

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2014

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant has requested examples of successful claims for pothole damage from Hampshire County Council ("the council"). The council provided four examples, but withheld some information under the exemptions provided by section 40(2) and section 42(1) of the Freedom of Information Act 2000 ("the FOIA").
2. The Commissioner's decision is that the council has correctly applied the exemptions provided by section 40(2) and section 42(1). However, the Commissioner identified that the council's response was provided outside of 20 working days, and therefore breached the requirement of section 10(1).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 14 May 2012, the requester that the complainant is acting on behalf of wrote to the council and requested information in the following terms:

"Because my time is precious, I do not want to make a claim if I am clearly going to be refused. Therefore I wish to understand in what circumstances the Council may pay out. Please can I have examples of where the Council has paid out, so that I can judge whether it is worth wasting anymore time/effort on this."

5. The council initially contacted the complainant on 13 June 2012 to advise that the request would exceed the costs limits provided by the FOIA. The council upheld this position in an internal review on 3 January 2013. Following mediation by the Commissioner, the council revised its position and provided four examples of relevant claims to the complainant on 8 October 2013, but with some information redacted under the exemptions provided by section 40(2) and section 42(1).
6. The complainant contacted the council on 15 October 2013 to contest the application of exemptions. The council subsequently responded to the complainant on 5 November 2013 that it considered the matter to be concluded.

Scope of the case

7. The complainant contacted the Commissioner on 7 November 2013 to contest the council's application of exemptions. The council subsequently confirmed to the Commissioner on 25 November 2013 that it considered its application of exemptions to be correct, and invited the Commissioner to conclude the matter by issuing an independent decision.
8. The Commissioner considers that the scope of this case is the determination of whether the council has correctly withheld information under the exemptions provided by sections 40(2) and 42(1). The Commissioner will also consider whether the council provided its response within the time for compliance provided by section 10(1).

Reasons for decision

Section 40(2) – Third party personal data

9. Section 40(2) provides that:

"Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied."*

10. Section 40(3) provides that:

"The first condition is–

- (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–*
- (i) *any of the data protection principles..."*

Is the withheld information personal data?

11. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

"...data which relate to a living individual who can be identified–

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."

12. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. In this instance, the Commissioner has reviewed the information (which comprises both redacted sections of text and entire pages) that has been withheld on this basis and accepts that the information is the personal data of the various individuals including claimants, private individuals who have reported highway issues to the council, council employees, and contractor employees.
13. The complainant has specifically advised the Commissioner that he considers a proportion of the withheld claim forms would contain information that does not represent personal data under the DPA, and should therefore not be withheld. However the Commissioner has reviewed the claim forms as part of his investigation and has concluded that they represent personal data in their entirety.
14. The Commissioner identified that a considerable proportion of the claim forms represented biographical information, such as that about damage sustained to vehicles, or the exact location and dates of incidents. Such information has the potential to be connected to an individual through additional information that might enter the public domain, and through that process become personal data as defined by the DPA. The Commissioner has been particularly mindful that claims might clearly relate to incidents that have resulted in substantial damage, injury or

loss of life, and which have potentially been publicised through police notices, local newspapers, and other public media.

15. Lastly, the Commissioner has considered the extent to which the withheld pages could be anonymised by removing the personal data, but has concluded that it would not be possible to redact the information in a meaningful manner without rendering the page useless. The Commissioner is therefore satisfied that the withheld pages in their entirety are personal data.

Would disclosure breach the data protection principles?

16. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant to this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the individual

17. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
18. In this case the council has explained that it does not consider that the members of the public who have either submitted the claim, or otherwise referred highway issues to the council, would have a reasonable expectation that their personal data be disclosed into the public domain through a FOIA request. This is particularly so for individuals who are acting as claimants, as the council's claim form includes a statement confirming that personal data will be processed and disclosed under the terms of the DPA.
19. While the council has not commented specifically on the reasonable expectations of the council and contractor staff whose personal data has also been withheld, the Commissioner has identified that this information is composed of names and signatures found in council road maintenance sheets. The Commissioner considers that these individuals are unlikely to have a reasonable expectation that their personal data in such circumstances would be disclosed to the world at large.

Consequences of disclosure

20. The council has advised the Commissioner that it considers that the release of the personal data belonging to claimants and other members of the public would cause distress to those individuals, who would be unlikely to understand why their personal data has been publically disclosed.
21. Additional to this, the Commissioner considers that the release of those individual's personal data, which includes biographical and contact details, would represent an invasion of privacy through confirming that those individuals had either submitted a complaint or made a claim against the council.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

22. The council advised the Commissioner that it perceives there to be limited legitimate interest in the withheld personal data being disclosed, because the general requirement of openness and transparency in showing that claims are dealt with fairly and diligently has already been met through the information that has already been disclosed. Additionally, the council considers that the disclosure of the personal data of claimants and other member of the public would be unlawful, as those individuals were not provided with any form of statement, such as in a privacy notice, which would indicate that their personal data could potentially be publically disclosed.

Conclusion

23. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
24. However, having considered the circumstances of this case and the withheld information itself, the Commissioner's view is that the right to privacy outweighs the legitimate public interest in disclosure. It is clear to the Commissioner that the disclosure of the withheld personal data would be outside the expectations of the individuals to which it pertains. This is particularly relevant to the claimants and members of the public, who the Commissioner considers would not expect to have the existence of their claims or complaints confirmed to the world at large, nor have their contact information and biographical information publically released. Additionally, the Commissioner has concluded that the council

and contractor staff who have been involved in road maintenance would not expect their names and signatures to be publically disclosed. The Commissioner therefore considers that the council was correct to withhold the personal data under the exemption provided by section 40(2).

Section 42(1) – Legal professional privilege

25. 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."

26. The principle of legal professional privilege is based on the need to protect a client's confidential communication with their legal advisor. There are two limbs to legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, the council has confirmed to the Commissioner that it sought to rely upon advice privilege.

Is the exemption engaged?

27. For the exemption to be engaged the communications must be to and from a legally qualified person. The council provided a copy of the communications to the Commissioner, who was satisfied that it represents communications between the council's Environment Department and two legally qualified persons within the council's Legal Services, namely a solicitor and a barrister.

28. For the exemption to be engaged, the communications must also be proven to have still held the necessary quality of privilege at the time the request was received. The council has explicitly confirmed to the Commissioner that the communications had not, at the time of the request, been disclosed to third parties, and therefore still retained the necessary quality of privilege. There is no conflicting evidence that would lead the Commissioner to consider that this is not correct.

29. Based on his review of the communications and the council's submissions, the Commissioner is therefore satisfied that the communications are subject to legal professional privilege, and that the exemption provided by section 42(1) is engaged.

The public interest test

30. As a qualified exemption, section 42(1) is subject to a public interest test. The communications must therefore be disclosed if the public

interest in disclosure outweighs the public interest in maintaining the exemption.

Public interest in favour of disclosing the information

31. 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. The council has advised the Commissioner that it has acknowledged these factors, but did not identify further factors that were relevant to the circumstances of this request.
32. The complainant has proposed to the Commissioner that the council has failed to distinguish between 'advice' and the 'decision on whether to accept such advice and act accordingly', and contests that while both appear to take place within the council's Legal Services, only the former can attract legal professional privilege. The Commissioner has considered this argument, but has concluded that in the circumstances of this case the argument is not applicable. This is because, having considered the withheld communications, it is apparent to the Commissioner that the council has submitted claim information to a legally qualified person within its Legal Services, in order for that person to reach a legal decision on the council's liability. The communications cannot therefore be divided into what is 'advice' and what is a 'decision'. Related to this, the Commissioner understands that the outcome of those legal decisions, which for all four claims entailed a settlement being paid, were included in the information that was disclosed to the complainant.

Public interest in favour of maintaining the exemption

33. The council has advised the Commissioner that it considers the principle of legal privilege, which safeguards the openness between client and legal advisor, to be a strong factor against disclosure. Additional to this, the council has explained that the disclosure of the communications in relation to specific claims would only result in a limited general insight into how the council manages and responds to claims, due to each case being legally considered on specific circumstances.
34. The importance of legal advice privilege has already been expressed by the Commissioner and the Information Tribunal in a number of previous decisions. These decisions have confirmed that the 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*, the Information Tribunal described legal professional

privilege as "*a fundamental condition on which the administration of justice as a whole rests*".

35. 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 section 42 states the following:

"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."

36. 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.

Balance of the public interest test

37. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the council and the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.
38. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions, particularly where these decisions result the use of public monies. However, having considered to the circumstances of this case, the Commissioner does not consider that the public interest in disclosure outweighs the strong public interest in maintaining the council's right to communicate with its legal advisors in confidence.
39. The Commissioner has observed that the public interest in maintaining this exception is particularly strong. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the withheld information and consideration of all the circumstances, the Commissioner did not consider that there were any such factors that would equal or outweigh the particularly strong public interest inherent in this exemption.

40. The Commissioner appreciates that the complainant considers that the matter requires an appropriate level of transparency and accountability, but considers that the nature of the communications, which will relate to the highly specific circumstances present within individual claims, would provide little public value in providing general transparency in relation to successful claims. A further factor that reduces the public interest in disclosure is the existence of another means by which members of the public can hold the council accountable for damage sustained from road defects, namely by submitting a claim and seeking redress by either the council's internal processes or else through Court.
41. The Commissioner has ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exception, and that the council was therefore correct to withhold the information under the exemption provided by section 42(1).

Section 10 – Time for compliance

42. Section 10(1) requires that a public authority must provide its response within the time for compliance, which is 20 working days following the date of receipt.
43. In this case the Commissioner has identified that the council provided its response outside 20 working days, and therefore breached the requirement of section 10(1).

Right of appeal

44. If 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

45. 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.
46. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF