

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 June 2011

**Public Authority:** Lincolnshire County Council  
**Address:** County Offices  
Newland  
Lincoln  
Lincolnshire  
LN1 1YS

### Summary

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The complainant requested information relating to the Council's decision to end the Stamford Scholarship Scheme. The Council supplied some information but it refused to provide copies of legal advice and cited the exemption under section 42(1) of the Freedom of Information Act 2000 ("the FOIA"). It said that the public interest did not favour disclosure of the information. The Commissioner investigated and decided that the exemption was engaged and that the public interest favoured maintaining the exemption. He found breaches of section 10(1), 1(1)(a), 17(1) and 17(1)(a)(b) and (c). The Commissioner does not require any steps to be taken.

### 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 FOIA. This notice sets out his decision.

### Background

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2. The Stamford Scholarship Scheme was established by a formal agreement in 1987. Its purpose was to allow the Council to pay for local children who were eligible for a grammar school education to attend Stamford Endowed Schools (SES). Under the agreement, the Council could pay for fifty places each year. The original agreement was

terminated by the Council with effect from 31 August 1997. The Council then entered into another agreement with SES that provided that from 1 September 1998, the Council would pay for fifty places each year for those pupils found to be most suitable in accordance with the selection procedure administered by the SES governors and agreed by the Council. The scheme was the Council's response to a lack of suitable provision for the most academically able pupils in the area.

3. In 2006, the Council considered whether to end the scheme in the light of the potential for the local comprehensive school to improve to the point that it was able to provide suitable education for the more academically able or for the designated transport zone for the nearest grammar school to be changed to provide funded travel for the most academically able pupils. The Council considered its decision in two meetings. The Council resolved to terminate the existing contract and negotiate a new "tapering contract" to phase out the scheme. That agreement was entered into in December 2006. The Council decided not to increase the designated transport area at this stage but it approved a plan to undertake a four yearly assessment and if that indicated a lack of suitable provision, it would consider further options. It should be noted that under section 14 of the 1996 Education Act, a local authority has a general duty to ensure that there is sufficient suitable school provision available in the area. At the time of writing this notice, the Council is carrying out one of the four yearly reviews.

## The Request

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4. On 15 May 2010, the complainant requested information from the Council in the following terms:

*"I'm forwarding your email so that you can see the attachments which you sent at that time. I'd be grateful if you would kindly send me*

- (a) *any further Reports relevant to the discussions and decision about ending the Stamford Scholarship Scheme*
- (b) *Copies of the legal advice obtained by Councillors before they had made their decision*
- (c) *A copy of the legal advice obtained by Councillors after they had made their decision and before it was announced to the public"*

5. The Council replied on 1 July 2010. In relation to point (a) of the request, the Council referred to reports and minutes it had attached and which were available on its website. In relation to point (b) and (c) of the request, the Council explained that the only record of legal advice provided directly to elected members at the times specified was

contained in the information it had attached. However, the Council added that it held copies of legal advice provided to the Children's Services Department about the Stamford Endowed School Scholarship Agreement. It added that it would not be able to disclose this because it was exempt under section 42(1) and the public interest favoured maintaining the exemption. From subsequent exchanges with the Council, it was apparent to the Commissioner that at the time of its refusal, it did not consider that this information fell within the scope of the request on 15 May 2010 because this legal advice was not provided directly to councillors. The Council subsequently decided that this information fell within the scope of the request on 15 May 2010 because it would have been discussed with councillors though not necessarily provided to them.

6. On 16 July 2010, the complainant replied and requested an internal review of the refusal to provide the withheld legal advice.
7. On 31 August 2010, the Council completed an internal review of its refusal on 1 July 2010. It stated that the appeal had been unsuccessful.

## **The Investigation**

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### **Scope of the case**

8. On 31 August 2010, the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly withheld the legal advice.

### **Chronology**

9. On 13 January 2011, the Commissioner wrote to the complainant to set out his understanding of the complaint.
10. The complainant replied on the same day and confirmed that the Commissioner had accurately reflected the nature of her complaint.
11. On 14 January 2011, the Commissioner wrote to the Council. He asked the Council to provide a copy of the withheld information and he asked for some further supporting information.
12. The Council replied to the Commissioner on 17 January 2011. It stated that it had attached copies of the withheld legal advice. The Council also said that it had identified further information relating to the drafting of the notice informing the public about the decision to end the scheme that fell within the scope of the request of 15 May 2010

- although it also considered that this was exempt under section 42(1) of the FOIA and the public interest favoured withholding it. The Council also referred to legal advice relating to its consideration of continuing the scheme and it said that it had decided that this was not relevant to the request. The Council provided highlighted copies of information in the public domain which contained brief references to the legal advice taken.
13. On 25 January 2011, the Commissioner wrote to the complainant and referred to the additional legal advice identified by the Council. He asked some questions to help him to understand whether the complainant believed that this information fell within the scope of her request.
  14. On 26 January 2011, the complainant telephoned the Commissioner. She clarified that when she had requested an internal review, she was referring to whatever legal advice had been withheld by the Council in its refusal notice on 1 July 2010. She also confirmed that she wanted the additional legal advice that the Council had identified relating to the drafting of the notice informing the public about the decision to end the scheme. The complainant also sent a follow up email confirming the details of this conversation.
  15. On 26 January 2011, the Commissioner telephoned the Council. The Commissioner sought clarification regarding the withheld information and what information was being withheld at the time of the Council's refusal notice. The Council said that it would provide appropriate clarification. The next day, the Commissioner wrote to the Council about these issues.
  16. On 21 February 2011, the Council supplied a further bundle of numbered documents with a schedule. It set out which information fell within each part of the request that was made on 15 May 2010. The Council explained that although it had initially said that it did not hold legal advice that was obtained by councillors it had changed its view on this because it felt that it had interpreted the request too narrowly at first to mean information that had been provided directly to councillors. The Council explained that all of the legal advice it had now identified would have been discussed with the councillors and therefore fell either within part (b) or (c) of the request on 15 May 2010. Unfortunately, the Council did not address the Commissioner's query regarding whether the legal advice that it wished to scope out of the investigation had formed part of the information that had originally been refused in its refusal of 1 July 2010.
  17. On 11 March 2011, the Commissioner and the Council discussed the information that the Council wished to scope out of the investigation

- during a telephone conversation. The Council clarified that this advice was not part of the information that was being refused on 1 July 2010. It also clarified that it did not form part of the Council's considerations relating to ending the scheme.
18. On 16 March 2011, the Commissioner wrote to the Council to ask for further information to help him to understand the wider background.
  19. On 17 March 2011, the Commissioner wrote to the complainant to explain that having considered the matter, he was inclined to agree with the Council that the legal advice relating to its earlier considerations about continuing the scheme did not fall within the scope of the request.
  20. The next day, the complainant replied and did not dispute the Commissioner's conclusions regarding the scope of the investigation.
  21. On 11 April 2011, the Council provided the Commissioner with background information.
  22. On 19 April 2011, the Commissioner telephoned the Council to ask for some further clarification concerning the impact of the scheme on the children of the area. As the Council was not able to respond over the telephone, it provided a written response to the Commissioner on 5 May 2011.

## Analysis

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### Substantive Procedural Matters

#### Exemption – Section 42(1)

23. This exemption 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.
24. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, the Council sought to rely on advice privilege.
25. The Council has relied on the exemption in relation to one piece of advice from a barrister in 2003 and various other items of legal advice

in 2006, both in house advice from a solicitor and external legal advice from a barrister.

26. In her original complaint to the Commissioner, the complainant raised various concerns about whether the Council could claim privilege. Her concern focused on the Children's Services Directorate and whether it is entitled to rely on privilege. There was no evidence to indicate that the complainant's concerns were well-founded, and the relevance of some of them was not clear.
27. Having considered the information, the Commissioner was satisfied that it was covered by legal advice privilege. The Commissioner also noted that there was nothing about the circumstances of this case that would suggest that any of the legal advice had lost its confidential character.

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

28. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
29. In addition to the above considerations, the Commissioner also notes that the legal advice relates to an issue which is an important one for the local area, namely the provision of suitable education for pupils. The Commissioner notes, as mentioned in the background section of this notice, that the Council has a general legal duty to ensure that suitable schools are available for pupils. The Commissioner also notes that the issue relates to how the Council is using public funds.
30. The Commissioner notes that the legal advice in question would be likely to help the public to understand more about the Council's decision making process and the factors that it took into account when making that decision.

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

31. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional

privilege as, “a fundamental condition on which the administration of justice as a whole rests”.

32. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner’s published guidance on legal professional privilege states the following:

*“Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice”.*

33. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.

34. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

*“...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”*

35. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

36. Generally speaking, the value in withholding information diminishes over time and the Commissioner notes that the legal advice in question dates from 2006 and one item of advice dated back to 2003 (although this was used again in 2006). However, the Council has argued that although the immediate purpose for which the advice was obtained is gone, it considers that the advice is still relevant. It has pointed out that a contractual relationship still exists between the Council and the SES and that it is currently undertaking one of its four yearly assessments of school provision in the area. In view of this, the issues will be back in the spotlight and the potential for challenge remains.

The Council has also explained that the advice also relates to matters of general principle which may be applicable in other situations in the future.

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

37. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to decisions that affect other people's lives. In the case of children's education that general interest is a strong one in the Commissioner's view, particularly given the Council's general legal obligation to ensure that there is suitable educational provision in the area.
38. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
39. The Commissioner notes that the Council has published information concerning the decision-making process, including the reports that were submitted to the executive setting out the various options for consideration and the minutes of the Overview and Scrutiny Committee following the call in of the decision. This information also contained references to the fact that legal advice had been received and a number of points for and against the different options. These circumstances demonstrated that there had been opportunities for both internal and external scrutiny of the decision. Having considered this and the contents of the information, it was not the Commissioner's view that disclosure of the information would have added to the public understanding of the decision to the extent that its disclosure would have been justified.
40. The Commissioner would also observe that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentative, unlawful activity or a significant lack of transparency. Based on the details in the above paragraph, it is not evident to the Commissioner that the latter factor applies. The Commissioner notes that the decision to end the scholarship scheme involved saving public money rather than spending it and that the decision did not, in relative terms, affect a large amount of individuals. The Commissioner has also considered the Council's longer term plans to monitor the situation on a four yearly basis and that the longer term effect of this decision is not yet known. Following his inspection of the information, the Commissioner could see no obvious signs of unlawful



activity or evidence that the Council misrepresented any legal advice it received.

41. The Commissioner also notes that the advice is relatively recent and that there is a likelihood that the Council may still need to defend their position, particularly in light of the fact that the Council intends to undertake four yearly assessments. The Commissioner accepts that this is likely to put the matter back into the spot-light and there is a public interest in allowing the Council to be able to defend itself fairly if necessary. He also agrees with the Council that some of the legal advice concerns matters of general principle which may have a broader application in the future and there is therefore a possibility that the Council may still wish to rely on the legal advice in another context.
42. The Commissioner understands that the complainant has legitimate concerns about the decision taken by the Council and the effect that this may have had on certain children. She has expressed to the Commissioner that it is her view that the decision was a bad one and that the Council should not have taken the steps it did without ensuring that adequate alternative provision was in fact available. The Commissioner understands these concerns but he would like to highlight that it is not his role to consider the particular merits of the decision. The Commissioner has considered whether there are sufficient circumstances that would warrant an unusual level of transparency of this decision by disclosure of the legal advice that was taken. Having regard to all the circumstances of the case, the Commissioner considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

### **Procedural Requirements**

43. As the Commissioner was satisfied that section 42(1) was engaged and that the public interest favoured maintaining the exemption, he does not consider that the Council breached its obligations under the FOIA by withholding this information.
44. During the Commissioner's investigation, the Council said that it held more information relating to the request than had been identified as falling within the scope of the request in its initial response of 1 July 2010 or its internal review. In view of this, the Commissioner finds the Council in breach of section 10(1) and 1(1)(a). In relation to some of this information, the Council relied on the exemption under section 42(1) for the first time during the Commissioner's investigation. This was a breach of section 17(1) and 17(1)(a)(b) and (c) of the FOIA.

## The Decision

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

- It correctly withheld the information from the complainant using the exemption under section 42(1) and it correctly determined that the public interest favoured maintaining the exemption.

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

- The Council breached section 10(1) and 1(1)(a) because of its failure to identify all the information that fell within the scope of the request by the date of its internal review. It also breached section 17(1) and 17(1)(a)(b)(c) because, in relation to some of this information, it sought to rely on the exemption under section 42(1) for the first time during the Commissioner's investigation.

## Steps Required

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47. The Commissioner requires no steps to be taken.

## Other matters

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48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

### Time taken for internal review

49. The Commissioner's published guidance states that an internal review should not exceed 20 working days unless exceptional circumstances are involved. The Commissioner notes that on this occasion, the Council took longer than 20 working days to complete its internal review. The Commissioner trusts that the Council will consider the Commissioner's guidance and make appropriate improvements in the future.

## Right of Appeal

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50. 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)

51. 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.

52. 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 16<sup>th</sup> day of June 2011**

**Signed .....**

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

## Legal Annex – Freedom of Information Act 2000

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### 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.”

### Effect of Exemptions

#### Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

### Time for Compliance

#### 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.”

### Refusal of Request

#### 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."

### **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."