

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 30 June 2011

**Public Authority:** London Borough of Hackney  
**Address:** Town Hall  
Mare Street  
London  
E8 1EA

### Summary

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The complainant asked London Borough of Hackney ('LBH') for a copy of external legal advice it received in respect of the action it took when a phone conversation was placed online.

LBH said that it held the requested information, but would not provide it by virtue of section 42(1) of the Act (legal professional privilege). The complainant requested an internal review and LBH upheld its initial position.

The Commissioner finds that the information was withheld appropriately under section 42(1). He is satisfied that the exemption was engaged and in all the circumstances of the case the balance of public interest favoured maintaining the exemption.

However, he did find procedural breaches of the Act because LBH failed to answer the complainant's request in 20 working days. He requires no remedial steps to be taken in this case.

### 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. On 4 May 2010, the 'Hackney Citizen' posted audio recordings of a telephone conversation between a Mayoral candidate and one of LBH's call centre operators on its website.
3. On 6 May 2010, LBH's legal department wrote a letter to the Editor of the 'Hackney Citizen' asking it to remove the item otherwise it would seek an injunction.
4. LBH explained to the public that external legal advice was sought about this matter. The complainant asked about that advice.

## The Request

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5. On 11 July 2010 the complainant requested the following:

*'... With specific regard to the matter of the Council's 6 May 2010 injunction threat, please provide all of the following information:*

- (i) *Please confirm whether or not an external solicitor was instructed to give advice to the Council on the audio recordings and the data of those instructions (if any);*
  - (ii) *Please provide the external instructed solicitor's name and firm;*
  - (iii) *Please provide the date any such advice was received by the Council;*
  - (iv) *Please indicate the fee paid (if any) by the Council for the external solicitor's advice; and*
  - (v) *Please provide a copy of said external solicitor's advice (if any).*
6. Having received no response, the complainant telephoned LBH on 11 August 2010 to ask about it. She followed this up in writing the next day.
  7. On 17 August 2010 LBH issued its response. It apologised for it being late. It provided the information for requests (i), (ii) and (iv). It provided an ambiguous response for request (iii). It explained that for item (v), the information was held, but it was exempt from disclosure by

virtue of section 42(1) (legal professional privilege)<sup>1</sup>. It explained why it believed that the public interest favoured maintaining the exemption. It also provided its internal review details.

8. On 24 August 2010 the complainant asked LBH to conduct an internal review into its handling of requests (iii) and (v). She explained that the response to (iii) did not answer her question, because it failed to particularise the dates. She also explained that she did not believe that the public interest test was considered properly and explained the factors that she believed should be taken into account.
9. On 13 October 2010 LBH communicated the results of its internal review. It provided a full answer to request (iii), but still withheld the information for request (v). It explained that it had considered the situation again and believed that section 42(1) had been applied appropriately in this case. It outlined the factors it had considered and explained why it believed that the public interest favoured maintaining the exemption. It provided the Commissioner's details as a right of appeal.

## The Investigation

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### Scope of the case

10. On 24 October 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked him to consider the following:
  - (i) The legal advice she asked for in request (v) should be provided to the public.
  - (ii) The reviewer may have been conflicted in that the information concerned their potential actions.
  - (iii) The disclosure of the information would illustrate whether there were any misrepresentations.
  - (iv) There were serious public interest factors that favoured disclosure in a situation where a public authority tries to chill the freedom of speech.

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<sup>1</sup> All of the sections of a statute that are cited in this Notice can be found in full in the Legal Annex attached to it.

- (v) She also provided a number of further arguments about the operation of the exemption.

11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the Commissioner cannot consider the lawfulness or otherwise of the actions of LBH in its engagement with the press.

### **Chronology**

12. On 9 December 2010 the Commissioner wrote to the complainant and LBH to explain that the complaint was eligible for consideration. He asked LBH for a copy of the withheld information.
13. On 14 January 2011 LBH provided the Commissioner with a copy of the withheld information.
14. On 4 April 2011 the Commissioner provided a detailed update to the complainant and explained the scope of his investigation.
15. On 8 April 2011 the Commissioner made detailed further enquiries of LBH. He received a response on 27 May 2011.

### **Analysis**

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#### **Substantive Procedural Matters**

#### **Exemptions**

16. LBH has explained in its view that all of the withheld information is covered by legal professional privilege and that it can apply section 42(1) to it all. It also explained that in its view the public interest in maintaining the exemption outweighed that in disclosing the material.
17. Section 42(1) of the Act is worded as follows:

*"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information."*

18. The application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] ("*Bellamy*") where legal professional privilege was described as: -

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client."* (Paragraph 9)

19. Section 42(1) is a qualified exemption. This means a two step approach needs to be taken. The Commissioner must first consider whether the exemption is engaged and then, where it is, he will go on to consider whether or not the balance of public interest favours maintaining the exemption.

**(1) *Is the exemption engaged?***

20. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.

21. LBH has confirmed to the Commissioner that the category of privilege which it is relying on to withhold this information is advice privilege.

22. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, even where there is no pending or contemplated litigation. It was considered in detail by the House of Lords in the *Three Rivers* case<sup>2</sup> and it explained that there were three requirements for material to be covered by legal professional advice privilege. The Commissioner has adopted this approach in this case and these factors can be summarised as follows:

1. the communication must be between a qualified lawyer acting in their professional capacity and a client;
2. it must be created with the sole or dominant purpose of obtaining or providing legal advice; and
3. it must be confidential.

23. The first requirement is one of fact. In this case all the information amounts to communications between a lawyer acting in their professional capacity and a member of staff of LBH (their client). This requirement is therefore satisfied.

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<sup>2</sup> *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* [2004] UKHL 48

24. The second requirement is also one of fact. The Commissioner has examined the withheld information and is satisfied that the sole purpose of it was the obtaining or providing of relevant legal advice. This requirement is therefore also satisfied.
25. The last requirement is an issue of law. The Commissioner considers that the information can be deemed to be confidential. This is because the information is of substance, was imparted in circumstances that led to an expectation of confidence (formal legal advice between a lawyer and their client) and the disclosure of the information would have led to an erosion of this confidence which would have not have accorded with the expectations of the confider. This erosion of confidence would have caused damage to the confider as its position may be prejudiced through unexpected disclosure. The final requirement is therefore satisfied.
26. The Commissioner's view is also that the advice has not lost its confidentiality and therefore is privileged in this case. The Commissioner notes that this is a situation of advice privilege. He believes that in circumstances other than litigation partial disclosure, such as the issuing of the letter that 'threatened' the 'Hackney Citizen' and the explanation of its position in the correspondence, will not result in the loss of confidentiality and therefore the loss of legal advice privilege. His view has been supported by the Information Tribunal in *FCO v Information Commissioner* [EA/2007/0092]<sup>3</sup> ('FCO') which stated:

*'There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.'* (Paragraph 22)

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<sup>3</sup> This decision can be found at the following link:  
[http://www.informationtribunal.gov.uk/Documents/decisions/FCO\\_vICDecision\\_amendedWebsite\\_290408.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf)

27. The Commissioner is satisfied that the information that has been provided to the public about this matter does not falsely represent the withheld information. After careful consideration, he is satisfied there is no waiver on the facts of this case, the confidentiality of the advice remains and the exemption is engaged.

**(2) *The public interest test***

28. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner can only consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure. It is important to note that the Act is a public disclosure regime and therefore Commissioner is only able to consider whether the information can be disclosed to the public, rather than the complainant by themselves<sup>4</sup>.
29. It is also important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. However, it is clear that just because some members of the public may be interested in the information, this does not necessarily mean that releasing the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public<sup>5</sup>.

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

30. LBH explained that legal professional privilege is a fundamental and established convention in the legal system. It reiterated the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities

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<sup>4</sup> This point was confirmed by the Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) at paragraph 52.

<sup>5</sup> *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

just as much as it does to individuals. Furthermore, LBH highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1).

31. It explained that local government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. It explained that it was particularly important that its legal staff were able to consult external lawyers in confidence to ensure that LBH receives necessary advice in a forum which is conducive to a free exchange of views. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice may well set out the perceived weaknesses of LBH's position. Without such comprehensive advice, the quality of LBH's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
32. LBH also explained that the disclosure of legal advice would be likely to have a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
33. It stated that the disclosure would be likely to have a corrosive effect on good Government. This could lead to decisions being taken that are legally unsound. Not only would this undermine LBH's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided. The Commissioner acknowledges that there is a public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this. For example the Commissioner has considered Lord Taylor of Gosforth CJ's obiter dictum on this point in *R v Derby Magistrates Court, Ex p B* [1996] AC 487:

*'The principle that runs through all of these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client [in this case, LBH], must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.*
34. LBH concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of



legally privileged material, there are no public interest factors of sufficient weight adequate to compel disclosure in this case. LBH explained that the Information Tribunal in *Bellamy* explained that legal professional privilege was 'a fundamental condition' of justice and 'a fundamental human right'. The Commissioner acknowledges the strength of the arguments advanced by LBH in relation to this point. Indeed, there is a significant body of case law to support the view that there is a strong element of public interest built into section 42(1). For example, paragraph 35 of *Bellamy* stated:

*'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'*

35. The Commissioner has considered the complainant's contention that the time for LBH to acquire an injunction had long passed. The Commissioner understands that LBH could still have undertaken litigation in certain circumstances at the date of the request and so does not believe that this argument reduces the weight of the public interest factors above. Whilst the complainant has pointed to a blog where a spokesman allegedly said that the case was closed from LBH's point of view, the Commissioner has discussed this matter carefully with LBH. It explained that it regarded the advice as being live at the date of the request because there was still the possibility of litigation being necessary. In the Commissioner's view, the statement above adds some further weight to the public interest factors that favour maintaining the exemption.
36. The complainant has argued that there is a suspicion of misrepresentation given that the LBH have not disclosed the law that they relied on in this case to make the 'threat' in the letter addressed to the 'Hackney Citizen'. The Commissioner has considered the withheld information alongside what is in the public domain and is content that there is no misrepresentation in this case. This argument does not therefore reduce the weight of the public interest factors above.
37. The complainant has argued that the timing of events supports her view that the first letter sent was not lawful and thus LBH were required to 'double down' and acquire external legal advice afterwards. The Commissioner notes that the individuals within LBH were legally qualified and could give legal advice professionally themselves. The Commissioner is not satisfied that the circumstances in acquiring further legal advice meant that this further advice deserves any less protection than in a circumstance when external legal advice is sought straight

away. Indeed, a public authority has a duty to ensure that matters are dealt with in a manner that costs the least amount of public funds when possible.

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

38. However, it is important to remember that the factors outlined above must be balanced against the arguments in favour of disclosing the legal advice which forms the requested information; Parliament did not intend the exemption contained at section 42(1) of the Act to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* [EA/2007/0052] (*'Mersey Travel'*) underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. It placed weight on the fact that the legal advice related to an issue which affected a substantial number of people. The complainant explained that the Commissioner must place similar weight on the factors that favour disclosure in this case because it involved LBH 'chilling' the rights of freedom of expression for a local newspaper and such alleged behaviour if widespread would have a detrimental effect on the public; both because the press would be unable to provide scrutiny and because the threat of an injunction and legal costs could lead to self censorship in future.
39. The Commissioner appreciates that the potential adverse effect to the media needs to be taken into account as part of public interest determination. The Commissioner appreciates that disclosure of information to the public about the potential erosion of freedom of expression is a weighty factor that favours the disclosure of the information.
40. LBH has also acknowledged that there are public interest factors in favour of disclosure in this case. It has explained that there is an obvious public interest factor that favours transparency and accountability in relation to its actions and decisions that it has taken.
41. The complainant has explained that the identified factors of transparency and accountability should receive particular weight in this case for the following four reasons:
  - (i) The legal advice at the heart of this appeal relates to a matter of public importance – it is an example of *'a local authority threatening to shut down the Article 10 Freedom of Expression right of a local paper in reporting news'* and therefore *'requires commensurate transparency in the way in which that decision was formulated'*;

- (ii) The current situation in terms of accountability is unsatisfactory. LBH has explained that it believes that its position was lawful and that it was relying on legal advice, but not why its position was lawful (or the law on which it relies) nor the circumstances that led it to seek further advice. She has explained that the disclosure of the key outcome of the legal advice should mean that the rest of the legal advice is now disclosed;
- (iii) It could be argued that there is an inherent contradiction in allowing LBH to claim both that it acted lawfully and that it should not provide the legal advice that allegedly says that this is so; and
- (iv) It is not clear what provisions of the Data Protection Act 1998 (the 'DPA') allow for injunctions to be sought by LBH against a local newspaper (the complainant believes that this is the subject of the advice in question). Furthermore, if there is no such legal basis then LBH has made a threat without any lawful authority to do so.
42. The Commissioner agrees with both parties that transparency and accountability are key principles underlying the application of the Act. For the first point, the Commissioner accepts that there is a real public debate about the effect of injunctions on the freedom of speech, as there was at the date of the request. He also accepts accountability is important when a public authority decides it is appropriate to consider litigation about something that is said about it. This is a public interest factor that favours disclosure.
43. For points two and three, the Commissioner has already considered the issue about whether partial disclosure should limit the confidentiality of the legal advice above; his view is that it does not. However, the Commissioner does believe that there is a strong public interest in people understanding the reasons for the decisions of public authorities and in being able to assess the reasons for them. The Commissioner does place real weight on the need for transparency on the facts of this case. In addition, the Commissioner also accepts that disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in LBH's position.
44. For point four, it must be noted that any individual would be able to instruct a solicitor (or a barrister through a solicitor) and obtain independent legal advice for their opinion about the operation of the law in these circumstances. Indeed, if LBH was to be challenged in court then independent legal advice would be essential. The Commissioner accepts that the argument that the information is required to circumvent acquiring legal advice has been declared as being a weak one by the

Information Tribunal. It was originally observed by the Information Tribunal in *FCO* that:

*"The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid."* (Paragraph 30)

45. This paragraph was then developed by a differently constituted Tribunal in its decision in *Dr Thornton v Information Commissioner* (EA/2009/0071)<sup>6</sup> ('*Thornton*'), which quoted this paragraph and stated that:

*'Curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal arguments relevant to the issue concerned, are, in that Tribunal's words, "weak" factors that do not outweigh the strong public interest in withholding information to which LPP applies. In the circumstances of this case we agree with this observation.'* (Paragraph 44)

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

46. The Information Tribunal in *Calland v Financial Services Authority* [EA/2007/0136] ('*Calland*')<sup>7</sup> explained its approach when considering the balance of the public interest in this exemption (at paragraph 37):

*'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'*

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<sup>6</sup> At paragraph 15.

<sup>7</sup> This decision can be found at:  
[http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO\\_0136\\_webdecision\\_080808.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf)

47. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164 ('*DBERR*'). In *Thornton*, the Tribunal usefully distilled the High Court's approach into six principles:
1. there is a strong element of public interest inbuilt into the exemption;
  2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
  3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
  4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
  5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
  6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
48. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the basis for which it issued a letter to the 'Hackney Citizen'. Disclosure of the legal advice may therefore assist the public's understanding of the legality of its current position.
49. There is also no doubt that concerns about the balance between privacy and publicity is a matter of public importance. There is a real public anxiety about this matter and it is an issue that may be controversial for the foreseeable future.
50. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids public understanding and participation in debates on issues of public importance – especially, as in this case, where allegedly debate was attempted to be reduced by the actions taken by LBH.

51. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the *DBERR* where he said:

*"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise [at paragraph 41]....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (Paragraph 53)*

52. Justice Williams indicated though that section 42 should not accordingly become an absolute exemption "by the back door". Public interest favouring disclosure would need to be of "equal weight at the very least..." (at paragraph 53). The Commissioner also notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of protection that is to be expected.
53. The Commissioner has carefully considered the advice and does not think that its contents have been misrepresented by LBH. It is noted that the legal advice (whatever its content) consists only of the legal opinion of certain individuals.
54. The Commissioner accepts that on the circumstances of this case the weight of the public interest factor in ensuring transparency has been mitigated by the possibility of the complainant obtaining independent legal advice about her concerns. He has discussed this point in detail in paragraphs 44 and 45 above.
55. In considering where the public interest lies the Commissioner has taken into account the nature and sensitivity of the advice provided which, in his view, leads him to conclude that the inbuilt weight of legal professional privilege in relation to this information was still very strong at the date of the request. Furthermore, the Commissioner has attached a significant weight to the fact that disclosure of the advice would enable the public to further understand, challenge and debate the reasoning behind LBH's position on this issue. The Commissioner has also noted what it is in the public domain and that the advice remains 'live' in terms of the issues to which it relates and therefore at the time of the request the potential for harm to the privilege holder was significant.

56. Taking into account all the factors above, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 42(1).
57. For the avoidance of doubt, the Commissioner has also considered whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged. He has concluded that the weight of the arguments favours the maintenance of the exemption to the whole of the withheld information.
58. For all the reasons above, he therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

### **Procedural Requirements**

#### *Section 10(1)*

59. Section 10(1) requires that a public authority complies with section 1(1) within twenty working days (except for limited exceptions that are not relevant to this case).
60. LBH failed to comply with section 1(1) in 20 working days because it did not answer the request. It therefore breached the requirements of section 10(1).

#### *Section 17(1)*

61. Section 17(1) requires that a public authority issues its refusal notice within 20 working days when it is withholding information. LBH failed to issue its refusal notice in 20 working days and therefore it breached section 17(1).
62. The Commissioner does not require any remedial steps to be taken for these procedural breaches because it is not something that can be resolved through remedial steps. He also notes that LBH has apologised for the delays that the complainant experienced.

### **The Decision**

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63. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It applied section 42(1) appropriately to the withheld information. He has found that the exemption was engaged and that in all the circumstances the public interest favoured maintaining the exemption.

64. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached section 10(1) because it failed to respond to the request within 20 working days; and
- It breached section 17(1) because it failed to issue an appropriate refusal notice in 20 working days.

### **Steps Required**

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65. The Commissioner requires no steps to be taken.



## Right of Appeal

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66. 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: 0300 1234504

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)

67. 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.

68. 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 30<sup>th</sup> day of June 2011**

**Signed .....**

**Faye Spencer  
Group Manager**

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

## Legal Annex

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### Freedom of Information Act 2000

#### Section 1 - General Right of Access

Section 1 of the Act provides that:

- '(1) 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.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."
- (3) Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
  - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."
- (4) The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.’

## **Section 10 - Time for Compliance**

Section 10 of the Act provides that:

‘(1) 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.”

(2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

(5) Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.”

(6) In this section –

“the date of receipt” means –

(a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.’

## **Section 17 - Refusal of request**

Section 17 of the Act provides that:

‘(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) 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—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.'

## **Section 42 – 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.'