

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2021

Public Authority: Caerphilly County Borough Council

Address: foi@caerphilly.gov.uk

Decision (including any steps ordered)

1. The complainant has requested a copy of correspondence to the Senior Committee Services Officer at Caerphilly County Borough Council from the Acting Clerk of Van Community Council. Caerphilly County Borough Council refused the request citing section 42 of the FOIA. The Commissioner's decision is that Caerphilly County Borough Council was entitled to rely on section 42 to refuse the request. However, the Commissioner has also recorded a breach of section 17(1) of the FOIA as the response exceeded the specified timescales stipulated under section 10 of the FOIA. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 10 May 2019, the complainant wrote to Caerphilly County Borough Council and requested the following information:
"I am making ... a request for a copy of the letter or email to [named individual A], Senior Committee Services Officer, Caerphilly County Borough Council, from [named individual B], Acting Clerk/RFO of Van Community Council in an honorary capacity.
3. The Council responded on 27 August 2019. It refused to disclose this information by virtue of section 42 of the FOIA, (Legal Professional Privilege – LPP).
4. Following an internal review the Council wrote to the complainant on 11 September 2019. It apologised for its late response to the complainant's request attributing it to an administrative error. It also confirmed that it

was upholding its original decision to refuse the request on the basis of section 42 of the FOIA , further stating that the requested information was a request for legal advice copied to the Head of its Legal Services department who provided legal advice. It confirmed that section 42 would apply to both the request and the legal advice itself.

Scope of the case

5. The complainant contacted the Commissioner on 16 October 2019 to complain about the way his request for information had been handled. He was not satisfied with the Council's reliance on the exemption cited and expressed concern regarding its delay in responding to his request.
6. The Commissioner considers that the scope of her investigation is to determine whether the Council was correct to refuse the request on the basis of section 42 and to consider whether it complied with its obligations under section 10 of the FOIA which sets out the timescale (20 working days) for compliance with the request.

Reasons for decision

Section 42 – Legal professional privilege

7. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege. The information withheld under this exemption is correspondence from the Acting Clerk of Van Community Council (VCC) to the Council in relation to a meeting and staffing matter at VCC.
8. Legal professional privilege (LPP) is not defined under the FOIA or in any other legislation but is a common law concept shaped by the courts over time.
9. LPP is intended to protect the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the former Information Tribunal described LPP 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 related communications and 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..."

10. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA (EA/2007/0136; 8 August 2008)*.
11. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
12. The Council has confirmed that it is relying on advice privilege in respect of the disputed information, and that the sole or dominant purpose of the information was a request for legal advice following a staffing matter at Van Community Council. The correspondence was addressed to the Senior Committee Services Officer with the Council's Head of Legal Services/Monitoring Officer copied in. The Council has confirmed that its Head of Legal Services is recognised by the Law Society as a solicitor.
13. In respect of the confidentiality of the information, the Council has stated that the Community Council advised that the communication was confidential indicating that there would be no expectation that the information would be put in the public domain. As the information has only been shared between the Community Council and their legal advisors, and has never been officially released by either party, the Council is satisfied that the restricted disclosure means that the associated confidence has not been lost.
14. In the light of the above, the Commissioner is satisfied that the information withheld is protected by LPP and that section 42(1) of the FOIA is engaged. She has therefore gone on to consider the public interest.

Public interest arguments in favour of disclosing the information

15. The Council has acknowledged that there are general public interest factors in disclosure in respect of accountability, transparency and furthering public debate.

Public interest arguments in favour of maintaining the exception

16. The Council is mindful that the general public interest in maintaining the exemption of legal professional privilege (LPP) will always be strong due to the importance of the principle behind LPP. Namely to safeguard openness in all communications between a client and legal advisor to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
17. The Council has cited previous decisions by the Commissioner and the First-tier Tribunal which have determined that disclosure of information that is subject to LPP would have an adverse effect on the course of justice through the weakening of the general principle behind LPP
18. In support of this argument, the Council has referred to the Tribunal's decision in respect of *Bellamy v the Information Commissioner and DTI* [EA/2005/023] in which the Tribunal described LPP as a "*fundamental condition on which the administration of justice as a whole rests.*"
19. Based on the above, the Council considers that there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance attached to it as a long-standing common-law concept.

The balance of the public interest test arguments

20. The Council has weighed up the balance of public interest factors and acknowledges the general public interest in public authorities being as accountable and transparent as possible in relation to their business as this can help increase public understanding, trust and participation in the decisions taken. It also accepts that disclosure of the disputed information may assist the public in understanding how the Community Council makes decisions. However, in regard to the circumstances of this case, it is not the Council's view that the public interest in disclosure would equal or outweigh the strong public interest in maintaining the right of the Community Council to consult with their legal advisors in confidence about the staffing matter.
21. The Council has acknowledged for the public interest to equal or outweigh the strong public interest in preserving the principle of LPP there would need to be factors where substantial amounts of money are involved or where a decision will affect a large amount of people, and has informed the Commissioner that it cannot identify any obvious signs that these factors were present in this case to tip the balance in favour of disclosure.
22. In weighing up the balance of the public interest outlined by the Council, the Commissioner also acknowledges the general public interest factors

in favour of transparency and accountability referred to in paragraph 15 of this notice.

23. The Commissioner is also mindful of the general public interest in being able to demonstrate that the Community Council was prepared to take advice to ensure that its staffing matter was compliant.
24. However, the Commissioner recognises the importance of the general principle that clients should be able to receive free and frank legal advice from their lawyers and acknowledges that this in itself is a strong public interest factor in maintaining the exemption. The Commissioner is mindful that this was confirmed by the Tribunal in the case of *Bellamy v the Information Commissioner* referred to in paragraph 18 of this notice and further reinforced in *Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/01445)* in which the Tribunal states:

"Our starting point, therefore is that the exemption is qualified, not absolute, but that ...must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute."

25. As referred to by the Council in paragraph 21 of this notice, the Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors involved in this particular case.
26. Having considered the relevant public interest factors both in favour of disclosure and maintaining the exemption, the Commissioner considers the weight of public interest is therefore balanced in favour of maintaining the exemption.

Section 10(1) – time for compliance with request

27. Section 10 of the FOIA states 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 17 – refusal of the request

28. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice..."

29. The complainant submitted his request for information on 10 May 2019 which the Council acknowledged on 13 May 2019. However, despite a number of chasers from the complainant, the Council did not provide its full response until 27 August 2019 which is clearly in excess of the specified timeframe. The Commissioner has therefore recorded a breach of section 17(1) of the FOIA.

Right of appeal

30. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Catherine Dickenson
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