

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2015

Public Authority: South Tyneside Council
Address: Town Hall & Civic Offices
Westoe Road
South Shields
Tyne & Wear
NE33 2RL

Decision (including any steps ordered)

1. The complainant submitted a request to South Tyneside Council (the Council) seeking information about the legal action it had taken in relation to a particular blog which contained comments about three councillors and a Council official. The Council provided the complainant with some of the information he had requested but withheld the remainder on the basis of section 42(1) (legal professional privilege), section 36(2)(c) (effective conduct of public affairs) and section 40(2) (personal data). The Commissioner has concluded that all of the withheld information is exempt from disclosure on the basis of section 42(1) of FOIA. However, the Commissioner has also concluded that by taking longer than 20 working days to reply to the request the Council breached sections 10(1) and 17(1) of FOIA.

Background

2. In 2009 the Council initiated legal action in California after three councillors, and one Council official, complained that were being libelled in a blog called 'Mr Monkey'. The intention of the legal action was to identify the individual, or individuals, behind the blog. The action went through the US Courts because this is where Word Press, the online publishing platform used by the blogger, is based.
3. As a result of the proceedings, in 2011 the Council was provided with information from Twitter regarding a number of its accounts which

apparently included IP identities, mobile phone numbers and email addresses of account holders.

4. Such information included information about Twitter accounts set up by Mr Ahmed Khan. At the time, Mr Khan was an independent councillor. Mr Khan denied (and continues to deny) being behind the blog in question.
5. In response, Mr Khan sought to challenge this action by launching a strategic lawsuit against public participation motion (an 'anti-SLAPP' motion) in 2011. This proved to be unsuccessful, as was Mr Khan's appeal against the court's rejection of his motion. In 2013 a court costs order was made which required Mr Khan to pay the Council \$97,415.96 to cover its costs in resisting his anti-SLAPP motion.
6. At the time of the complainant's request in May 2014, the Council had dropped its original legal action which aimed to identify the blogger. The legal action had cost £214,734. However, the Council was still considering whether to initiate proceedings in the UK courts to pursue Mr Khan for non-payment of the costs order.

Request and response

7. The complainant submitted the following request to the Council on 29 May 2014:

'Court action for libel by Cllr Iain Malcolm and ors v Does (Mr Monkey)

I should be pleased if you could let me have the following information:

- 1) *Who authorised the funding by the Council of this court action, did they take legal advice; if so please let me have a copy.*
 - 2) *In view of the substantial cost involved in a libel action in the US, which committee authorised this court action, please let me have a copy of the minute of the committee.*
 - 3) *Was the action confirmed by the full Council, if not why not?*
 - 4) *The Plaintiffs were awarded costs against Mr Ahmend Khans [sic] by the court in May 2013, have these costs been recovered, if not what steps have been taken to recover these costs?'*
8. The Council responded on 6 September 2014. It explained that the decision to take the court action was taken in 2009 by the Council's former Head of Corporate Governance and that the decision was taken under powers delegated by elected members to officers under the Council's Constitution. The matter was not therefore reported to a Committee or Council. The response went on to explain that information concerning actions or steps to be taken in relation to recovering the

costs from Mr Khan of \$97,415.96 was exempt from disclosure on the basis of the exemptions contained at sections 42(1) (legal professional privilege) and 36(2)(c) (effective conduct of public affairs) of FOIA.

9. The complainant contacted the Council on 8 September 2014 and asked it to conduct an internal review of its decision to withhold information in response to his request.
10. The Council informed him of the outcome of the internal review on 2 October 2014. It upheld the application of the two exemptions cited in the refusal notice.
11. The complainant contacted the Council again on 12 October 2014. He asked the Council to clarify the name of the individual who originally authorised the legal action, ie the name of the former Head of Corporate Governance. He also explained that his request had sought a copy of any legal advice held in relation to the decision to authorise this legal action.
12. The Council responded on 27 November 2014 and provided the complainant with the name of the former Head of Corporate Governance. It confirmed that any legal advice such as that described in his letter of 12 October 2014 would also be exempt from disclosure on the basis of section 42(1) of FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 25 November 2014 in order to complain about the Council's handling of his request. The complainant explained that he disputed the Council's decision to withhold the information falling within the scope of his request. He was also dissatisfied with the time it took the Council to respond to his request and the manner in which it conducted the internal review.
14. During the course of his investigation the Council also informed the Commissioner that it considered certain parts of the withheld information to be exempt from disclosure on the basis of section 40(2) of FOIA, the personal data exemption.
15. The Commissioner therefore proceeded to consider whether the information the Council withheld is exempt from disclosure on the basis of sections 42(1), 36(2)(c) or 40(2) of FOIA. He has also considered the Council's delays in responding to the complaint.
16. FOIA does not include any statutory requirements regarding internal reviews. Rather, these matters are addressed in the Code of Practice,

issued under section 45 of FOIA. Therefore the Commissioner has considered the Council's conduct of the internal review in the Other Matters section of this notice.

Reasons for decision

Section 42 – legal professional privilege

17. The withheld information falls into two different categories; firstly, information confirming the funding of the original legal action initiated by the Council and secondly, potential legal action concerning the enforcement of the costs order against Mr Khan.
18. The Council has argued that both categories of information are exempt on the basis of section 42(1) of FOIA.
19. 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. In the circumstances of this case the Council has argued that the information attracts litigation privilege (as opposed to advice privilege).
20. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of privilege can only be relied upon in circumstances where the following criteria are met:
 - Where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility;
 - The dominant purpose of the communications must be to obtain advice to assist in the litigation; and
 - The communications must be made between a professional legal adviser and client, although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
21. With regard to the information concerning the funding of the original legal action, the Council argued that it was clear that the dominant purpose of these communications was to obtain legal advice to assist in the litigation. Furthermore it was clear that all of the communications were between a legal adviser (whether external or internal) and a client (ie the Council). The Council explained that when the documents were

created there were no proceedings in progress, however litigation was being contemplated by the Council and there was a real prospect of litigation being commenced. Indeed this is evidenced by the fact that proceedings were commenced in the US in April 2009. The Council acknowledged that the proceedings in the US Court had now ceased. However, it explained that at the time of the complainant's request further proceedings were being contemplated to recover the costs from Mr Khan. It argued that the information regarding the costs of funding the original US court proceedings remained relevant to any potential UK proceedings against Mr Khan in relation to the Council's ability to recover costs on behalf of plaintiffs.

22. With regard to the information concerning the enforcement of the costs order against Mr Khan, again the Council argued that it was clear that the dominant purpose of some of this information was to obtain external legal advice or the provision of in-house legal advice to assist in any potential UK costs litigation. The Council noted that other parts of this information comprised communications between the Council and third parties and thus do not attract privilege by themselves. However, it argued that such information still attracted litigation privilege because they were prepared for the purpose of litigation and had been used as evidence in the litigation.
23. The Commissioner has reviewed the withheld information and accepts that all of the information attracts litigation privilege. With regard to the information concerning the funding of the original legal action this clearly constitutes communications between client and lawyers, the dominant purpose of which is the seeking and provision of legal advice. Although the US court proceedings have now ceased, the Commissioner is satisfied that legal advice concerning the funding of that legal action is directly relevant to potential UK proceedings to recover costs against Mr Khan. Furthermore, the Commissioner is satisfied that at the time of the complainant's request there was a real likelihood of such proceedings taking place.
24. With regard to the information concerning the enforcement of the costs order, the Commissioner is satisfied that the dominant purpose of the majority of the withheld information is clearly the seeking and provision of legal advice between a client and legal adviser. As noted in the preceding paragraph, he is satisfied that at the time of the request there was a realistic prospect of proceedings being initiated against Mr Khan and therefore such information attracts litigation privilege. With regard to the information comprising correspondence between the Council and third parties the Commissioner is satisfied that these documents were created for the purpose of the prospective litigation and therefore also attract litigation privilege.

25. The Commissioner has therefore concluded that all of the withheld information is exempt from disclosure on the basis of section 42(1) of FOIA.

Public interest test

26. 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

27. The Council argued that it was firmly of the view that the public interest favoured maintaining the exemption in relation to all of the information. It emphasised that the concept of legal professional privilege and the rationale behind it is to ensure frankness and openness between lawyer and client and the public interest in protecting this confidentiality is inherently strong. The Council argued that the level of harm to it if the information was disclosed was likely to be significant due to the fact that at the time of the request further legal proceedings were still being contemplated and the communications between the Council and its lawyers, and the correspondence with third parties, remained highly relevant to any potential litigation.
28. It argued that to disclose the communications would be manifestly unfair to the Council and the individual claimants. This is because it would be likely to prejudice their ability to properly litigate any such proceedings as disclosure of those communications would reveal the basis of their case.

Public interest in favour of disclosing the information

29. The complainant explained that he was concerned that taxpayers' money had potentially been misused to fund the libel action in the US courts. His reasoning for this was two-fold.
30. Firstly, he argued that Statutory Instrument 2004 No. 3082 made it clear that although local authorities could indemnify individuals in 'defending himself against legal proceedings brought by a third party' they are 'prohibited from indemnifying members or officers for the cost of libel action or slander'. The complainant acknowledged that the Council would argue that it had a duty of care to protect its employees but he suggested there was no case law which extended to funding private libel actions. Rather, he argued that such a duty of care simply covered matters such as safeguarding health and safety, dealing promptly with grievances etc. In any event, he argued that such a duty

of care only applied to employees of the Council not members of the Council.

31. Secondly, the complainant questioned the decision making processes that led to the action being authorised. He noted that the decision to fund the action was taken by then Head of Corporate Governance but under the Council's constitution 'All executive decision making powers are exercisable by the Leader'. The complainant argued that as the leader was one of the plaintiffs, along with two other elected members and a senior officer of the Council, this represented a conflict of interest for the Head of Corporate Governance. For example, what influence did the plaintiffs and other members have on the Head of Corporate Governance in agreeing to fund this legal action?
32. Furthermore, the complainant emphasised that a significant amount of public money had been spent by the Council in pursuing this court action, action which ultimately proved to be unsuccessful. The complainant noted that the Council's actions had generated a notable amount of local press interest.
33. He also emphasised that the original court action was no longer current and thus disclosure of the information would not undermine the Council's position in respect of those proceedings.
34. In light of the above, the complainant argued that there was an overwhelming and exceptional public interest in disclosure of the information which would allow the public to understand the basis upon which the Council had decided to undertake the original court action. Furthermore, he argued that there was an equally compelling interest in the disclosure of information regarding the steps the Council had taken, or was contemplating taking, to recover some of its costs from Mr Khan.

Balance of the public interest test

35. 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).

36. 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.
37. 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.
38. 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.
39. 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.
40. In the circumstances of this case the Commissioner accepts that all of the legal advice can be said to be live. This because, although the original legal action launched by the Council had been withdrawn by the time the complainant submitted his request, for the reasons discussed above, the Commissioner considers such information to be directly relevant to any potential proceedings the Council may take in respect of Mr Khan's failure to pay the costs order. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.
41. With regard to the public interest in disclosing the information, the Commissioner accepts that the costs incurred by the Council, in what

some in the local community clearly consider a controversial legal action, are not insignificant. Furthermore, the Commissioner believes that the queries that the complainant has raised regarding the legal basis of the action in light of the Statutory Instrument he referred to are not, on the face of it, unreasonable ones. Moreover, in the Commissioner's opinion disclosure of the withheld information would provide the public with a clear and detailed insight into the Council's basis for instigating its legal action in the first place, and to a lesser extent, the steps it was contemplating in respect of pursuing costs from Mr Khan. Consequently, taking these issues into account, the Commissioner believes that there is also a strong public interest in disclosing the information.

42. Nevertheless, the Commissioner has ultimately concluded that the public interest favours maintaining the exemption. In reaching this finding he wishes to emphasise that he is not dismissing the importance and relevance of the arguments advanced by the complainant. However, given that the advice is still live, its disclosure risks having a significant and detrimental impact on the Council's ability to pursue any proceedings in respect of potential court action associated with this matter and indeed its ability to have confidential discussions with its legal adviser. In the Commissioner's view this represents a significant risk to the wider public interest.
43. In light of this finding the Commissioner has not considered the Council's reliance on section 36(2)(c) or section 40(2).

Section 10 and section 17

44. Section 10(1) of FOIA requires public authorities to disclose information promptly and in any event within 20 working days following the date of the request.
45. Furthermore, section 17(1) of FOIA requires public authorities, who wish to withhold information in response to a request, to provide requestors with a refusal notice stating that fact. Such notices must be issued within the time period specified in section 10(1).
46. In this case the complainant submitted his request on 29 May 2014 and the Council responded on 6 September 2014. Its response provided some information but explained that further information was exempt from disclosure.
47. In light of its delay in responding to this request the Council breached both section 10(1) in respect of the information it did disclose and section 17(1) in relation to its delay in issuing its refusal notice.

Other matters

48. The complainant explained to the Commissioner that he had concerns with the manner in which the Council had conducted the internal review. He noted that the Council stated that such reviews are chaired by an independent panel of senior management not involved in the original decision. (This approach conforms to the guidance set out in the section 45 Code of Practice of FOIA regarding how public authorities should conduct internal reviews.)
49. However, the complainant noted that the Council's initial response was signed by Mike Harding, Head of Legal Services and Monitoring Officer. Furthermore he suggested that the internal review response indicated that the internal review panel consisted of Mr Harding, Gill Hayton (Deputy Monitoring Officer), Paul Robinson (Corporate Lead) and Dave Patterson (Information Team).
50. The Commissioner has considered the content of the internal review response carefully. In his opinion this actually states that the internal review panel simply consisted of Ms Hayton and although the three other individuals also attended, they did not take any part in the decision making process.
51. In light of this the Commissioner is satisfied that the internal review was conducted in a fair and independent manner, and moreover, one that conforms to the requirements of the Code of Practice.

Right of appeal

52. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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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