

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2017

Public Authority: Horsham District Council

Address: Parkside
Chart Way
Horsham
West Sussex
RH12 1RL

Decision (including any steps ordered)

1. The complainant has requested information from Horsham District Council ("the Council") about the purchase and use of a building. The Council disclosed some held information, and withheld some under the exemption provided by section 42(1) of the Freedom of Information Act ("the FOIA"). The complainant subsequently disputed the Council's application of section 42(1).
2. The Commissioner's decision is that the Council has correctly applied section 42(1). However the Council has breached section 10(1) by failing to comply with section 1(1) within the time for compliance, and section 17(1) by failing to provide a refusal notice within the time for compliance.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 31 July 2016, the complainant wrote to the Council and requested information in the following terms:

I would be grateful for information on the acquisition of the Millstream Surgery, North Street, Storrington in 2014.

- 1) The date of its acquisition by HDC in 2014 and the £ price paid.*
- 2) Details of the statutory powers used by the Council to purchase the building. Please supply copies of the Cabinet and / or Delegated Authority reports authorising the transaction.*
- 3) Provide details of all correspondence and discussions with the following parties in relation to the current and future use of the building; -*
 - a) Storrington and Sullington Parish Council*
 - b) The Glebe Medical practice, Storrington*
 - c) Medical Centre Developments Limited*
 - d) NHS Coastal West Sussex Clinical Commissioning Group*
 - e) NHS England*
 - f) Church of England Diocese of Chichester**This request to include notes of any meetings between the Council and any of the listed parties*
- 4) Details of all development and building appraisals commissioned by the Council, Glebe Surgery, NHS England, the Clinical Commissioning Group or the Chichester Diocese relating to the proposed use of the Millstream building as the main primary care facility for the village of Storrington. This to include all plans, sketch schemes, building cost plans, valuation and development appraisals. Please include copies of all correspondence between the parties relating to this work.*

5. The Council responded on 30 August 2016. It disclosed held information in respect of part 1, withheld information (under section 42(1)) in respect of part 2, and refused to comply with parts 3 and 4 under the provisions of section 12.
6. Following an internal review the Council wrote to the complainant on 25 September 2016. It maintained its earlier position.

Scope of the case

7. The complainant contacted the Commissioner on 10 October 2016 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the Council withdrew reliance upon section 12 and disclosed held information in response to parts 3 and 4 of the request.

9. The Commissioner therefore considers the scope of the case to be the determination of whether the Council has correctly withheld information under section 42(1).

Reasons for decision

Section 42(1) – Legal professional privilege

10. Section 42(1) states 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.

11. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) 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.

12. There are two types of privilege: 'litigation privilege' and 'legal advice privilege'. 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. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these 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. Communications made between adviser and client in a relevant legal context will therefore attract privilege.
13. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.

14. In this case the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.

Legal advice privilege

15. The Commissioner has viewed the withheld information, which comprises a 'Property Title Report Form' deriving from July 2014. This report was provided by the Council's Legal Services to the 'Estates, Property & Valuation Team' in respect of a property that the Council was at that time negotiating to purchase.
16. The Commissioner is therefore satisfied that the withheld information represents legal advice provided to a client by their legal advisers. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently the Commissioner accepts that the withheld information attracts legal professional privilege on the grounds of legal advice privilege, and that on this basis section 42(1) is engaged.

The public interest test

17. As a qualified exemption, section 42(1) is subject to a public interest test. The information must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

18. 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.
19. The complainant has informed the Commissioner that he has requested the information in order to understand the Council's purchase and future use of a building that was formerly a surgery. This is of strong relevance to local residents, who are currently served by another surgery which now wishes to develop a new building on a green field site. This proposed development is a matter of significant contention in the local community.

Public interest arguments against disclosure

20. The Council argues that the information has been requested in connection to a live dispute that could yet result in litigation, and has

referred the Commissioner to the webpages¹ of an active campaign group that is pursuing the matter. The disclosure of the information, which has not lost its privilege, would potentially damage the Council's ability to defend its position if faced with a legal challenge.

Balance of the public interest test

21. The Commissioner has considered the arguments put forward by the complainant, 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.
22. 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 may impact upon public amenities.
23. However, there is also a strong opposing public interest in maintaining the Council's right to communicate with its legal advisors in confidence. 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.
24. Following inspection of the withheld information and consideration of all the circumstances in this case, the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in this exemption. It is clear that the legal advice is relatively recent, and was used to inform the Council's negotiations to purchase a building, on which topic there appears to have already been substantial public disclosure. It is also evident that local concerns about the development of new surgery buildings remain live and may yet result in a legal challenge. In such a scenario it is not reasonable that the Council should be required to reveal its legal position in advance.
25. The Commissioner has ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption provided by section 42(1) for legal advice privilege has been correctly applied.

¹ <http://www.savetheglebe.com>

Section 10(1) – Time for compliance with request

26. The Commissioner has identified that the Council failed to comply with the requirement of section 1(1) within twenty working days following receipt of the request, and on this basis breached the requirement of section 10(1).

Section 17(1) – Refusal of request

27. The Commissioner has identified that the Council failed to issue a refusal notice within the time for compliance provided for in section 10(1), and on this basis breached the requirement of section 17(1).

Right of appeal

28. 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

29. 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.
30. 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

Alun Johnson
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