



**First-tier Tribunal  
(General Regulatory Chamber)**

**Information Rights**

**Appeal Reference: EA/2018/0012**

**Decided without a hearing  
On 19 July 2018**

**Before  
KAREN BOOTH  
JUDGE**

**ANNE CHAFER AND PAUL TAYLOR  
TRIBUNAL MEMBERS**

**Between**

**IAN COWAN**

**and**

**INFORMATION COMMISSIONER**

Appellant

Respondent

**Decided on the papers at Liverpool Civil & Family Centre on 19 July 2018**

## DECISION AND REASONS

1. The Respondent's decision notice 14/12/2017 (Reference: FS50666585) is in accordance with the law and the appeal is therefore dismissed.

### *Background to the appeal*

2. The Appellant is a former Councillor of Trimley St Martin Parish Council ("the Parish Council"). He resigned his position in December 2015. The background to his resignation and request for information is helpfully set out on pages 37-39 of the bundle of evidence.

### *The request for information*

3. On 28/12/16 the Appellant sent an email to the Parish Council. He made a three-part request for information under the Freedom of Information Act 2000 (FOIA). The relevant parts of his request were in the following terms.

"In terms of [the Parish Council] Standing Order 20(a) would you please supply me with the following information –

**One:** a copy of the invoice relating to the payment made to Prettys on 7 June 2016 for £1, 058.40 and described as "*legal advice*".

Note: [ .....]

**Two:** A copy of the "*legal advice*" supplied by Prettys.

Note: [ .....]

**Three:** A copy of the Minutes relating to Item 17 on the Agenda of the 6 December 2016 Meeting of {the Parish Council}, as follows: "*To agree a response to the Report on the Code of Conduct complaint.*"

Note: [ .....]."

4. On 10/1/17, the Parish Council responded to the request. They provided the information requested in parts one and three but refused to provide the information requested in part two in reliance on section 40(2) of FOIA (and also citing section 42).
5. The Appellant sought a review of the response. This was provided on 27/1/17. The Parish Council apologised for failing to inform him of his right to seek a review of the decision and to appeal against it. They confirmed that the invoice provided had been provided in full and that there were no separate minutes relating to a closed session. They continued to refuse to disclose the legal advice sought in reliance on section 40(2) and, in the alternative, section 42(1). They explained that the issue addressed in the legal advice related to an employment matter and that the decision not to disclose was taken on the basis that disclosure would not be fair to the individual concerned.

### *The complaint to the Information Commissioner*

6. On 6/2/17 the Appellant submitted a complaint to the Respondent about the Parish Council's response. He raised 14 objections (as set out in detail on pages 58-66 of the bundle).
7. The Respondent's office investigated the complaint. The Case Officer wrote to the Parish Council on 22/6/17 (page 75) seeking a copy of the withheld information (the legal advice sought by the Appellant) and further information about the basis for their reliance on section 42(1). The Parish Council correctly pointed out that they had primarily relied on section 40(2), although they had also mentioned section 42(1). The Respondent's Case Officer then raised some further questions regarding their reliance on section 40(2). The Parish Council's further responses are at pages 87-89. They provided the Respondent with a copy of the withheld information.
8. On 27/9/17 the Respondent's Case Officer advised the Appellant that, having considered the responses of the Parish Council, he had formed the view that they were entitled to rely on section 42(1) and that if the Appellant wished to pursue the matter further he was minded to recommend that the Respondent issue a Decision Notice confirming this.
9. On 14/12/17 the Respondent issued her decision. The Respondent decided that the Parish Council's decision to rely on section 42(1) was correct and that no steps needed to be taken by the Parish Council to comply with FOIA.

### *The appeal to this Tribunal*

10. The appellant appealed to this Tribunal against the Respondent's decision. His appeal grounds are set out at pages 14-22. His desired outcome was "Full disclosure of the "legal advice" referred to in my original FOIA request."
11. He cited 5 reasons for appealing, which can be summarised as follows.

- Reason 1 – third party absolute exemption wrongly applied by Parish Council.  
The Parish Council's primary reason for refusal was section 40(2). The Respondent had decided there was no need to rely on section 40(2), as section 42(1) was fully engaged. As the Appellant was the "third party" mentioned in the legal advice (or one of the third parties), section 40(2) should be reconsidered.
- Reason 2 – permission to publish was not requested from the third party.  
The Parish Council incorrectly assumed that the "third party" (himself) would not consent to the disclosure. The minutes of the closed session had, improperly, not been placed in the public domain. In the event that the legal advice related to any of the events described on page 17, no one apart from himself could reasonably be described as a third party.
- Reason 3 – the Parish Council had waived their right to confidentiality.  
The 7 June minutes correctly referred to section 141 (and not, as asserted by the Parish Council, section 111) of the Local

Government Act. In view of this, any rights to confidentiality were irrevocably waived by the Parish Council and the legal advice could be placed in the public domain.

- Reason 4 – disclosure is in the public interest.  
The Parish Council has a history of lack of transparency regarding the misuse of public funds. The legal advice expenditure was falsely minuted as having been approved/budgeted in advance. Section 111 could not have applied even if it had been cited.
- Reason 5 – culpability of Parish Clerk.  
Alleged breach of section 54(2) (failure to comply with an Information Notice) of FOIA by Parish Clerk.

12. On 13/2/18 the Respondent submitted a Response to the Appeal (pages 23-35 of the bundle). Paragraphs 16-20 deal with appeal grounds 1,2, 3 and 5 and paragraphs 21-28 deal with appeal ground 4.

13. On 24/2/18 the Appellant submitted a Reply to the Response (pages 37-45). It is apparent from that document that he had by then received from the Parish Council a “heavily redacted” copy of the withheld legal advice (presumably as a result of a Data Protection Act request that he had made at the suggestion of the Respondent – see paragraph 24 of the decision notice). He refers to having attached a copy of the redacted version he received, but this was not included in the bundle of evidence that was before us. However, at page 4 of the Reply the Appellant set out in sections the text that had been provided to him (all of which related to him), with his comments underneath each section. It was clear to us, therefore, which parts of the withheld information had been disclosed and which had not. We decided that it was fair and just to decide the appeal without seeing the redacted advice that had been provided to the Appellant.

14. On 20/3/18 the Appellant provided a short final submission dated 20/3/18. This focused on the alleged improper/unlawful approval of the payment for the legal advice, his rejection of the claim that section 111 of the LGA provided the power for the expenditure, and the consequent need for full disclosure of the legal advice.

*Our task and the issues we had to decide*

15. Section 58 of FOIA sets out our task when determining an appeal.

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
  - (a) that the notice against which the appeal is brought is not in accordance with the law, or
  - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

16. Both parties had elected to have the appeal decided on the papers. The evidence before us included: (a) an open bundle (consisting of 103 pages of evidence, plus the case management directions dated 22/3/18 on the closed documents and the Appellant's final submission dated 20/3/18); and (b) a closed bundle (consisting of unredacted copies of the legal advice that was the subject of the request and the undated letter at page 87 of the open bundle.

After considering both bundles, which included detailed submissions from both parties, we decided that we were able to decide the case without an oral hearing and that it would be fair and just to do so. Rule 32 of our procedural Rules was therefore satisfied.

17. The issue we had to decide was whether the Respondent had correctly concluded that the Parish Council had dealt with the Appellant's request for information in accordance with the requirements of Part I of FOIA. In particular, we had to decide whether the Respondent had correctly decided that the withheld information was exempt information by virtue of section 42(1) and, if so, whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The Respondent was correct to say that, because she was satisfied that section 42(1) applied and that the public interest test in maintaining the exemption outweighed the public interest in disclosure, she did not need to consider section 40(2). Section 1 of FOIA allows a public authority to withhold information to which any exemption applies. However, we thought that the Respondent's previous communications in this respect had caused some confusion. The Appellant correctly pointed out in his appeal that the Parish Council's primary reason for refusing to disclose the legal advice was because they considered it to be exempt information under section 40(2). We assumed that the Respondent's Case Officer considered section 42(1) to be the most obviously applicable exemption (correctly, in our view) and for this reason he side-lined section 40(2). It would have been preferable in our view if he had explained why he was focussing on section 42(1) and that if they were satisfied that section 42(1) applied to all of the withheld information it would be unnecessary to consider section 40(2).

18. Despite the Respondent's assertions to the contrary, however (see page 28, para.17), it was also open to us to decide whether section 40(2) applied to that

information; in addition to or (in the event that we decided that it could not be withheld in reliance on section 42(1)) in the alternative<sup>1</sup>.

19. There had clearly been some confusion on the Appellant's part about the Parish Council's references to section 40(2) and the use of the term "third party data".

The section heading for section 40 is "personal information". Section 40(1) deals with personal information that relates to the person who made the request for information. A person has no entitlement under FOIA to receive personal data that relates to him/herself (that would, at the material time, have needed to be requested under the Data Protection Act 1998 – which is what the Appellant presumably did after the Respondent had issued her decision). The Parish Council's reliance on section 40(2) was clearly in relation to the personal data of an individual or individuals *other than the Appellant*. In view of this, the Appellant's detailed arguments about "third party data" and his consent to disclosure were therefore misconceived and of no relevance to the appeal.

*The issues that were not relevant to the appeal*

20. The following issues were not relevant to the appeal.

- For the reasons mentioned in the previous paragraph, the Appellant's submissions about the incorrect application of section 40(2).
- The statutory power under which the legal advice had been sought and paid for. Our task was to consider whether the Appellant was entitled to have the withheld information communicated to him. The Appellant's points about the statutory powers under which the Parish Council acted had no bearing on this. However, we agreed with the Respondent's view that the Parish Council's explanation about the error in the statutory power cited was credible.
- The Appellant's allegation regarding section 54(2). This Tribunal has no jurisdiction to consider such a matter. In any event, we agreed with the Respondent that the allegation was misconceived given that an information notice (defined in section 51) had not been served on the Parish Council.
- The Appellant's general allegations of impropriety and misuse of public funds.

*Our decision and the reasons for it*

*Section 42(1)*

21. Having reviewed the withheld information, we were satisfied that it clearly fell within section 42(1), which provides as follows.

---

<sup>1</sup> See paragraph 109 of the Upper Tribunal's decision in *IC v 1. Malnick*; 2. *ACOBAs [2018] UKUT 72 (AAC)*.

## 42 Legal professional privilege

- (1) Information in respect of which a claim to legal professional privilege [or, in Scotland .....] could be maintained in legal proceedings is exempt information.

It clearly amounts to what is known as “legal advice privilege” (a confidential communication between a lawyer and client (the Parish Council) for the purposes of giving legal advice or assistance in a litigation/non-litigation context.

22. In view of the fact that the Parish Council had disclosed part of the document to the Appellant we considered whether the privilege in the totality of the document had been waived. Given the nature of the advice sought and the personal data included within the remainder of the document, we concluded that the privilege had *not* been waived and that it was fair for the Parish Council to continue to assert privilege over it.
23. We were also satisfied that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
24. When considering the public interest test, our starting point is that the “default setting” is in favour of disclosure. The balancing exercise starts with both scales empty and level. A public authority may only refuse to disclose where the public interest in maintaining the exemption outweighs the public interest in disclosure.
25. The Respondent’s decision notice and Response to the appeal set out the general (and very weighty) public interest arguments in favour of maintaining the section 42(1) exemption. We fully accepted those arguments, but we then had to consider whether there were particular or further factors that pointed to disclosure or non-disclosure.
26. The Appellant’s public interest test arguments in favour of disclosure are set out on pages 20 and 21 of the bundle. He asserted that “it is overwhelmingly in the public interest that the “*legal advice*” supplied by Prettys should be placed in the public domain in order to clarify justifiable concerns regarding whether or not this expense was legitimately incurred.” (page 20). This was based on his beliefs that the decisions to seek and fund the legal advice were unlawful (both in terms of legal powers and process) and may, therefore, have constituted a misuse of public funds.

We were not persuaded by this. We agreed with the Respondent’s point (page 30) that disclosure of the *contents* of the legal advice would not further the public interest in legitimate spending by the Parish Council and, in any event, that there are other (more appropriate) channels of complaint that members of the public may pursue if they have concerns about such matters.

27. We could not identify any other legitimate public interest arguments in favour of disclosure of this particular advice. There were, however, further factors that

pointed strongly in favour of *non-disclosure*. The advice sought was in relation to an employment matter concerning a particular individual and not an issue that is in the interests of the public. The advice includes personal information about an individual that it would be unfair (both to the individual and the Parish Council) to disclose. The date of the legal advice also indicated to us that the legal advice may still have related to an issue that remained “live” as at the date of the request for information.

28. We were satisfied that the public interest in maintaining the exemption was heavily weighted against the public interest in disclosure in this case.

*Section 40(2)*

29. The withheld information also consisted of personal data relating to an individual (“data subject”) other than the Appellant. Such information is subject to an absolute exemption where its disclosure would contravene any of the data protection principles.

The data protection principles are set out in Schedule 1 to the DPA. For the purposes of disclosure under FOIA only the *first data protection principle* is of likely relevance:

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) .....

30. In the absence of the consent of the data subject, the only Schedule 2 condition of potential relevance is condition 6(1):

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

The leading case law on condition 6(1)<sup>2</sup> has established that it requires the following three questions to be answered:

- Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

---

<sup>2</sup> *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 563 (AAC) at [35] - [42].



- Is the processing involved necessary for the purposes of those interests?
- Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

31. The Appellant's stated reason for requiring disclosure of the withheld information was his concern about the possible misuse of public funds by the Parish Council. On the face of it, that could be a legitimate interest. However, having reviewed the withheld information it was clear to us that its disclosure could not further that interest. It was also abundantly clear that disclosure would be unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject, who would have a strong expectation of confidentiality.

32. In view of this we were satisfied that the withheld information was also exempt from disclosure under section 40(2) which, being an absolute exemption, is not subject to any public interest test.

33. I mention, by way of observation only, a concern we had about paragraph 24 of the Respondent's decision notice, which referred to the Appellant's right to make a subject access request for his own personal data. We assumed that it was this that triggered the Appellant's subject access request and the subsequent (and possibly unwise) disclosure of parts of the withheld information by the Parish Council. The Parish Council may not have been aware of the legal professional privilege exemption in paragraph 10 of Schedule 7 of the Data Protection Act 1998. We suspected that they were not. As a data controller, it is for them to acquaint themselves with the relevant provisions of the 1998 Act. However, as a Parish Council they are unlikely to deal with such requests very often and we considered that it would have been preferable if paragraph 24 had alluded in some way to that exemption.

#### *Conclusion*

34. For the above-mentioned reasons we were satisfied that the Respondent's decision notice was in accordance with the law.

**Signed: Karen Booth**

**Judge of the First-tier Tribunal**

**Date: 7 September 2018**