

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 September 2011

Public Authority: Sunderland City Council
Address: PO Box 100
Civic Centre
Sunderland
SR2 7DN

Summary

The complainant requested the Council to release information relating to its decision to grant mandatory and discretionary rate relief to the Church of Scientology Religious Education College (COSREC). The Council provided some information but refused to release the majority of information it held under sections 21, 40(2), 41(1), 42(1), 43(2) of the Act. As the complainant remained dissatisfied, he approached the Commissioner. The Commissioner has reviewed the outstanding information and the Council's application of the exemptions cited. He has concluded that the Council was correct to rely on sections 21 and 42(1) of the Act in this case. Concerning the application of section 40(2) of the Act, the Commissioner has concluded that the Council was correct to refuse to release the personal data of third parties under this exemption. Section 40(2) was also applied to the Council's internal accounts reference for COSREC. The Commissioner has concluded that section 40(2) of the Act does not apply to this information. In respect of the Council's application of sections 41(1) and 43(2) of the Act, the Commissioner has decided that these exemptions are not engaged in this case. He has therefore requested the Council to release further information to the complainant within 35 days of this Notice.

The Commissioner's Role

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.

The Request

2. The complainant contacted the Council on 26 August 2010 to request the following information:

"In respect of the following property:

51 Fawcett Street
Sunderland
SR1 1RS

Please provide details of any mandatory or discretionary relief from non-domestic rates which has been applied at any time over the past 5 years.

If such relief has been applied, please provide:

- a copy of the application form and all documents supplied in support of it.
 - the reasons behind the Council's decision to apply the relief.
 - all information held including (but limited to) internal and external communications and correspondence relating to this matter."
3. The Council responded on 8 October 2010. Concerning the first two elements of the complainant's request, the Council provided a copy of the application it received from the Church of Scientology Religious Education College (COSREC) and provided the reasons behind the Council's decision to grant mandatory and discretionary rate relief. In respect of the third element of the complainant's request, the Council confirmed that it wished to rely on sections 12 and 21 of the Act for the non disclosure of this information.
4. The complainant requested an internal review on 8 October 2010.
5. The Council responded on 7 December 2010. It released further information to the complainant but refused to disclose some of the requested information under sections 21, 40, 41, 42 and 43 of the Act.

The Investigation

Scope of the case

6. On 13 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider

whether the Council had acted appropriately by withholding the outstanding information under sections 21, 40, 41, 42, and 43 of the Act.

7. During the course of the Commissioner's investigation the Council decided to release a further 152 documents to the complainant, which had previously been withheld from the complainant under one or more of the exemptions cited. As these documents were disclosed in full, they will not be addressed in this Decision Notice.
8. Concerning the Council's application of section 40(2), the Commissioner notes that the Council has released the names of its own employees referred to throughout the withheld information to the complainant. The Notice will therefore address the application of section 40(2) of any other third parties referred to in the remaining withheld information.

Chronology

9. The Commissioner wrote to the Council on 28 January 2011 to inform it that he had received a complaint from the complainant. This letter requested the Council to provide a copy of all remaining withheld information within 20 working days.
10. The Council responded on 24 February 2011. It provided several files containing copies of the remaining withheld information.
11. The Commissioner wrote to the Council on 20 April 2011 to request that it reconsider disclosing further information to the complainant in light of the Decision Notices he had already issued addressing other requests the complainant had made to another public authority relating to COSREC (case references FS50252171, FS50241934 and FS50277373) and the Information Tribunal hearing of *Mr William Thackeray v Information Commissioner and The Common Council of the City of London (EA/2009/0095)*.
12. As the Commissioner received no response he chased the matter up on 6 June and 26 July 2011.
13. The Council responded on 27 July 2011. It confirmed that it was now willing to release a further 152 documents to the complainant in full and an additional 10 documents in part and would do so upon the Commissioner's instruction. It advised that it remained of the opinion that a number of documents should still be withheld under sections 21, 40, 41, 42 and 43 of the Act and provided further arguments to support its decision.
14. The Commissioner wrote to the Council on 10 August 2011 to request that it release the further information to the complainant. In relation to

the application of section 21 of the Act, the Commissioner asked the Council to provide the complainant with the necessary information to enable him to access this information himself.

15. The Council responded on 24 August 2011 confirming that it had now contacted the complainant to provide the additional information the Commissioner requested.

Analysis

Exemptions

16. As stated above, the Council has relied on sections 21, 40, 41, 42, and 43 of the Act for the non disclosure of the remaining information. The Commissioner will now consider the application of each of these exemptions in turn.

Section 21 – information accessible to the applicant by other means

17. Section 21(1) of the Act states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. Section 21(1) has been applied by the Council to 26 documents.
18. Although information may be available elsewhere, it is the Commissioner's view that the relevant consideration here is whether the requested information is reasonably accessible to the complainant. For the Commissioner to agree that the requested information is accessible to the complainant, he must be satisfied that:
 - a) the complainant has already found the information; or
 - b) the Council is able to direct the complainant precisely to the requested information i.e. the Council must be reasonably specific about where the information can be found so the complainant can find it himself without difficulty.
19. The Council provided a table of the documents it holds to which section 21(1) of the Act had been applied to the complainant with individual links for each document to the location of this information on the internet.
20. The Commissioner is satisfied that the complainant has access to the internet and that the complainant is able to locate each of the documents in turn via the link provided by the Council. He is therefore satisfied that this information is reasonably accessible to the

complainant by other means and that section 21 of the Act applies in this case to this information.

Section 40(2) – personal data

21. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
22. The Council has applied section 40(2) of the Act to a series of photographs of scientologists, volunteers and members of the public. The Council has also applied this exemption to the internal business rates account number it has given COSREC and to the names and any contact details of the following categories of people:
 1. employees of external organisations;
 2. members of COSREC whose names are not already in the public domain;
 3. people who have been assisted by COSREC;
 4. individuals who have provided testimonials on their dealings with COSREC; and
 5. public sector employees of other public authorities.
23. For each category of information currently being withheld under section 40(2), the Commissioner must first consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

“personal data” means data which relate to a living individual who can be identified -

 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”
24. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the Council argued that disclosure of the information described in paragraph 21 above would breach the first data protection principle.
25. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

- (a) at least one of the conditions in schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

Photographs of scientologists, volunteers and members of the public

26. The Commissioner notes that the photographs are of a large number of individuals involved in the various activities of COSREC. It is quite obvious that a person can be identified from a photograph and therefore that this information falls within the definition of personal data.
27. The Commissioner will first consider the issue of fairness and whether disclosure of this information would be unfair.
28. The Commissioner is of the view that disclosure of this information would reveal personal information relating to a number of individuals. It would reveal the identity of individuals who follow Scientology, active volunteers and others which appear to be seeking help or have been assisted by scientologists. The Commissioner considers an individual's beliefs to be personal data of a private nature. He also considers the reasons why an individual may of sought help or been assisted by scientologists to be personal data of a private nature. It is his view that disclosure of information which relates to an individual's private life is unfair and an unwarranted intrusion into their right to privacy.
29. The Commissioner also accepts that these individuals will have no expectation that these photographs would be released into the public domain via the Act. He acknowledges that these individuals may have agreed to have their picture taken in certain circumstances. However, he does not accept that these individuals would have anticipated that this information could be the subject of a request under the Act and could possibly be released into the wider public domain. These individuals would have no expectation that this information could be disseminated in this way.
30. The Commissioner is therefore satisfied that these photographs are exempt from disclosure under section 40(2) of the Act, as disclosure of this information would be unfair and so in breach of the first data protection principle.

Business rates account number for COSREC

31. The Commissioner understands that the Council has withheld its internal accounts reference number for COSREC under section 40(2) of the Act.

32. As stated in paragraph 22, personal data is data which relates to a living individual from which that individual can be identified. The information being considered here is COSREC's internal account or reference number. COSREC is not an 'individual' or a business operated by a sole trader it is an organisation. This information does not therefore fall within the definition of personal data and so section 40(2) of the Act cannot apply.

Employees of external organisations

33. The name of an individual is quite obviously personal data; it is information from which that individual can be identified. The Commissioner now needs to consider whether disclosure would be unfair.
34. The names of various individuals employed by external organisations are recorded throughout the withheld information. The organisations concerned are organisations that have been involved in the activities of COSREC or accepted monies raised by COSREC during its fund raising events.
35. These individuals have had no involvement in the Council's decision to grant mandatory rate relief and have only become involved indirectly in this information request because COSREC chose to send copies of such information to the Council in support of its application. These individuals contacted COSREC on behalf of the external organisation they represent for a specific reason which is not connected in anyway to COSREC's application for mandatory and discretionary rate relief. These individuals would therefore have no expectation that their names would be disclosed into the public domain via the Act and would hold the expectation that their names would remain private.
36. As these individuals will have no expectation that their names would be disclosed into the public domain, the Commissioner has decided that disclosure would be unfair and in breach of the first data protection principle. He is therefore satisfied that section 40(2) of the Act applies to this information.

Members of COSREC

37. As stated above, the name of an individual is personal data. The Commissioner will again consider whether the disclosure of the names of members of COSREC would be unfair.
38. Again, these individuals had no involvement in the Council's decision to grant mandatory or discretionary rate relief to COSREC. They have only become indirectly involved in this information request because COSREC

chose to send copies of such information to the Council in support of its application.

39. It is the Commissioner's view that disclosure of this information would not only release the names of these individuals into the public domain but it would also release information about these individuals' private lives; that they are or were Scientologists, hold or held such beliefs and have or have had specific links to COSREC. In other cases he has considered, the Commissioner has made a general but clear distinction between information which relates to one's public life and information which relates to one's private life. He considers disclosure of information which relates to an individual's private life is in the main unfair and an unwarranted intrusion into those individuals' right to privacy.
40. As these individuals had no involvement in COSREC's application or the Council's decision making process, the Commissioner is satisfied that they would have no expectation that their name and their involvement in Scientology would be released into the public domain via an information request of this nature.
41. For these reasons, he is satisfied that disclosure would be unfair and in breach of the first data protection principle outlined in the DPA. He has therefore concluded that section 40(2) of the Act applies to this information.

People who have been assisted by COSREC or provided testimonials (3 and 4 of paragraph 21 above)

42. Again, the name of an individual is personal data. The Commissioner will now consider whether the disclosure of this information would be unfair in this case.
43. For those that provided testimonials, it is clear from the testimonials they gave that they are scientologists themselves or are at least individuals that hold similar beliefs. Paragraphs 38 to 40 above are therefore applicable here.
44. Concerning those individuals that have been assisted by COSREC, the Commissioner considers that at least some of these individuals will, too, be scientologists or hold similar beliefs. Again paragraphs 38 to 40 apply here.
45. Some of those individuals who have been assisted by COSREC may not be scientologists or hold such beliefs but the Commissioner considers disclosure would still reveal information of a private nature about these individuals. COSREC is involved in various projects addressing, for example, human rights issues, the rehabilitation of criminals and drug users. Releasing the names of individuals who have been assisted by

COSREC into the public domain may reveal or suggest to others that they have specific problems of this nature and this type of information is information which relates to one's private life. The Commissioner considers the disclosure of this type of information would be unfair and an unwarranted intrusion into their right to privacy.

46. For the reasons explained above, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle outlined in the DPA. He has therefore concluded that section 40(2) of the Act is engaged for this information.

The names of public sector employees outside of the Council

47. The names of these individuals is quite obviously personal data. The Commissioner will now consider whether disclosure would be unfair.
48. Although the Commissioner makes a distinction between information which relates to one's public life and information which relates to one's private life and considers the former attracts less privacy, the relevant consideration here is whether the requested information relates to decisions these individuals have taken in their public capacity which have then directly affected the Council's consideration of COSREC's application.
49. The Commissioner has reviewed the documents in question. A considerable number of documents relate to other matters or to separate public authorities' consideration of a similar application. Although the documents may have assisted the Council in its decision making process, they do not directly relate to the overall decision that was reached. These public sector employees became indirectly involved in the decision making process because COSREC forwarded copies of these documents to the Council in support of its application.
50. Concerning the expectation of these individuals, the Commissioner accepts that public sector employees are aware of the implications of the Act and the possibility that information may be released into the public domain concerning decisions they have made as public servants. However, the information being considered here is not information relating to decisions these individuals have made concerning the Council's decision to grant rate relief to COSREC, it concerns decisions they have been involved in relating to other matters being dealt with by a separate public authority. The Commissioner considers these individuals would have no expectation that this information would be released into the public domain in this way.
51. The Commissioner has therefore decided that disclosure would be unfair in these circumstances and in breach of the first data protection

principle. He is therefore satisfied that section 40(2) of the Act applies to this information.

Section 41 – information provided in confidence

52. Section 41(1) of the Act provides that information is exempt from disclosure if it was obtained by the Council from any other person and the disclosure would constitute an actionable breach of confidence. The exemption is absolute and therefore not qualified by the public interest test set out in section 2 of the Act.
53. The Commissioner notes that section 41(1) of the Act has been applied to an email the Council received from another public authority detailing its decision to reject COSREC's application for discretionary rate relief, to a financial figure provided by COSREC during the application process which reveals the total donations it received in one particular year and to COSREC's financial statement for the period ending 31 December 2004 ('financial information').

Was the information obtained from another person?

54. The Commissioner has reviewed the information withheld under this exemption and he is satisfied that the information was obtained by the Council from another person. The email the exemption has been applied to was obtained from another public authority and the financial information was provided by COSREC at application stage and during the evaluation process.
55. The Commissioner now needs to consider whether disclosure of this information would constitute an actionable breach of confidence.

Would disclosure constitute an actionable breach of confidence?

56. The Commissioner considers the test set out in *Coco v A N Clark (Engineers)* [1968] FSR 415 is the most appropriate test to apply in this case. This test states that a breach will be actionable if:
- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence;
 - there was an unauthorised use of the information to the detriment of the confider; and
 - there is no public interest defence on which the Council can rely.
57. When considering the first element of the *Coco v Clark* test he must consider whether the information has the necessary quality of

confidence. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as generally accessible although information that has been disseminated to the general public clearly will be. Information which was important to the confider cannot be considered to be trivial.

58. The Commissioner will address the email the Council received from another public authority first. The Commissioner notes that the public authority which sent the email to the Council granted mandatory rate relief to COSREC but rejected its application for discretionary rate relief. He has reviewed the What Do They Know website and the various information requests relating to COSREC. He notes that this public authority released into the public domain confirmation that it had granted mandatory rate relief to COSREC in response to another information request the complainant had made to this authority before the date of the email in question.
59. However, the Commissioner cannot find any information available on this website or elsewhere on the internet which explicitly states that this public authority released into the public domain confirmation that it rejected COSREC's application for discretionary rate relief. The Commissioner can therefore only conclude in this case that the contents of the email in question are not otherwise accessible. Concerning the issue of triviality, the Commissioner considers the content of the email in question is not trivial, as it relates to matter which will be important to the public authority that sent the email to the Council.
60. For these reasons, he is satisfied that the email in question has the necessary quality of confidence and therefore that it meets the first element of the *Coco v Clark* test.
61. Turning now to the financial information COSREC provided at application stage and during the evaluation process, the Commissioner considers this information has the necessary quality of confidence as well. This is because the information is not trivial in nature and the Commissioner is not aware of this information being made publicly available by COSREC.
62. As the Commissioner is satisfied that the email and the financial information referred to in paragraph 53 above have the necessary quality of confidence, he must now go on to consider the remaining elements of the *Coco v Clark* test.
63. Concerning the second element of the test, an obligation of confidence can be expressed both explicitly and implicitly.

64. Again, addressing the email in question first, the Commissioner notes that the Council provided no specific arguments to demonstrate that the contents of this email meet the second element of the *Coco v Clark* test.
65. The Commissioner has reviewed the contents of the email himself and he is not satisfied that it meets the obligation of confidence limb of this test for the following reasons.
66. He considers there was no explicit or implicit obligation of confidence placed on the Council by confider i.e. the other public authority when sending this email. He also notes that the public authority concerned was willing to release confirmation of its decision to grant mandatory rate relief to COSREC into the public domain in response to another information request made by the same complainant. Taking this into account, the Commissioner considers the public authority in question would have no objection to its decision not to grant discretionary rate relief to COSREC or at least the simple confirmation of this, which is all the email in question is, to be released into the public domain or, if it did, it would be unable to provide any convincing arguments to support such an objection.
67. For the email in question, the Commissioner has therefore concluded that it fails to meet the second element of the *Coco v Clark* test and therefore that section 41(1) of the Act cannot apply.
68. Turning now to the financial information supplied by COSREC during the evaluation process, the Council argued that all applicants are given the impression or expectation that any financial information they provide during the evaluation process will remain private and confidential. It stated that it does not routinely disclose any financial information provided by such organisations and so these organisations would have no expectation of this happening.
69. The Commissioner does not agree that there was an explicit obligation of confidence in this case but accepts that due to the very nature of how these applications are assessed and the general expectation of all taxpayers that their financial details will remain private and confidential that in this case the requested information was imparted in such a way which gave rise to an implied obligation of confidence.
70. It is now necessary to consider whether disclosure would cause any detriment to COSREC. The Commissioner considers that there is a distinction between information relating to an individual's personal and private life and information which is commercial information. Following the Information Tribunal hearing of *Pauline Bluck v IC & Epsom & St Helier University NHS Trust, EA/2006/0090* it is the Commissioner's view that detriment is not a prerequisite of an actionable breach when

information relating to an individual's personal and private life is being considered. This is because it can be argued in the alternative that the real consequence of disclosing personal and private information is the infringement of the confider's privacy.

71. However, the Commissioner does not agree that the same approach should not be taken where commercial information is concerned. In a more recent Information Tribunal hearing, *The Higher Education Funding Council for England v Guardian News & Media Ltd, EA/2009/0036*, it was stated that:

"...for the time being, this Tribunal, when dealing with the type of information in question in this Appeal [commercial confidence] should not depart from the line of authority from the higher courts leading from *Coco v Clark*" (paragraph 43).

The requested information in this case is commercial information relating to COSREC. It is therefore the Commissioner's view that for disclosure to constitute a breach of confidence in this case there has to be a detrimental impact on the confider i.e. COSREC.

72. The Council has provided no arguments for the Commissioner to consider this element of the *Coco* test. As it has failed to provide any evidence to demonstrate how the disclosure of this information would be detrimental to COSREC and it is not obvious to the Commissioner from viewing the information himself, he cannot accept that this information meets the third element of the *Coco v Clark* test.
73. For these reasons, the Commissioner has concluded that section 41(1) of the Act does not apply to this information.

Section 42 – legal professional privilege

74. Section 42(1) of the Act states that information is exempt from disclosure under the Act if it is subject to legal professional privilege.
75. Legal professional privilege protects the confidentiality of communications between lawyer and client. In the Information Tribunal hearing of *Bellamy v Information Commissioner and the DTI EA/2005/0023*, the Tribunal described it 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, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation." (para. 9)

76. There are two types of legal professional privilege; advice privilege and litigation privilege. In this case the Commissioner understands that the Council considers advice privilege applies to a number of internal emails involving the Council's Legal Department.
77. For advice privilege to apply the information must be a confidential communication between a professional legal adviser and his client created for the dominant purpose of seeking or providing legal advice. The Commissioner considers advice privilege covers communications between adviser and client in a relevant legal context.
78. The Commissioner has reviewed the withheld information and he is satisfied that all the emails in question are confidential communications between the Council's Legal Department and Business Rates Department in a relevant legal context. The legal context being the Council's deliberations on whether to grant COSREC mandatory and/or discretionary rate relief. Some of the communications detail specific legal advice provided by the Council's Legal Department during this process. Others discuss matters relevant to this process and within a legal setting; matters which were brought to the attention of the Council's solicitor to provide them with opportunities to raise any legal issues or considerations.
79. As the Commissioner is satisfied that advice privilege applies to this information and section 42 of the Act is a qualified exemption, he must now consider the public interest test.
80. The following arguments were presented by the Council in relation to the public interest test.

Public interest arguments in favour of disclosure

81. The Council confirmed that disclosure would promote the overall transparency and accountability of the Council. In this case it would also provide detailed information between the Council's Legal Department and its Business Rates Department relating to the evaluation process of COSREC's application. The Council accepted that disclosure of this information would enable members of the public to understand more clearly how it reached its decision and why it granted mandatory and discretionary rate relief to COSREC.

Public interest arguments in favour of maintaining the exemption

82. However, the Council felt that there were overriding public interest arguments in favour of maintaining this exemption. It stated that disclosure would hinder its ability to freely seek legal advice relating to such matters in the future, as professional legal advisers would be reluctant to provide frank advice due to the fear of such advice being

Balance of the public interest test

83. The Commissioner has given the arguments presented by the Council for and against disclosure careful consideration. He accepts that disclosure in this case would promote openness and transparency and increase public debate about which organisations should benefit from reductions in tax and on what basis. He also agrees that disclosure would enable members of the public to understand more clearly the legal basis for awarding mandatory and discretionary rate relief to COSREC and challenge the decision from a more informed position.
84. However, despite these compelling arguments in favour of disclosure, the Commissioner considers that there are overriding public interest factors in maintaining this exemption in this case. He notes that there is an in built public interest in withholding information which is subject to legal professional privilege in order to preserve this concept. This is because of the strong constitutional importance attached to legal professional privilege and therefore the protection of free and frank communications between lawyer and client.
85. In the case of *R v Derby Magistrates Court ex parte P [1996] 1 AC487*, Lord Taylor stated:
- “Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests”.
86. The Commissioner accepts that there is a public interest in protecting the Council's ability to communicate freely with its legal advisers to obtain advice; not just on business rates but more generally on all matters that concern the Council. This is to ensure that decisions are made on a fully informed basis and in conjunction with thorough legal advice. He accepts that disclosure in this case could have a damaging effect of the Council's ability to obtain frank legal advice in the future which would in turn hinder the Council's ability to make well informed decisions.
87. The Commissioner also notes that the legal advice given remains 'live'. He considers it is fairly recent and it continues to be relied upon by the Council to support its decision to grant COSREC rate relief. Rate relief is subject to regular reviews and a renewal's process. The Commissioner

considers the legal advice will be used in the future to evaluate any renewed application COSREC may wish to make.

88. Overall, the Commissioner does not consider there are any compelling overriding public interest factors in this case that would outweigh the in built weight accorded to maintaining this exemption. He has therefore concluded that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.
89. The decision the Commissioner has made on the public interest test in this case is similar to the decision reached by the Information Tribunal in the hearing of *Mr William Thackeray v Information Commissioner and The Common Council of the City of London*, EA/2009/0095.

Section 43 – commercial interests

90. Section 43(2) of the Act states that information is exempt from disclosure under the Act if its disclosure would or would be likely to prejudice the commercial interests of the Council and/or a third party. In the Information Tribunal hearing of *Hogan & Oxford City Council v Information Commissioner (EA/2005/0030)* ('Hogan') the Tribunal stated that:

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

91. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

92. As stated above in paragraph 84, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The Tribunal stated that:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk”.

93. The second limb of the test “would prejudice” places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner’s view that prejudice must be at least more probable than not.
94. The Council has not explicitly stated which limb of the prejudice test it considers applies. The Commissioner will therefore proceed to consider the lesser threshold of “would be likely to”. If this threshold is not met, it follows that the higher threshold of “would” does not also apply.
95. The Council stated that section 43(2) of the Act has been applied to the fees paid by the Council for external legal advice. It confirmed that it considered disclosure of this information would be likely to prejudice the commercial interests of the barrister concerned, as disclosure would affect the ability of the barrister concerned to operate differential pricing structures to other organisations.
96. No further arguments were submitted to the Commissioner and the Council did not explain in any more detail exactly how it reached this view. It is not for the Commissioner to argue a point on a public authority’s behalf; it is for the public authority concerned to provide detailed submissions for the Commissioner to consider demonstrating why it considers an exemption is engaged.
97. The arguments submitted, as outlined in paragraph 89 above, are insufficient to demonstrate that disclosure would be likely to be prejudicial to the barrister concerned.
98. It is also the Commissioner’s view that when considering prejudice to a third parties commercial interests, it is necessary for the public authority to demonstrate that the arguments presented have originated from the third party itself. This is in line with the Information Tribunal hearing of *Derry City Council v Information Commissioner EA/2006/0014*. In this hearing the Tribunal stated that it could not taken into account speculative arguments put forward by the public authority as it was clear that these had not originated from the third party concerned.
99. In this case, the Council has provided no evidence to demonstrate that the arguments it has presented have originated from the barrister concerned. It is the Commissioner’s view that these arguments are the Council’s own thoughts on the matter and are not representations that have originated from the barrister in person. In line with the Derry hearing, the Commissioner cannot give any weight to these arguments

when considering the application of section 43(2) of the Act to the information in question.

100. For the reasons explained above, the Commissioner has concluded that section 43(2) of the Act is not engaged in this case.

101. As he has found that section 43(2) of the Act does not apply, there is no need for the Commissioner to go on to consider the public interest test.

Procedural Requirements

102. The Commissioner notes in this case that the Council failed to issue a refusal notice to the complainant within 20 working days of his request. He therefore finds the Council in breach of section 17(1) of the Act.

103. The Commissioner also finds the Council in breach of section 17 of the Act for failing to specify in the refusal notice it issued exemptions on which it later relied (sections 40(2), 41(1), 42(1) and 43(2)).

104. The Council also failed to provide information the complainant was entitled to within 20 working days of his request. He therefore finds the Council in breach of sections 1(1)(b) and 10(1) of the Act in this case.

The Decision

105. The Commissioner's decision is that the Council dealt with the following aspect of the request for information in accordance with the Act:

- it appropriately relied on section 40(2) of the Act for the non disclosure of personal data relating to third parties;
- it correctly relied on section 21 of the Act for the non disclosure of information which is available to the complainant by other means; and
- it correctly relied on section 42(1) of the Act for the non disclosure of information subject to legal professional privilege.

106. The Commissioner's decision is that the Council did not deal with the following aspects of the request for information in accordance with the Act:

- it incorrectly relied on section 40(2) of the Act for the non disclosure of the Council's internal accounts reference for COSREC;
- it incorrectly relied on section 41(1) of the Act for the non disclosure of an email it received from another public authority and the financial information it received from COSREC;

- it inappropriately relied on section 43(2) of the Act for the non disclosure of the fees the Council paid a barrister for external legal advice;
- it breached section 17 of the Act for failing to cite in its refusal notice to the complainant exemptions on which it later relied;
- it breached section 17(1) of the Act for failing to issue its refusal notice to the complainant within 20 working days of his request; and
- breached sections 1(1)(b) and 10(1) of the Act for failing to provide information the complainant was entitled to within 20 working days of his request.

Steps Required

107. The Commissioner requires the Council to take the following steps to ensure compliance with the Act:

- the Council should disclose all information previously refused under sections 41(1) and 43(2) of the Act to the complainant and the Council's internal accounts reference for COSREC, which was incorrectly withheld under section 40(2) of the Act with the personal data of any third parties listed in paragraph 21 redacted.

Failure to comply

108. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

109. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following issue he identified during his investigation.

110. Concerning the complainant's request for an internal review, the Commissioner notes that the Council took two months to respond. The complainant's request was made on 8 October 2010. However, the Council did not respond until 7 December 2010; two months later.

111. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued

guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the Code of Practice issued under section 45 of the Act states in this regard:

"41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay."

112. The Commissioner notes that, in failing to advise the complainant of the estimated date for completion of the internal review and in failing to complete the internal review within a reasonable timescale the Council failed to conform to Part VI of the section 45 Code of Practice.

Right of Appeal

113. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

114. 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.

115. 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 13th day of September 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1)

Provides that -

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

–

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

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

Section 10(1)

Provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 12(1)

Provides that –

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

Section 17(1)

Provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 21(1)

Provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 40(2)

Provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3)

Provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 41(1)

Provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority),
- (b) and the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

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.”

Section 43(2)

Provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”