

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2013

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Leamington Spa
CV32 5HZ

Decision (including any steps ordered)

1. The complainant has requested legal advice which Warwick District Council (the "council") received in relation to the collection of 2 rents from the Racing Club. The council refused the request, citing the exemptions for prejudice to effective conduct of public affairs and legal professional privilege.
2. The Commissioner's decision is that by failing to issue a response or a refusal notice within the statutory time limit the council breached section 10 and section 17(1) of the FOIA. The Commissioner also finds that the council has correctly applied section 42(1) of the FOIA to the withheld information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 28 September 2012 the complainant made the following request for information:

"I should like to request under the Freedom of Information Act 2005 to see the legal advice that Warwick District Council received regarding the collecting of two rents from the Racing Club site, i.e. from Racing Club and from the Cadets. I should also like to know if this advice came from our County legal team or from another legal body."

5. The council responded on 5 February 2013 and refused the request, citing the exemptions for prejudice to effective conduct of public affairs and legal professional privilege.
6. Following an internal review the council wrote to the complainant on 5 March 2013. It stated that it was upholding its original decision to refuse the request.

Scope of the case

7. On 31 October 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled. The initial complaint identified the council's apparent failure to respond to the request. Following the Commissioner's intervention the council issued a response.
8. Subsequent to the response being issued to the complainant, the Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied exemptions in withholding the requested information and whether the council had addressed the full scope of the request.
9. In relation to the latter part of the request for "I should like to know if this advice came from our County legal team or from another legal body", the council provided the complainant with this information during the Commissioner's investigation. The Commissioner's investigation has, therefore, considered the council's application of exemptions to refuse the request.

Reasons for decision

Sections 1 and 10 – the provision of information

10. Section 1 of the FOIA provides that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have that information communicated to them. Section 10(1) of FOIA provides that this must be done within 20 working days of receiving a request.
11. In this case the request was submitted on 28 September 2012 and the response issued on 5 February 2013. By failing to confirm that it held information covered by the scope of the request within the statutory time-limit and failing to respond to the latter part of the request until

prompted by the Commissioner, the Commissioner finds that the council breached section 10 of the FOIA.

Section 17 – the refusal of a request

12. Where a public authority is to any extent seeking to rely on an exemption contained in Part II of the FOIA, section 17(1) requires a public authority to issue a notice within 20 working days which –
 - (a) states the fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
13. In this case the council did not provide the complainant with a notice informing them of its reliance to rely on exemptions to refuse the request within the statutory time-limit. The Commissioner has therefore determined that it breached sections 17(1)(a), (b) and (c) in its initial handling of the request.

Section 42 – Legal Professional Privilege

14. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
15. The principle of legal professional privilege (LPP) is based on the need to protect a client's confidence that any communication with their 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, in relation to the request for copies of the instructions and opinions of counsel, the council sought to rely on both advice and litigation privilege.
16. Having inspected the withheld information to which the council has applied the exemption, the Commissioner is satisfied that this consists of communications made by or to qualified solicitors for the dominant purpose of obtaining or giving legal advice. The information, therefore, falls within the scope of the exemption. However, prior to determining whether the exemption is engaged, the Commissioner has considered whether the advice still attracted privilege at the time the request was received. He has also considered whether the advice additionally attracts litigation privilege.

Does the advice still attract LPP?

17. When considering whether legal advice has been disclosed such that the advice can no longer attract LPP the Commissioner considers that the sole consideration under section 42(1) is whether the information is still confidential from the world at large. The council has explicitly confirmed to the Commissioner that the advice had not, at the time of the request, been made available to the public or to a third party.

Litigation Privilege

18. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
19. Having read the withheld information it is clear to the Commissioner that, at least when the legal advice was sought, there was a real prospect or likelihood of legal action being brought against the council. The council has explicitly confirmed to the Commissioner that this threat remained at the time of the request as the issue was still live.
20. Based on his review of the withheld information and the council's submissions, the Commissioner is satisfied that the withheld information is subject to legal professional privilege. This is because the information is not publically known and there is no suggestion that privilege has been lost, there was a real likelihood of litigation taking place at the time of the request, and the information is for lawyers to use in preparing a case for litigation.

The public interest test

21. As section 42 is a qualified exemption, the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the information

22. The council has argued that there is a broad public interest in it being open and transparent about its activities in relation to the Racing Club

site. Disclosure would clarify the factual position of the council for all parties.

23. The complainant has suggested that allegations have been made that the council may have committed a contravention of the Fraud Act 2006 in dealing with the substantive matter. Disclosure of the information would serve the public interest in revealing possibly impropriety or misfeasance in public office.

Public interest in maintaining the exemption

24. The council has argued that disclosure of the legal advice into the public domain would negatively impact on the council's position in trying to resolve the Racing Ground issue. It has emphasised that, at the time of the request, these matters were still at a sensitive and undetermined stage. Disclosure of the information would severely inhibit this process and prejudice the council's options in how to deal with the matter going forward. The council considers that disclosure would also undermine the principles behind LPP and its ability to speak freely and frankly with its lawyers.
25. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional 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*¹, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
26. The Commissioner considers that 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.
27. 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:

¹ Appeal number EA/2005/0023.

"...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..."

28. 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

29. In relation to the complainant's suggestion that the council might have committed fraud in relation to the Racing Club matter, the Commissioner has not been provided with any specific evidence in support of this claim. Having conducted a search the Commissioner has found references to the collecting of rents issue and the council's potentially liability in this matter, however, he has found no evidence which shows that the council might have committed fraud in its handling of the matter².
30. The Commissioner accepts that the FOIA can provide a mechanism for obtaining evidence of malpractice by a public authority or other practices which are of genuine public interest – information which would not otherwise be publically available. However, he considers that, in order to challenge the inbuilt public interest in protecting LPP and maintaining the exemption, there must be sufficient, countervailing evidence which justifies disclosure.
31. In general terms and, without reference to this specific request, the Commissioner recognises that there is a tension between: (a) a request which seeks evidence of potential misconduct by a public authority and the associated public interest which would be served by confirmation that such conduct has or has not occurred and, (b) the public interest in maintaining LPP in order that an authority might defend itself from such allegations.

² See, Minutes of the Finance and Scrutiny Committee (11/10/11), Warwick Town Council, available online and the following news articles:
<http://www.warwickcourier.co.uk/news/local/arbitrators-called-for-over-racing-club-dispute-1-3711106>; <http://www.highbeam.com/doc/1G1-303992423.html>;
<http://www.warwickcourier.co.uk/news/local/arbitrators-called-for-over-racing-club-dispute-1-3711106>.

32. In relation to the suggestion of fraud which has been raised in this specific case, the Commissioner considers that, as a criminal offence, the FOIA is not necessarily the appropriate mechanism for such allegations to be explored. It is certainly not within the Commissioner's remit to adjudicate in such matters and, given that legal advice may be relevant to a public authority's defence should such a charge be brought, it seems clear that disclosure of said advice would, in advance of an authority being able to consider any formal charges, prejudice its position. The Commissioner considers that this, in addition to the lack of substantive evidence which suggests that the council may have committed fraud, combines to resolve the tension identified above in this case.
33. The Commissioner notes 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 or unlawful activity. Following his inspection of the information, the Commissioner could see no sign of unlawful activity or evidence that the council has misrepresented any legal advice it had received.
34. The Commissioner has placed significant weight on the fact that the advice was live and the council's confirmation that possible litigation was in prospect at the time of the request.
35. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. 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.
36. The relevant position in law in was analysed by the Upper Tribunal in *DCLG v The Information Commissioner & WR* [2012] UKUT 103 where the Upper Tribunal stated their first reason for not ordering disclosure was:-

"The effect on the course of justice, in terms of a weakening of confidence in the efficacy of LPP generally, which a direction for disclosure in this case would involve. There are in our judgment no special or unusual factors in this case which justify not giving this factor the very considerable weight which it will generally deserve."

37. It is clear to the Commissioner in this case that the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.
38. As the Commissioner has found that the council has correctly applied section 42(1) to withhold the information in this case and that the public interest favours maintaining the exemption, he has not gone on to consider the council's application of section 36

Right of appeal

39. 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

40. 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.
41. 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

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