

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 November 2016

**Public Authority:** Hertfordshire County Council  
**Address:** County Hall  
Pegs Lane  
Hertford  
SG13 8DE

#### Decision (including any steps ordered)

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1. The complainant has requested information used to amend the Children's Services - Foster Carers Payments policy published in April 2015. The Commissioner's decision is that Hertfordshire County Council has correctly applied the exemption for legal professional privilege at section 42 of the FOIA and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner does not require any steps to be taken.

#### Request and response

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2. On 20 April 2016, the complainant wrote to Hertfordshire County Council ('the council') and requested information in the following terms:  
  
"documents and information used to amend Children's Services - Foster Carers Payments policy published in April 2015."
3. The council requested clarification on 21 April 2016. It said that it does not understand the meaning of the request and said that the policy is updated annually and the 2016 version is currently being finalised.
4. On the same day the complainant responded stating that when the policy was amended, certain evidence and documents were considered that informed the council's decision to amend the policy. He then clarified the request as follows:

"I would the documents, emails and any other specific information that was used to amend the policy last year in the way that it did. Please can you release any information provided by the legal department?"

5. On 19 May 2016 the council confirmed that it holds the requested information and provided the 'Legal advice on policy from Counsel' regarding the Tower Hamlets case, which informed its Foster Carers Payments policy review, and the email activity that contributed to the review of the fostering payments document. However, it redacted some information under the exemptions at sections 40(2) and 42 of the FOIA and withheld 5 versions of a draft policy under the exemptions at section 22(1) and 42 of the FOIA.
6. The complainant requested an internal review on 19 May 2016.
7. The council provided an internal review response on 22 June 2016 in which it maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 24 June 2016 to complain about the way his request for information had been handled.
9. On the day the Commissioner confirmed the scope of the case to the complainant as being to consider whether the council is entitled to rely on the exemptions at section 42 and 22 of the FOIA as a basis for refusing to provide the withheld information, the complainant replied stating that he thinks the case should also consider whether the council complied with all of the requirements of the Code of Practice.
10. During the course of the investigation, the council reconsidered its position and provided some information that had initially been redacted from emails dated 2 April 2015 at 14:17 and 12 May 2015 at 10:41pm. It also reconsidered the draft version of the policy and retracted its reliance on section 22. It provided the complainant with a combined version of the draft policies in which redactions had been made for information subject to legal professional privilege.
11. The Commissioner has therefore considered the council's application of section 42 to the redactions in the draft policies and in the emails.
12. There are two Codes of Practice relevant to the FOIA.

13. The section 45 Code of Practice<sup>1</sup> fulfils the duty of the Chancellor of the Duchy of Lancaster set out in section 45 of FOIA. The code provides guidance on the practice it would be desirable for public authorities to follow to meet their obligations under FOIA and covers the following areas:

- Advice and assistance
- Fees
- Transferring requests
- Consultation with third parties
- Confidentiality obligations
- Complaints procedures

The Commissioner has the power to issue a practice recommendation under section 48 of FOIA if he considers that a public authority is not conforming to the code. This will include steps he thinks the organisation should follow in order to meet the code's requirements.

14. Guidance for public authorities on good records management is provided by the section 46 Code of Practice<sup>2</sup>. The code provides guidance to public authorities on keeping, managing and destroying records. Section 47 of FOIA places a duty on the Commissioner to promote the following of good practice by public authorities and the observance by them, of FOIA and codes of practice.

15. The Commissioner has not deemed it necessary, and is not under any obligation, to consider the council's compliance with either of the Code of Practice in this case.

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<sup>1</sup> <https://www.gov.uk/government/publications/code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000>

<sup>2</sup> <https://ico.org.uk/media/for-organisations/research-and-reports/1432475/foi-section-46-code-of-practice-1.pdf>

## Reasons for decision

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### Section 42 – Legal professional privilege

16. This exemption 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.
17. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. It protects the confidentiality of communications between a lawyer and a client and has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*<sup>3</sup> as;  
  
"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph 9)
18. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
19. In this case the council has submitted that the withheld information is subject to legal advice privilege. It explained to the Commissioner that it constitutes either a request for advice from the departmental client (in this case senior officers from within the Childrens Services Department) on the legality of information contained within advice that is passed to its Foster Carers, the professional legal opinion of the council's Principle Lawyer (the chief legal advisor for its Childrens Services Law Group)

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<sup>3</sup> Appeal number EA/2005/0023

based on past court decisions or past barristers advice, or it is the reflection of that advice being put into a working document to gauge its appropriateness. It provided the Commissioner with a detailed submission as to how each individual redaction constitutes information subject to legal professional privilege.

20. The council confirmed that the withheld information has not been made available to any third party or to the public. It said that the information was sent, received and exhibited with an implied expectation of confidentiality because it discusses matters in a free and frank manner, being open questions and plain language, whereas if there was no expectation of confidentiality, then the language used would be formal and questions asked would be in a closed form.
21. The council also explained that in the interests of being open and transparent, the information that was received from the Barrister in relation to the Tower Hamlets decision was disclosed in response to this request. It clarified that there is a difference in the information that has been released and the information that was withheld as the withheld information is not a repetition of the advice from the Barrister but is advice that the council's Principle Lawyer has tailored to meet the requirements of the council and its Fostering Service, and is in relation to specific questions about the policy. In addition, it said that any information that was located in the various drafts and constituted legal advice/discussion that went into creating that final draft has not been released to the public even though the outcome of that advice has.
22. The Commissioner has reviewed the withheld information. Based on that review and the council's submission the Commissioner is satisfied that the withheld information is subject to legal professional privilege.

### **The public interest test**

23. 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 arguments in favour of disclosing the requested information**

24. In its submission to the Commissioner, the council said that there is some minimal weight attached to the general principles of achieving accountability and transparency which in turn could assist the public's understanding, trust and participation in the decisions taken by public authorities. It said that in this case, disclosure of the requested information could also help the public to understand some of the issues

associated with events which led to the change of policy and would also allow the public to consider the quality of the legal advice which was provided.

25. In correspondence to the complainant, the council provided the following public interest arguments for releasing the information:
  - “The release of this information would allow for the County Council to be transparent as for the reasons that decisions are taken and the issues considered before decisions are made.
  - The release of this information would allow for the County Council to be accountable for the decisions that it takes on behalf of its stakeholders.
  - When Public Authorities are open to achieving both accountability and transparency amongst its various stakeholders. This will lead to better public understanding, which would increase trust and participation by stakeholders in the decisions taken.
  - The release of this information would allow for public scrutiny of the Legal Services and advice provided for the County Council.”
26. In his internal review request, the complainant said that there is a very strong public interest in scrutinising the processes that led to the approval of an unlawful and discriminatory policy.
27. The Commissioner considers that the ‘default setting’ of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.

### **Public interest arguments in favour of maintaining the exemption**

28. In its submission to the Commissioner, the council said that there is very strong public interest in maintaining the exemption.
29. It explained that it is in the public interest for decisions to be made within a fully formed legal context and that this advice needs to be extensive and cover the many possible issues that may arise in a decision. It said that legal advice is both requested and provided with the reasonable expectation that the information would not be released which is a fundamental aspect to ensure openness between the individuals concerned and to safeguard access to fully informed, realistic and frank legal advice. The council submitted that disclosure of such

advice would discourage future communications and inhibit future discussions whereby legal guidance is sought and given. It said that the ability of a public authority to be able to consult with its lawyers in confidence and be able to obtain confidential legal advice is a very important inherent aspect of the client and legal representative relationship. The council also stated that should any communications that are considered as legal advice be subject to routine or even occasional public disclosure without extensive 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.

30. The council informed the Commissioner that while this information relates to a past policy, it is still considered as a live matter (although it is not currently preparing for legal action) as the complainant currently has an open complaint with the Local Government Ombudsmen in relation to this policy being unfair and has stated that the council "... faces reputational and litigation risks in relation to the way the scheme is framed." The council also said that it has to be mindful that there is always the possibility of any local authority policy once published, being the subject of judicial review.
31. 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 aforementioned Bellamy case, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
32. 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 legal professional privilege<sup>4</sup> 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

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings.”

33. 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.
34. 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:

“...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...”

35. 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 arguments**

36. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, including the fact that the issue is considered to be a live matter in which the council may need to defend its decision, 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.
37. 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, unlawful activity or a significant lack of appropriate transparency. The council is of the opinion that none of these circumstances are present in this case and following her inspection of



the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.

38. In relation to the complainant's arguments at paragraph 27, the Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO*<sup>5</sup> which considered the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..." (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

39. Having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.
40. The Commissioner acknowledges that even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'. However, he does not consider this to be an overriding factor in this case.
41. The Commissioner is satisfied that in this case 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. She has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.

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<sup>5</sup> Appeal no. EA/2007/0092

## Right of appeal

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

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

43. 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.
44. 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** .....

**Deborah Clark**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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