

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 10 April 2012

Public Authority: Fleetwood Town Council
Address: c/o 13 Warren Avenue North
Fleetwood
Lancashire
FY7 7BA

Decision (including any steps ordered)

1. The complainant requested information concerning an allotment plot from Fleetwood Town Council ("the council"). The council withheld some information using section 42(1) of the Freedom of Information Act 2000 ("the FOIA") on the basis that it was subject to legal advice privilege. During the Commissioner's investigation, the council disclosed some of the legal advice as it accepted that this was no longer confidential. The Commissioner's decision is that the request should have been dealt with under the terms of the Environmental Information Regulations 2004 ("the EIR") rather than the FOIA. He is satisfied however that regulation 12(5)(b) was engaged in relation to the remaining information and that the public interest favoured maintaining the exception. He was also satisfied that no further recorded information was held.

Background

2. The council explained to the Commissioner that early in 2010 initial enquiries were made to Wyre Borough Council ("WBC") about taking ownership of and responsibility for managing the allotments in Fleetwood. WBC requested that the council produce its own tenancy agreements. Following discussions, a policy was agreed which included sole tenancies only and a tenancy agreement was put in place. The council received a list of tenants, however, the complainant's name

was not on that list. The actual transfer of title occurred on 2 December 2010.

3. The council said that the complainant first made contact with it in February 2011 when she claimed to have a "rolling WBC joint tenancy agreement" with her father. WBC subsequently located a copy of a jointly signed agreement dated October 2007 which had apparently been authorised by staff at WBC at the time. As soon as the council became aware of this issue, it resolved to seek legal advice to help it to determine what action to take.
4. The complainant and the council remain in disagreement over the above issue and this forms the subject of this particular request.

Request and response

5. On 11 August 2011, the complainant requested information concerning an allotment plot and an agreement that she said had been in place since 1 October 2007 which had made her a joint tenant. She said that she had been unhappy with the stance taken by the council in relation to this matter during the course of discussions with the chairman. She asked for information in the following terms:

"...we are formally requesting copies of all emails, all written accounts and all minutes relating to this matter".

6. On 25 August 2011 the council replied. It confirmed that it held emails relating to the matter and it also confirmed there were relevant references within the recent minutes of the council. The council asked if the complainant could be more specific about what emails she wanted to see.
7. On 8 September 2011, the council wrote to the complainant again and said that it had not received any clarification from her regarding what emails she wished to see. The council cited the exemption under section 21 of the Freedom of Information Act 2000 ("the FOIA") and said that in accordance with this section, it did not have to provide minutes of the meetings as these were already publicly available. It also said that the majority of the correspondence was exempt under section 42(1) of the FOIA because it was covered by legal professional privilege. The council also said that it was unable to provide a list of tenants but it had attached all the other relevant information that it held.
8. On 18 September 2011, the complainant replied and expressed dissatisfaction with the response received. She said that she had visited Fleetwood Library and been informed by them that they do not have an

up to date set of council minutes. She said that the information on the website was not up to date. She also said that the council had not considered the public interest test associated with section 42(1) and she questioned whether privilege had been "waived".

9. The council responded on 21 September 2011. It said that it had checked with the library that all relevant minutes were available. It also said that the information was exempt under section 21(1) because the council intended to publish the information on its website. The council said it wished to maintain that section 42(1) was engaged and that the public interest favoured maintaining the exemption. It said that it did not agree that privilege had been waived.
10. The complainant replied on 11 October 2011 and presented her counter arguments. She said that a copy of some legal advice had been put into the public files at Fleetwood Library and that she believed that correspondence was held from [name] and the National Allotment Association which had not been provided.
11. On 26 October 2011, the council said that any further complaint should be directed to the ICO.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether:
 - The council correctly withheld information using the exemption under section 42
 - The council should have provided correspondence from [name] and the National Allotment Association
13. During the Commissioner's investigation, the council conceded that some of the relevant legal advice was available in the public library. It therefore provided this to the complainant, thereby informally resolving this part of the complaint.

Reasons for decision

Was the information environmental?

14. There are separate rights of access relating to information that meets the definition of "environmental information" set out in regulation 2 of

the EIR. Information that is “environmental” cannot be considered under the FOIA.

15. In this case, the council dealt with the request under the FOIA. The Commissioner’s view is that it should have dealt with the request under the EIR. The information in question relates to tenancy issues relating to an allotment plot. According to regulation 2(1)(c), environmental information is any information on activities affecting or likely to affect the land. The Commissioner was satisfied in this case that the information was on (meaning relating or concerning) an activity affecting the land (i.e. allotments).

Regulation 12(5)(b) - Did the council correctly withhold relevant information?

16. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”.
17. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege and, even though the council originally relied on section 42(1) of the FOIA, the Commissioner considers that it is appropriate to consider the equivalent exception under regulation 12(5)(b) of the EIR.
18. The information being withheld consists of communications with the National Association of Local Councils (“NALC”) and one written request to the National Society of Allotment and Leisure Gardeners (“NSALG”). The Commissioner was satisfied that the withheld information consisted of communications made for the dominant purpose of requesting or giving legal advice. He was satisfied that there was a relevant legal context and that the legal advisor had appropriate legal qualifications.
19. Information cannot be privileged unless it is confidential. The Commissioner took into account that some of the legal advice was made publicly available. The publicly available information refers to the questions that were asked by the council because they are quoted by the solicitor. The information also refers back to the content of some earlier legal advice, albeit in less detail. This information is no longer confidential and therefore, it is not the case that the entirety of the withheld information is privileged. Nonetheless, the Commissioner can see no merit in ordering a second disclosure of the same information as it is already in the public domain. The Commissioner is satisfied that the information that the council is continuing to withhold goes beyond the

details that have already been disclosed and that it therefore remains privileged.

20. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
21. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
22. 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".
23. The Commissioner accepts that disclosure of information that is subject to legal professional privilege would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the Council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
24. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant legal advice.

Public interest arguments in favour of disclosing the requested information

25. 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.
26. In this case, the Commissioner notes that disclosure of the full legal advice may assist the public in understanding fully the actions taken by the council in this particular case.

Public interest arguments in favour of maintaining the exemption

27. As already indicated, 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".
28. 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".*
29. 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.
30. 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..."*
31. 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.

Balance of the public interest arguments

32. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. 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 authority's right to communicate with a lawyer in confidence.
33. The Commissioner observes 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 misrepresentation, unlawful activity or a significant lack of appropriate transparency. It was not apparent to the Commissioner that any of these factors were relevant in this case.
34. In the Commissioner's view, there is little wider public interest in the disclosure of this particular information. The interest is more of a personal one because the complainant is obviously unhappy with the decision taken by the council in this case. Nonetheless, the Commissioner considers that there has been an appropriate degree of transparency surrounding the decision in this case which has already gone beyond the usual expectations, since the council made public one of the items of legal advice.

Did the council hold information from the named individual and the National Allotment Association relating to the issues raised by the complainant that it had not provided?

35. Regulation 5(1) of the EIR provides a general right of access to recorded information held by public authorities. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

36. The Commissioner asked the complainant if she could explain why she believed that this information was held. The complainant referred to an email dated 15 March 2011 from the council's clerk. The email ends with the request, "...please let me know what you and the Council Allotment Committee decide". The complainant said that she found it difficult to believe that this information would not have been recorded because the council would need to ensure that it keeps records relating to the decision-making process to ensure that the matter can be scrutinised in an open and transparent way. She also said that she had been in touch with NSALG and she had been informed that while conversations can take place over the telephone, any requests for advice have to be in writing and the response from NSALG will be in writing too.
37. The council confirmed that it did not hold, at the time of the request, any information from the named individual relating to the issues raised by the complainant and the one item of correspondence it had sent to NSALG had been withheld under section 42(1). It said that NSALG had responded verbally at the time. The clerk to the council told the Commissioner that she had been provided with written comments from NSALG indirectly as they were sent to a particular individual (independent from the council) who chased up the matter when the clerk mentioned that no written advice had been received. The clerk told the Commissioner however that this information was only provided to her indirectly at an allotment site meeting following the request in question. It was not held by the council at the time of the request.
38. The council explained to the Commissioner that the individual referred to by the complainant always prefers to discuss issues by phone or in person. The council consulted the individual concerned and he wrote to the Commissioner alongside the council to confirm that no relevant correspondence was held.
39. The council had also searched relevant electronic and paper information to check that this information was not held. It said that it was not aware of any information being mislaid, deleted or destroyed.
40. Based on the above, the Commissioner accepts that on the balance of probabilities, no more information was held by the council. The fact that the complainant is surprised by this situation and would expect the council to have recorded more information is not evidence that more recorded information existed.

Right of appeal

41. 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

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.

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

Andrew White
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