

Freedom of Information Act 2000 (Section 50)

Decision Notice

21 May 2007

Public Authority: Cheltenham Borough Council
Address: PO Box 12
Municipal Offices
Promenade
Cheltenham
GL50 1PP

Summary

The complainant requested the Council to release a copy of the submissions it made to Counsel regarding an ASBO application he requested to be ordered against his neighbour. The Council responded and refused to disclose the information, citing section 42 of the Act. The complainant remained dissatisfied and submitted that the release of this information was of great importance to him, as he wished to see what evidence was taken into account when his ASBO application was considered. The Commissioner considered the case and concluded that the exemption provided by section 42 of the Act was appropriately applied in this case and that the public interest favours maintaining this exemption.

The Commissioner's Role

1. The Commissioner's role 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 has been in dispute with his neighbour for several years and raised numerous complaints with the Council regarding their behaviour. At the time of making his information request, the complainant had been in correspondence with the Council regarding his application for an Anti Social Behaviour Order (ASBO) to be made against his neighbour. It came to the complainant's attention that the Council had made submissions to its legal adviser for the purpose of obtaining legal advice regarding his ASBO application.

He therefore wrote to the Council on 3 October 2005 to make the following request in accordance with Section 1 of the Act (a transcript of this section of the Act is contained within the Legal Annex section at the end of this Notice):

“that a copy of that submission be made available to me...”

3. The Council responded to this request on 31 October 2005. It confirmed that only one request for legal advice had been made and this was made on behalf of the Cheltenham Crime and Disorder Partnership (CCDP). It advised that the requested information was subject to legal professional privilege and therefore it was unwilling to provide the complainant with a copy.
4. The complainant wrote to the Council on 7 February 2006 to again request that it provide a copy of the submissions it made to Counsel for the purposes of obtaining legal advice. The complainant explained that he acknowledged the response received from Counsel would be deemed to be subject to legal professional privilege. However, he felt that he was entitled to a copy of the details submitted to the Council's legal adviser, as this would have included information about himself and/or his behaviour. He advised the Council that access to this information was of the “utmost importance”, as he wished to ensure that only “facts” were submitted to the Counsel for consideration.
5. The Council replied on 10 February 2006. It explained that any correspondence between the Council and its legal representative is subject to legal professional privilege and therefore a copy of any such correspondence cannot be disclosed. It tried to reassure the complainant that in such matters only facts and admissible evidence are used in the decision making process.
6. The complainant submitted a further request to the Council for this information on 13 February 2006.
7. The Council issued a further response on 9 March 2006. It advised the complainant that it does hold the information requested but it is unwilling to disclose it, as it is exempt information under section 42 of the Act (a transcript of this section of the Act is contained within the Legal Annex section at the end of this Notice).
8. The complainant continued to correspond with the Council on this matter and appealed against the Council's decision not to release the information on 6 April 2006. The Council reviewed its decision in accordance with its internal review process and on 18 April 2006 explained further to the complainant that it considered the exemption applied and why it felt it was not in the public interest to disclose this information.
9. As the complainant remained dissatisfied with the Council's decision to withhold the information requested, he contacted the Commissioner to request that he consider the Council's handling of his information request and the application of the exemption cited to the information required.

The Investigation

Scope of the case

10. The Commissioner's investigation into the complainant's concerns sought to establish whether the Council had complied with the requirements of Section 1 of the Act and, in particular, whether it had appropriately applied the exemption cited.
11. The Commissioner notes that the complainant also made a subject access request under the Data Protection Act 1998 for access to the personal data contained within the requested information. This issue is addressed in the 'Other matters' section to the end of this Notice, as it does not form any part of the Commissioner's decision concerning the complainant's information request to the council.
12. The complainant raised other issues concerning the validity of the information he requested. These issues have not been addressed within this Notice as they are not requirements of Section 1 and therefore fall outside the scope of the Act.

Chronology of the case

13. The Commissioner wrote to the Council on 6 May 2006 to request a copy of the information being withheld to enable him to consider whether the exemption claimed had been appropriately applied.
14. The Council responded on 21 August 2006 providing a copy of the information withheld.
15. The Commissioner wrote to the Council on 16 November 2006 for further information to establish the relationship between CCDP and the Council and to determine whether any further information to that supplied on 21 August 2006 was sent to Counsel for the purposes of obtaining legal advice.
16. The Council replied on 7 December 2006 and confirmed that no further information was sent to Counsel for the purposes of legal advice. It also explained that it was its Community Safety Manager who instructed Counsel to provide legal advice with regards to the ASBO application. It confirmed that the Community Safety Manager also held the position of Secretary to the CCDP and acting in both roles simultaneously requested Counsel to provide legal advice.
17. The Council was not asked to provide further explanations as to why it was in favour of maintaining this exemption, as the Commissioner felt the arguments were clearly presented in the council's earlier responses to the complainant dated 9 March and 18 April 2006.

Findings of the case

18. The information withheld comprises of:

- Submissions made to Counsel, which includes the draft ASBO application, covering letters and email correspondence with Counsel. The ASBO application in part contains the personal data of the complainant and details of the complaints he has raised.
 - Legal advice provided by Counsel concerning the ASBO application.
19. The complainant accepts that the legal advice provided by Counsel may be covered by legal professional privilege. However, the complainant does not accept that the instructions made to Counsel on which a decision was reached are covered by this exemption and, in the main, it is this information that the complainant requires access to.

Analysis

Section 42 Legal Professional Privilege

20. Section 42 of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege; legal advice privilege and litigation privilege. Legal professional privilege protects the confidential communications between professional legal adviser (including an in-house legal adviser) and clients from being disclosed.
21. The Council has argued that the information being withheld is the communication with Counsel for the purposes of obtaining legal advice in respect of the ASBO application. It stated that the information is therefore covered by legal professional privilege and section 42 of the Act is engaged.
22. The Commissioner has reviewed the information withheld and notes that this contains both the submissions made to Counsel and the legal advice obtained. In respect of the legal advice provided, the Commissioner is satisfied that this information is confidential legal advice, relates to communications with Counsel and therefore attracts legal advice privilege. With regards to the submissions made to Counsel, as the Council confirmed that these submissions were drafted as a means of conveying the information to Counsel to enable it to advise on the application, the Commissioner is satisfied that the information was created for the dominant purpose of obtaining legal advice and therefore attracts legal advice privilege.
23. To determine whether legal professional privilege continues to apply to the requested information, the Commissioner has considered whether the Council copied, shared or disclosed the information to either the general public or to a third party free from any restrictions as to its use. The Council confirmed that its Community Safety Manager instructed Counsel and at the time of requesting legal advice he also held the position of Secretary to the CCDP. It explained that the information had not been copied or shared with any third party and confirmed that the Community Safety Manager requested the legal advice as part of this role

within the Council and in conjunction with his position in the CCDP. The Commissioner is satisfied that there is no evidence to suggest that this is not the case and therefore that legal professional privilege has not been waived.

24. The Commissioner has therefore concluded that the information listed in paragraph 17 above is covered by legal professional privilege and therefore the exemption provided by section 42 of the Act is engaged in this case.

Public Interest Test

25. Section 42 of the Act is a qualified exemption and is therefore subject to the public interest test. In reaching a view on the public interest, the Commissioner has taken into account those cases already heard by the Information Tribunal in which the issue of legal professional privilege and the public interest have been considered.
26. In the case EA/2005/2003 *'Bellamy vs. the Information Commissioner and the DTI'* the Information Tribunal concluded that:
- “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest...it 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 cut cases”
27. In a similar case, EA/2006/0044 *Kitchener vs. Information Commissioner and Derby City Council* the Information Tribunal stated that:
- “if either lawyer or the client could be forced to disclose what either said to each other (whether orally or in writing) as part of that process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered”
28. These cases are not binding upon the Commissioner's decision, as each case is considered on its own merits. However, these cases provide the Commissioner with guidance in determining what weight should be given to the public interest arguments in this matter.
29. The Commissioner has considered the submissions made by the complainant and the Council. Whilst he accepts the complainant's personal reasons in favour of disclosure, the Commissioner is mindful that when dealing with requests for information, disclosure is to the public at large and not to one individual. The Commissioner also acknowledges that there are strong public interest arguments in favour of disclosing the information, as its release would allow the public to understand the basis of the Council's decision and its legal justification for a particular course of action.
30. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exemption. The Council argued that it

needs to be able to obtain full and frank legal advice and that because the difficult situation between the complainant and his neighbour is unresolved the public interest lies in maintaining this exemption. The Commissioner accepts that there is a real risk that disclosing confidential legal advice, including the submissions made to Counsel, could undermine the Council's ability to obtain such advice in a timely fashion and have the confidence that the advice given is done so freely without the consideration of its wider disclosure. Similarly, legal advice necessarily highlights both the strengths and weaknesses of a particular position. If legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the Act. English law considers "privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned" (case of EA/2005/2003 paragraph 8). It is therefore the Commissioner's view that there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.

31. For the reasons explained in paragraph 29, the Commissioner has concluded that in this case the public interest in maintaining the exemption provided by section 42 of the Act outweighs the public interest in disclosure.

The Decision

32. The Commissioner's decision is that the information requested is exempt from disclosure under section 42 of the Act. The Commissioner is therefore satisfied that the Council responded to this request in accordance with the provisions of the Act.

Steps Required

33. The Commissioner requires no steps to be taken.

Other matters

34. The Information Commissioner is also responsible for the enforcement of the Data Protection Act 1998. As part of the information requested by the complainant contains his own personal data, the Commissioner has considered whether such data could by application be accessed via the Data Protection Act. The Commissioner notes that the complainant has already submitted a complaint under the Data Protection Act to this office regarding his right of access to the personal data contained within the requested information and received a copy of the Commissioner's assessment dated 4 January 2007. In this particular case it was the Commissioner's view that a data controller can rely on a specific exemption under Schedule 7 (10) of this legislation to refuse to release personal

data which is covered by legal professional privilege and therefore no further action was required.

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 21st day of May 2007

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

Freedom of Information Act (2000)

Section 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 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.”