had the planning file available, in the event that any of the Councillors wished to see further information from that file. The purpose of the meeting was to determine how the Planning Control Committee was to be chaired and also to identify any issues that might need to be addressed in order to avoid any delays or adjournments at the final committee. Mrs Kelsey made it clear that this was not a meeting to make the decision, which would then be “rubber stamped” later by the full committee.
45. At a Planning Control Committee meeting there was a particular structure to the way the applications were dealt with. The application would be introduced by a planning officer, at the time, using an overhead display. The meetings were open to the public, hence the presentation. There was then an equal opportunity for the supporters and objectors to give their comments. After the objectors, local councillors could speak for or against the application. The committee might ask a question, which often related to traffic, and if possible, it would be answered at the committee. Members of the committee would then have a discussion, albeit without public involvement, and when Mrs Kelsey felt that all the members of the committee had had

their say, she would move to a vote. She followed this plan rigidly and never changed it.

46. Mrs Kelsey explained that if legal advice on any relevant issue was obtained, it would be in the Agenda Report as if it was not in the report, it would not be available to the members as they only had the Agenda Reports. There was, however, a solicitor at the committee who could deal with issues if they were raised and give a view. The solicitor would speak for the Council and that would be in public.
47. Mrs Kelsey explained that she could not recall whether there was any separate legal advice on 21<sup>st</sup> April 2005 relating to the two planning applications. However, if there had been, it would have been in the Agenda Report and not given in any other form. Mrs Kelsey said that she would expect to see in the Agenda Reports all the issues raised that were relevant to that application. However, she could not remember specifically about the abandonment issue in this application.
48. Mrs Kelsey was absolutely clear that she would not have tolerated any attempt by planning officers or others to persuade the Planning Control Committee to make a particular decision in relation to any planning application. She explained, in any event, that this would be impossible, given the number of members of the committee and the fact that it was put to a vote. Mrs Clark absolutely refuted any suggestion that she would try to influence the outcome of a Planning Control Committee's decision.
49. The Agenda Reports included the recommendations of the planning officer and the reasons the planning officer had to come to his/her conclusion. Mrs Kelsey explained that usually the committee adopted those reasons, although it might form reasons of its own. Mrs Clark confirmed that the reasons that appear in the Agenda Reports of the two planning applications were in fact the reasons that were adopted by the Planning Control Committee and appear in the formal record of the committee's decision of 21<sup>st</sup> April 2005. The reasons that were adopted may be summarised as rejecting the planning applications on the basis that they do not meet the requirements for development in the Green Belt.

50. Mr Smith confirmed in his oral evidence that, looking at the Agenda Reports now, he would not consider that there are any issues that had not been covered. Mrs Clark was also of the same view. Mr Smith left Bexley in March 2006 and was therefore not able to answer any questions about what was in fact contained within the planning file, but he confirmed it was not his practice to keep anything away from the planning file, apart from written legal advice. However, looking at the documents before him at the Tribunal, he did not think there was anything apparently missing, or anything that he would expect to be present. Mr Smith also confirmed that he had not destroyed or hidden any information, when questioned on this point by the Tribunal.
51. Mrs Clark also gave evidence to the Tribunal about the planning file and the searches that she had undertaken in order to respond to this appeal. Mrs Clark said that she obtained a computer print-out from 1987 onwards about No. 1 Parsonage Lane. She then went through all the planning files for the applications that were included. She also looked at the enforcement files, which are kept separately. There had been enforcement action taken by the Council in 1990 and so there is such a file about No. 1 Parsonage Lane. Mrs Clark explained that she went through everything herself, to see if there was any documentation that would be relevant to Mr Ralph's application. She also looked at the general street files, which contain queries and other correspondence that do not relate to any planning application, but to the street or properties in that street. Mrs Clark explained she looked at the street file for Parsonage Lane and North Cray Road, which is nearby. This was to make sure that nothing had been misfiled. Mrs Clark said that she could not think of anywhere else to look other than the places that she had searched.
52. Mr Maughan explained that he had met with Mrs Clark to discuss the extent of the search. Given the appeal, Mrs Clark had searched more widely than might have been required, but Mr Maughan was happy that this was a sensible approach and that she had done a proper search.
53. Mr Maughan explained in oral evidence that he is not a planning lawyer, but at the time there were two such specialists in his department. He had checked that no further written advice had been given apart from the one email of the 18<sup>th</sup> March 2005. Mrs Clark said

that she found the planning file as she expected it and there was nothing that seemed to be missing. Mrs Clark confirmed that she was at the pre-meeting before the Planning Control Committee and also present at the relevant Planning Control Committee meeting. She confirmed to the Tribunal that there was no recorded information other than that which had been made available and nothing was missing. Mr Ralph confirmed that he was not making any allegation that anyone had deliberately destroyed information.

54. Mrs Clark confirmed that all information had been made available to Mr Ralph, apart from the email dated the 18<sup>th</sup> March 2005, which is not the subject matter of this appeal and the letter dated 15<sup>th</sup> February 2005 that has been withheld (to be dealt with below). Mrs Clark confirmed that nothing would have been taken out of the file and the only things that had been added to the file were ongoing correspondence, as the file was still an active one. Mrs Clark's view was that there was nothing else to provide to Mr Ralph. Mrs Clark specifically confirmed that in relation to paragraphs (a), (b) and (c) in the Schedule, that there was no information in recorded form, whether legal advice or non-legal advice, other than that which had already been provided to Mr Ralph. Mr Maughan, in his evidence, said that he could not recall a time when members had decided a case against the advice of the legal department. He also said that there was often a large degree of cross-over between "legal advice" and "planning officers' views". Having read the Agenda Reports Mr Maughan's view was that there was a clear indication of what the legal advice had been on the use of the land and that the Council did not believe there was an existing use. Mr Maughan was confident that in responding to the Schedule, the Council had been through all of the information available. He had no idea what information it was that Mr Ralph was looking for. In his view, it simply did not exist.
55. Understandably, Mr Ralph asked why nobody had informed him before now that no information was available. Mrs Clark said that it simply did not occur to her that she should write to him because in her own mind the issue of abandonment had been dealt with in the Agenda Reports, as referred to above. Mr Maughan said that the reason he had not written to Mr Ralph along those lines, was because until the Tribunal hearing on the 2<sup>nd</sup> November 2006 he was under the impression that

the only thing Mr Ralph was seeking was the email of the 18<sup>th</sup> March 2005 and therefore that is what he had focussed on. He could not have therefore written informing Mr Ralph that information did not exist because he believed it did in the form of that email.

### The Relevant Law

56. Section 1(1) FOIA states:

*“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.”*

What amounts to “information” is set out in section 84 as follows:

*“information” (subject to sections 51(8) and 75(2)) means information recorded in any form;*

Sections 51(8) and 75(2) are not relevant.

The Environmental Information Regulations 2004 (EIR) set out at Regulation 5 the duty to make available environmental information on request and, subject to certain exceptions, it states that “...a *public authority that holds environmental information shall make it available on request.*” Regulation 2(1) states that “*“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...*”

Therefore, whether this case is determined under FOIA or EIR Mr Ralph is entitled to any information that is covered by paragraphs (a), (b) and/or (c) of the Schedule where this has been recorded and is held by the Council. Information that has not been recorded does not have to be provided.

## The Submissions

57. Mr Ralph's submissions may be summarised as follows:
- a. Mr Smith, in his letter of the 1<sup>st</sup> December 2004, had referred to the issue of abandonment as being "essential". That issue was missing from the Agenda Reports and as it was very relevant to the determination of the applications, it must exist, but not have been provided to him.
  - b. Documentation which he had provided to Philippa Gask and documentation raising doubts about the lawful use of the land were missing from the planner's file in January 2005 and not reported in the planning committee agenda for the 13<sup>th</sup> January 2005. Therefore other documents were likely to be missing.
  - c. Mr Maughan's letter of the 24<sup>th</sup> February 2005 states: "*I understand you have already been provided with copies of the documentation raising doubt about the lawful use of the land, which contributed to the planning department's decision to request legal advice*" and this therefore confirms the existence of documentation. It must have been available when the meeting was re-scheduled for the 13<sup>th</sup> January 2005. Mr Ralph also submits that planning law requires information that is essential to the determination of an application to be retained and that if the use of the land was unlawful, it would have been on Bexley's file.
58. The Commissioner's arguments were that it was clear on the evidence that no further information existed. The misunderstanding by Mr Maughan that all Mr Ralph was after was the legal advice, explains why Mr Ralph was not told earlier that information did not exist. This is supported by the evidence about the planning file and what would be on such a file. The surrounding evidence was consistent with this conclusion.
59. Mr Cornwall, for the Council, submitted the issue of abandonment had clearly been raised by Mrs W's letter of the 21<sup>st</sup> August 2004, referring



to abandonment, albeit in layman's terms. There is nothing to raise a suspicion that other documents existed.

60. We have summarised the written and oral submissions of the parties quite shortly, but we have taken the submissions into account in full.

### Findings

61. Having considered the bundle of documents, the witness statements of Mrs Clark and Mr Maughan and having heard the oral evidence of the witnesses, the Tribunal's conclusion is that there is no further recorded information of the type sought by Mr Ralph, as set out in paragraphs (a), (b) and (c) of the Schedule to the Order of the 2<sup>nd</sup> November 2006.
62. As to the information in paragraph (a) of the Schedule, Mr Smith was clear that it was the letter dated 21<sup>st</sup> August 2004, that raised the issue of abandonment. It does not use the word, but clearly goes to the cessation of a use and use only being through custom and practice. This letter, although dated before both planning applications were registered by the Council (see paragraph 22 above) was clearly written in contemplation of those applications. Accordingly we conclude this is the information sought under paragraph (a) of the Schedule and this has been provided to Mr Ralph by the Council.
63. As to paragraphs (b) and (c) of the Schedule, Mr Smith could not say specifically that there was nothing else in the file, because he no longer had access to it and it was some time ago that he did. However, he did indicate that, in his view, there was nothing apparently missing from the papers. Mrs Clark gave evidence that there was nothing missing from the planning file. In addition, there was nothing unusual when she looked at the file to give her an indication that something might have been missing. Mr Maughan confirmed that nothing further existed in his view. This is supported by the fact that the reasons for rejecting the planning applications related to the Green Belt and not abandonment. There is therefore no reason to suspect further documents exist, or existed, about abandonment as it was not as essential as Mr Smith had originally said it was.

64. Furthermore, although the Agenda Reports for the two planning applications do not refer specifically to “abandonment”, the Tribunal is satisfied that those reports do in fact deal with the issue that Mr Smith raised in his letter of the 1<sup>st</sup> December 2004. Namely, whether or not the land had been continuously used for certain purposes or whether the use of the land had changed and whether or not the land had existing planning permission. It is particularly relevant to note Mrs Clark’s evidence, that the Council specifically avoided using the word “abandonment”. Therefore, to the extent that the consideration of the issue was “essential” it had been considered and did feature within the Agenda Reports. We do not accept Mr Ralph’s interpretation of this correspondence or the Agenda Reports.
65. We are also satisfied on the evidence that the legal advice or other advice had been provided to planning officers orally and it was not until the 18<sup>th</sup> March 2005 that the legal advice was recorded in an email. Documents may have been missing from the planning file in January when Mr Ralph inspected it but we are satisfied that all the information available had formed part of the Agenda Reports and Mr Maughan’s evidence was that he had confirmed with Miss Gask that she had taken into account Mr Ralph’s information. In any case, we do not see that the absence of certain documents from the planning file in January 2005 means that one or more further documents about abandonment have not been provided to Mr Ralph and are being deliberately withheld by the Council.
66. Mr Maughan’s letter of the 24<sup>th</sup> February 2005 is clearly unfortunately worded. However, we are satisfied that this is no more than Mr Maughan indicating that he was not prepared to release the legal advice, even though he did not appreciate at the time that this advice had not been reduced to writing. Furthermore, nobody told Mr Ralph of the non-existence of further information as first, it seemed that Mr Ralph was in fact seeking the email dated 18<sup>th</sup> March 2005. It only became clear this was not the case in November 2006. Secondly, the Council believed Mr Ralph had seen everything else it had, which was in the planning file. Accordingly, we do not see any evidence to suggest that Mr Maughan was, at that time, referring to some further documentation, which is being withheld.

67. The Tribunal is also of the view that there is no evidence to suggest that the planning file has been tampered with or documents destroyed, whether deliberately or inadvertently. The Tribunal is also satisfied that those who gave evidence before it, under oath, did so honestly and to assist the Tribunal as best they could. The Tribunal found no reason to suspect dishonesty or a deliberate attempt to mislead anybody.
68. The Tribunal is also satisfied that the searches conducted by the Council comfortably satisfy the requirement for a reasonable search and that the Council's conclusion that they do not hold any further information (as referred to in the Schedule) is reasonable. The Tribunal's conclusion is that, on a balance of probabilities the Council does not hold any further information. In fact, it is more likely than not that the Council never held any information, within the meaning of FOIA, that fell within the category of paragraph (b) of the Schedule.

Was the Information Commissioner correct in deciding that the withheld letter was not relevant to the information sought by Mr Ralph (see paragraph 19(2) above)?

69. In accordance with the Directions, the Council disclosed to the Tribunal the letter dated 15<sup>th</sup> February 2005, which it had withheld and which is referred to in the Decision Notice of the Information Commissioner, at paragraph 19. The letter was not supplied to Mr Ralph. The Information Commissioner and the Council produced confidential submissions for the Tribunal on that piece of correspondence.
70. The letter is addressed to Mrs Clark and comes from a source external to the Council. It is not necessary for us to set out in detail the content of that letter, and indeed, given our conclusion on this issue it would not be appropriate to do so. Nevertheless, the letter does refer to the two planning applications made by Mr Ralph on behalf of his client and does including the word "abandonment", but only to ask what it means. In the course of the hearing the letter was shown to Mr Smith, who had the opportunity to read it. His evidence was that he did not believe that the content of the letter would have contributed to the recommendations he made and he would not have taken it into account in formulating those recommendations. Mrs Clark was also shown the letter, with which she was familiar. Mrs Clark confirmed that

she had read it at the time of the planning applications, but she did not believe it added anything of substance. She stated that it took no part in formulating the planning officers' recommendations and in fact, Mrs Clark said that she remembered this quite clearly.

71. The Tribunal's conclusion is that the letter of the 15<sup>th</sup> February 2005 is obviously confidential. The contents of the letter are not about abandonment nor does it raise abandonment as an issue concerning the land No. 1 Parsonage Lane. It is not a document falling within paragraph (a) of the Schedule. It is clearly not a document within paragraph (b) of the Schedule either. Furthermore, the Tribunal accepts the evidence of Mr Smith and Mrs Clark that this letter took no part in formulating their recommendations to the Planning Control Committee. The Tribunal is supported in this as on our own assessment, it could not be said to be relevant information. Accordingly it is not within paragraph (c) of the Schedule. The Tribunal's conclusion is that the Information Commissioner was correct to conclude this letter was not covered by the request for information.

### Conclusion

71. Given our conclusions on the issues set out in paragraphs 19(2) and (3) we do not need to consider the issue at paragraph 19(1). In relation to whether the Council holds information the outcome is the same under FOIA and EIR.
72. Mr Ralph has been clear throughout these proceedings that he feels that the client for whom he acted has suffered an injustice as a result of the rejection of the planning applications. Mr Ralph has made various criticisms about the planning process. However, this Tribunal's jurisdiction only extends to information that has been recorded and a Public Authority's obligation to provide it under FOIA and EIR. Mr Ralph is convinced that because the issue of abandonment was raised, that there must be some written documentation referring to that issue and he has not had access to it. Whilst we can understand how Mr Ralph came to question the existence of information, the Tribunal is satisfied, having considered the evidence, that this further information does not exist in recorded form and the Council has provided to Mr

Ralph the information it holds that is relevant to his requests. Our decision is unanimous.

73. Accordingly, this Appeal is dismissed and the Decision Notice of the Information Commissioner is upheld.

Peter Marquand  
Deputy Chairman

Dated: 4 October 2007