

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2015

Public Authority: Barnsley Metropolitan Borough Council

Address: Westgate
P.O. Box 609
Barnsley
S70 6FH

Decision (including any steps ordered)

1. The complainant has asked Barnsley Metropolitan Borough Council for recorded information relating to the Council's draft local development plan.
2. The Commissioner's decision is that the Council holds recorded information which relates to the first part of the complainant's request. He finds that the information held by the Council is subject to legal advice privilege and that the Council is entitled to withhold it in reliance on Regulation 12(5)(b) of the Environmental Information Regulations 2004.
3. The Commissioner has also decided that the Council does not hold any recorded information in respect of the second and third parts of the complainant's request.
4. The Council is not required to take any further steps in this matter.

Request and response

5. On 30 July 2014, the complainant wrote to Barnsley Metropolitan Borough Council ("the Council") and requested information in the following terms:

"(i) Please supply me copies of any correspondence between the Development Directorate and the Director of Legal and Land Governance on any concerns expressed (internally or externally)

in relation to the Council's activities and discussions/involvement with developers in the selection of sites for inclusion in the draft Local Plan before the public consultation exercise.

(ii) Please supply me with a copy of the instructions given by the Director of Legal and Governance to Leading Counsel and a copy of the Leading Counsel's opinion in relation to the Council's activities in discussions/involvement with developers in the selection of development sites for inclusion in the Draft Local Plan before the public consultation exercise.

(iii) Please advise me of the costs involved in engaging Leading Counsel in this particular instance."

6. The Council responded to the complainant's request on 28 August. The Council refused to supply the complainant with the information he seeks and advised him that it is relying on the exemption provided by section 42 of the FOIA – the exemption for legal professional privilege.
7. The Council advised the complainant that, 'there is no legitimate public interest in the current context of the preparation of the Local Plan which would justify departing from the general principle that there should be no constraint on legitimate dialogue between those seeking advice and their lawyers which is the basis of the exemption', and, 'the current stage of the local plan process is the production of a consultation draft which will be published shortly and which will allow the opportunity for all interested persons to respond to the draft proposals as to designation of sites and places for development'.
8. On 29 August the complainant wrote to the Council again. In his email the complainant challenged the Council's application of section 42 and you asked the Council to clarify the public interest factors it had considered.
9. Following continued correspondence between the complainant and the Council, the complainant sent the Council a further email on 10 September. In his email the complainant asserted that the Council had not responded to his request for clarification about its public interest considerations.
10. On 24 October the Council responded to the complainant's latest email. It discussed various issues which the complainant had raised about the Council's handling of his request. The Council advised the complainant that its Chief Executive had agreed that the decision regarding the application of section 42 had been taken at a senior level and there was little purpose in her reviewing the decision.

Scope of the case

11. The complainant contacted the Commissioner on 7 November to complain about the way his request for information had been handled.
12. The Commissioner's investigation of this complaint sought to determine whether the Council is entitled to rely on section 42 of the FOIA to refuse to provide the withheld information to the complainant. This notice sets out the Commissioner's decision.

Reasons for decision

Part (i) of the request

Is the requested information 'environmental information'?

13. The council's responses to the complainant have referred solely the provisions of the FOIA; specifically to section 42. Having considered the nature of the withheld information, the Commissioner has questioned whether the withheld information should have been considered under the provisions of the Environmental Information Regulations ("the EIR") rather than the FOIA.
14. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
15. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
16. Since the information sought by the complainant relates to the Council's identification of sites and their inclusion in its draft development plan, the Commissioner is satisfied that the requested information is environmental information and therefore falls to be considered under the EIR.
17. The provision in the EIR which is relevant for the Commissioner's consideration in this case is Regulation 12(5)(b) – where disclosure of the requested information would prejudice the course of justice.

Regulation 12(5)(b) – the course of justice

18. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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”. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
19. There are two types of legal professional privilege: Advice privilege which is attached to information in circumstances where there is no contemplated or pending litigation and where the information concerns the seeking or provision of legal advice and litigation privilege which is attached to information which concerns contemplated or pending litigation.
20. The Council has provided the Commissioner with copies of information which is relevant to the complainant’s request. This information consists of a short email chain and two separate (related) emails.
21. The short email chain (2 emails) consists of correspondence between the Council’s Solicitor and one of his colleagues – also a solicitor: It contains questions in relation to legal advice which had been sought by an officer working in the Council’s Development Directorate.
22. The two separate emails are from the Council’s Solicitor’s colleague to the manager of the Development Directorate and his colleagues working in the same department. The emails concern the initial officer’s request for legal advice and the advice given by the Council’s Solicitor.
23. Having reviewed the withheld information the Commissioner is satisfied that it falls within the scope of the complainant’s request and that it attracts legal professional privilege. The information constitutes the provision of legal advice from a properly qualified person, or communications which discuss issues associated with that legal advice.
24. The Commissioner has therefore decided that Regulation 12(5)(b) is properly engaged.
25. The Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.
26. 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”. The Commissioner

accepts that disclosure of legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

27. In this case, the Commissioner considers that disclosure of the withheld information would affect the council's ability to defend itself should it be faced with a legal challenge concerning its provisional identification of sites for inclusion in the Council's draft development plan.`

The public interest

28. The Commissioner's substitution of section 42 by Regulation 12(5)(b) requires him to consider whether, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the requested information

29. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
30. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of its identification of sites for their inclusion in the Council's draft development plan.
31. Disclosure of the withheld emails would also allow the public to consider the quality of the legal advice which was given by the Council's Solicitor and which was considered by officers of the Council.

Arguments in favour of maintaining the exception

32. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
33. It is very important that public authorities are able to consult with their lawyers in confidence and to be able to obtain confidential legal advice.
34. Should legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and

frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. 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."

35. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
36. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...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..."
37. This 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.

Balance of the public interest arguments

38. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make. In this case the complainant is essentially questioning the basis on which the identified sites have been put forward for inclusion in the draft development plan, where there have been parallel discussions between the owners and prospective developers of those sites.
39. However, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure.

40. He is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.
41. The Commissioner is mindful that any public interest associated with the withheld emails will be satisfied when the final draft of the development plan is made open to public scrutiny as part of the public examination process required by statute.
42. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
43. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
44. The Commissioner has decided that the Council is able to rely on the exception to disclosure which is provided by Regulation 12(5)(b) and it is therefore entitled to withhold the emails referred to above.

Parts (ii) and (iii) of the request

45. In his correspondence with the complainant, the Council's Solicitor made reference to 'working' with Queen's Council in examining legal issues relating to the Local Plan. The Council has clarified for the Commissioner what this 'working' entailed: The Council advised the Commissioner that no specific instructions were given to counsel. The issues were raised verbally during the course of a conference with planning officers, at which the overall strategy behind the eventual framework was discussed.
46. The Council has assured the commissioner that there was no specific conference with counsel about the local plan and therefore there was no specific fee in that regard. Where fees were paid to counsel, those fees covered a number of conferences where strategic issues were discussed prior to the production of the consultation draft local plan in October 2014.
47. Where there is a question of whether a public authority holds recorded information of the type described by an applicant, the Commissioner will make this determination by applying the civil test of the balance of probabilities. This test is in line with the approach taken by the

Information Rights Tribunal when it has considered whether information is held in cases which it has considered in the past.

48. The Commissioner has considered the assurance given by the Council in respect of the information sought by the complainant at parts (ii) and (iii) of his request. The Council's assurance appears to the Commissioner to be appropriate to the circumstances of this request/complaint.
49. The Commissioner finds no reason to question the Council's assurance and he is therefore persuaded that, on the balance of probabilities, the Council does not hold information relevant to parts (ii) and (iii) of the complainant's request.

Right of appeal

50. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

51. 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.
52. 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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