

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 5 January 2015

**Public Authority:** Sandy Town Council  
**Address:** 10 Cambridge Road  
Sandy  
Bedfordshire  
SG19 1JE

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to Sandy Town Council (the Council) about its decision to replace the lease agreement it had with Sandy Cricket Club with a licence. The Council provided the complainant with the information he requested with the exception of correspondence it had exchanged with its lawyers about this matter. The Council initially sought to withhold this information on the basis of section 41 (information provided in confidence) of FOIA but subsequently sought instead to rely on the exemption contained at section 42 (legal professional privilege).
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 42 and that in all the circumstances of the case the public interest favours maintaining the exemption.

#### **Request and response**

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3. On 26 June 2014 the complainant submitted a request to the Council concerning the 'Sandy Cricket Club Lease Agreement'. He asked to be provided with the following information:
  - a) The existing Lease*
  - b) The draft of the revised Lease*
  - c) the draft of the proposed licence*

*d) The correspondence between the council and the lawyers in full, including their reasoning and advice on why the original Lease could not be tweaked satisfactorily.*

*e) A detailed breakdown of proposed costs.'*

4. The Council responded on 16 July 2014 and provided the complainant with the information sought at points a), b) and c) of his request and also explained that it did not hold the information sought by point e). In relation to information sought at point d), the Council explained that it considered this information to be exempt from disclosure on the basis of section 41 (information provided in confidence) of FOIA. The Council explained that it did not offer an internal review procedure and advised the complainant to contact the Commissioner if he was dissatisfied with its response.

## **Scope of the case**

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5. The complainant contacted the Commissioner on 4 August 2014 to complain about the Council's decision to withhold the information sought by point (d) of his request, ie the correspondence between the Council and its lawyers regarding this matter. The complainant argued that disclosure of this information was in the public interest; the complainant's submissions on this point are considered below.
6. During the course of the Commissioner's investigation the Council explained that it considered the withheld information to be exempt from disclosure on the basis of the exemption contained at section 42(1) (legal professional privilege) rather than section 41.
7. The Commissioner has therefore considered whether the withheld information is exempt from disclosure on the basis of section 42 of FOIA.

## **Reasons for decision**

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### **Section 42 – legal professional privilege**

8. Section 42 of 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.

9. There are two categories of legal professional privilege: advice privilege and litigation privilege.
10. In this case the category of privilege the Council is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.
11. The withheld information constitutes correspondence between the Council and an external solicitor about the Sandy Cricket Club lease agreement and the Council's preference to replace the lease with a licence. Having examined this information the Commissioner is satisfied that the dominant purpose of this correspondence clearly constitutes the seeking and provision of legal advice. He is therefore satisfied that the withheld information is exempt from disclosure on the basis of section 42(1) of FOIA.

#### Public interest test

12. However section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and 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 maintaining the exemption*

13. The Council explained that at the time of the request the negotiations over the lease/licence were still continuing. It argued that if it disclosed this information under FOIA then those members of the cricket club who opposed any changes to the terms and conditions of its occupation of the Council's premises would have full sight of the confidential discussions the Council had had with its legal adviser. The Council argued that this would undermine its position during these negotiations.

#### *Public interest in favour of disclosing the information*

14. The complainant argued that the replacement of the lease with a licence placed the cricket club in a disadvantageous position because for a

sports club of this type to access grant funding they had to demonstrate that it had the security of tenure and a licence did not offer that. The complainant explained that as far as he was aware no other local club had been approached to surrender the security of their lease in favour of a short term licence.

15. He noted that the Council had explained that because of a change in buildings on the site, in its view the original lease cannot be amended and it had to be replaced with a licence. However, the complainant argued that it was unacceptable for the Council to withhold the legal advice upon which this view was based. To do so did not fit with the Council's commitment to openness and transparency. He also argued that the club itself could not afford to pay for its own advice on this matter, which presumably would simply duplicate the Council's own advice. In any event the complainant noted that the local council tax payers, including members of the cricket club, had effectively paid for this advice. Finally, he argued that there was no benefit to keeping this advice secret.

*Balance of the public interest test*

16. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

*'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).*

17. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:
  - how recent the advice is; and
  - whether it is still live.

18. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
  - the number of people affected by the decision to which the advice relates;
  - the amount of money involved; and
  - the transparency of the public authority's actions.
19. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
20. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
21. In the circumstances of this case the advice is clearly relatively recent and moreover as it is still being relied upon by the Council as a basis of its discussions with the cricket club the Commissioner accepts that it is also still live. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.
22. With regard to the public interest in disclosure of the information, in the Commissioner's view the number of people directly affected by the advice is relatively limited, ie those involved with the cricket club in question and potentially other users of the facilities. However, the Commissioner appreciates the complainant's line of argument that the change from a lease to a licence has the potential to have a significant impact on the club in terms of future funding. Moreover, disclosure of the withheld information would provide the public, and thus also the cricket club, with a detailed insight into the Council's legal basis for wanting a licence rather than a lease, and its approach to the negotiations about this matter. In other words, disclosure of the information would be genuinely informative with regard to the Council's position and actions on this issue. That said, in the Commissioner's opinion it would not be correct to argue that there is a complete lack of transparency in respect of the Council's actions. This is because he understands that the Council has held discussions with representatives

of the cricket club at which it has explained why it wishes to replace the lease with a licence.

23. The Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this view the Commissioner has taken into account the fact that the Council has already provided the cricket club with an explanation as to why it wishes to replace the lease with a licence. Whilst disclosure of the information would provide the public with a more detailed understanding of the Council's legal basis for such a decision, such a disclosure would realistically only serve the interests of a small group, namely the cricket club itself. Conversely, given that the advice is live, its disclosure risks having a significant and detrimental impact on the Council's ability to secure its preferred course of action and indeed its ability to have confidential discussions with its legal adviser on this matter. In the Commissioner's view this represents a significant risk to the wider public interest.

## Right of appeal

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24. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

25. 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.
26. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**