Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **20 March 2018**

Public Authority: **Southend-on-Sea Borough Council**
Address: **Civic Centre**
Victoria Avenue
Southend-on-Sea
Essex
SS2 6ER

Decision (including any steps ordered)

1. The complainant requested information from Southend-on-Sea Borough Council (the 'Council') about applications made to attend a specified primary school, together with consultation about changing the admission boundaries for this school. The Council provided some of the requested information but withheld part of it, citing section 12(1) FOIA as it estimated that the cost of compliance with this part of the request would exceed the appropriate limit. It considered that the information requested in part 5 was exempt from disclosure under section 42(1) FOIA as it attracted legal professional privilege.

2. The Commissioner's decision is that the Council applied section 12(1) of FOIA correctly and so it was not obliged to comply with part 1 of the complainant's information request. She also finds that section 42(1) is engaged in relation to part 5 of the request, and that the public interest favours maintaining the exemption. However, the Council's failure to provide a response confirming that information is held in scope of the request and its failure to issue its refusal notice within the statutory 20 working days, represents breaches of sections 10 and section 17 of FOIA. In addition, the Council extended the time period to consider the public interest test associated with section 42 and failed to complete it within a reasonable timeframe, thereby breaching section 17(3) of FOIA. The Commissioner does not require the Council to take any steps as a result of this notice.

Request and response

3. On 28 July 2017 the complainant wrote to the Council and requested information in the following terms:

> "*Can you inform me for the past 8 years:*
>
> 1. *The number of doorstep visits the council has made in relation to applications made for* [name redacted] *Infant school because there was suspicion of a fraudulent application by year;*
>
> 2. *The number of post code checks, with an explanation as to exactly what this means, by year for applications made for* [name redacted] *Infant school.*
>
> 3. *The budgeted amount for the primary school consultation.*
>
> 4. *A copy of the council staff that have declared a Pecuniary Interest for related to the Review of Primary School Catchment Areas consultation and the date that this interest was declared.*
>
> 5. *A copy of the external legal advice obtained by the council in relation to any Pecuniary Interest / conflict of Interest in the Review of Primary School Catchment Area consultation. Please also provide any historical external legal advice used by the council to opine on individuals for this matter."*

4. On 1 September the Council responded to parts 1-3 of the request, explaining that it was taking longer than expected for it to identify and locate the information for parts 4-5.

5. In relation to part 1 of the request, the Council cited the cost exclusion, section 12(1) of FOIA, and considered its section 16 FOIA advice and assistance obligations as to how the complainant might refine his request with a view to bringing it under the cost limit. However, it said that due to the way the information is held, it was unable to offer him any meaningful advice.

6. For part 2 of the request, the Council provided a booklet on primary admissions, together with a document about address checks on main rounds, and confirmed that the Admissions Team is only permitted to request proof of address where it is unclear if the child meets the published oversubscription criteria.

7. For part 3, the Council said there was no identified budget.

8. The Council responded to the remaining parts of the request on 27 September 2017.

9. In relation to part 4, the Council said that no staff members had confirmed a pecuniary interest.

10. For part 5, it confirmed holding information but refused to provide it, citing section 42(1) FOIA (legal professional privilege).

11. The complainant requested an internal review 17 September 2017; he added some further points to that review on 22 October 2017. The Council provided its internal review result on 31 October 2017, acknowledging the delay in responding to the request and recognising that it would have been clearer if the Council had advised that it does not have a record of the number of postcode checks carried out. It also provided some clarification, but maintained that section 12 applies to part 1 of the request, and that section 42(1) applies to part 5.

Scope of the case

12. The complainant contacted the Commissioner on 31 October 2017 to complain about the way his request for information had been handled. His complaint centred on the delays with the response and in considering the public interest test associated with the section 42 exemption.

13. Having clarified the scope of his complaint with the complainant, the Commissioner has considered whether the Council was entitled to rely on sections 12 and 42 of FOIA in refusing to provide some of the requested information. She also asked the Council why it failed to meet the statutory timescales in handling this request.

Reasons for decision

Section 12 – cost of compliance

14. In this case, the Council has cited the cost exclusion on section 12(1) of FOIA in relation to part 1 of the request.

15. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations).

16. The appropriate limit for local government £450 and, as the Regulations allow a public authority to charge the following activities at a flat rate of

£25 per hour of staff time, this equates to 18 hours of work undertaking any of the following tasks:

- determining whether the information is held;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and
- extracting the information from a document containing it.

17. In part 1 of his request of 28 July 2017 the complainant wanted to know "*the number of doorstep visits the council has made in relation to applications made for* [name redacted *Infant school because there was suspicion of a fraudulent application by year*" for each of the past eight years.

18. When considering applications for school places, the Council told the Commissioner that it takes very seriously any attempt to gain unfair advantage in the admissions process by giving false information, for example, providing a false address.

19. To guard against the possibility of fraudulent address data, its School Admissions Team:

- checks applications against the school record and follow up conflicts of data,
- asks a sample of applicants to provide proof of their home address,
- follows up all reports from the public or schools on suspected address fraud.

20. Checks include a request to initially provide evidence such as a UK driving licence or a council tax notification. Where information is unclear the Council makes internal checks and/or an announced home visit to verify details. This latter action is what the complainant has referred to as a "*doorstep visit*".

21. The Council said each case is looked at on its merits and the outcome of any investigation is recorded in the individual application record of the child concerned.

22. The Council also explained that it does not keep a separate record of doorstep visits and no statistics are kept concerning them.

23. It advised that the only way of finding the information requested by the complainant is to look through each individual file to identify if there had been concerns over the authenticity of the application, and, if so, whether a doorstep visit had taken place. It said that to obtain the information requested would involve undertaking all four of the tasks listed in paragraph 16 above as being activities which can be included in a section 12 calculation.

24. When estimating whether disclosing the requested information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in disclosing the information. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.

25. When making an application for a primary school place, the Council advised that parents may express a preference for up to three schools, and that any admission file could contain an application for the named school.

26. It said each year there are approximately 2000 primary school admission applications in the main annual admission exercise. This does not include applications for places received during the school year.

27. Although a sampling exercise was not undertaken in this instance, the Council told the Commissioner that, for a similar request, a small number of files were reviewed to better understand what would have to be done to extract information and whether it was feasible.

28. As a result, the Council estimated that to examine each school admission file to check whether it contained intentionally false information and then to identify what actions had been recorded as being taken would take approximately five minutes for each file.

29. It added that it considers this to be a reasonable and conservative estimate given that the information is not recorded in a specific location within the file and could be contained within wider case notes.

30. At five minutes per file, this equates to 166 hours. To answer part 1 of the complainant's request for eight years data would therefore take an estimated 1328 hours, which exceeds the 18 hours limit under section 12.

Conclusion

~~32.~~31. From the information provided, the Commissioner has concluded that the Council's estimate seems reasonable and that it was entitled to rely on section 12 for part 1 of this request.

Section 16 – advice and assistance

~~33.~~32. If a public authority estimates that the cost of determining whether or not information is held would be above the appropriate limit, it is not required to conduct searches but should consider providing advice and assistance with a view to helping the requester bring his/her request under the cost limit.

~~34.~~33. Under section 16 of FOIA, therefore, public authorities have an obligation to advise what, if any, information may assist requestors with their requests.

~~35.~~34. In this case, the Council said that although consideration was given as to how the complainant might narrow his request, there was no apparent way of reframing it, as even reducing it to one year's data would have exceeded the 18 hour limit. The Council was therefore unable to provide any guidance or help to the complainant in this regard.

~~36.~~35. The Commissioner is satisfied that the Council has given proper consideration to its section 16 FOIA obligations in relation to this part of the request. Like the Council, she has not been able to identify another way to reframe the request to bring it under the cost limit.

Section 42 – legal professional privilege

~~37.~~36. The Council has cited section 42(1) in relation to part 5 of the complainant's request, in which he asked for *"A copy of the external legal advice obtained by the council in relation to any Pecuniary Interest / conflict of Interest in the Review of Primary School Catchment Area consultation".*

~~38.~~37. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege ('LPP') and this claim to privilege could be maintained in legal proceedings.

~~39.~~38. This exemption is not absolute, so it is subject to the public interest test. Therefore, in addition to demonstrating that the withheld information is subject to LPP, a public authority must consider the

arguments for and against disclosure and demonstrate, in a given case, that the public

interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

~~40.~~39. LPP 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)[1] (*Bellamy*) 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 communications or exchanges come into being for the purposes of preparing for litigation."*

Does the information attract legal professional privilege?

~~41.~~40. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. 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.

~~42.~~41. The Council provided the Commissioner with the withheld information which consists of three email chains between the Council and its external lawyer, which it considers attract~~s~~ LPP. In this case, the privilege claimed is advice privilege. This applies where no litigation is in progress but confidential communications have taken place between a client and lawyer for the dominant purpose of seeking or giving legal advice. The client in this case is the Council.

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[1] http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

43.42. At the time of the request the Council has stated that no there was no pending litigation. Therefore the information would only be subject to advice privilege.

44.43. The Commissioner's view is that for LPP 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.

45.44. The Commissioner has published guidance on section 42 of the FOIA[2]. That guidance states:

> *"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 the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."…*
>
> *"The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem".*

Has the information been disclosed to the world at large?

46.45. The guidance referred to above says that once the public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been waived or lost because of earlier disclosures.

47.46. 'Waiver' is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over

[2] https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court

proceedings. In this context 'cherry picking', or only revealing part of the advice given, is not permitted.

~~48.~~47. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under FOIA. This is because under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.

~~49.~~48. The Council told the Commissioner that :

> *"The advice provided by* [lawyer's name redacted] *has not been disclosed either with or without restrictions."*

~~50.~~49. It said that a statement was made by the Council's Chief Executive to an open meeting of the Council on 19 October 2017, where she reminded Members of the guidance issued to them by the Director of Legal and Democratic Services on the declaration of interests in relation to the school admission arrangements.

~~51.~~50. The Chief Executive said that:

> *"Members who have DPI (disclosable pecuniary interest) in the proposals should declare that interest and withdraw from the meeting prior to the questions from members of the public which deal with the subject…Members who have a non-pecuniary interest in the proposals (eg they live in the area but the value of their property will not be affected) should declare that interest, and have regard to the requirements of the Members' Code of Conduct regarding their participation in the debate".*

~~52.~~51. It was for individual members to decide for themselves whether their circumstances were such that they had an interest to declare.

~~53.~~52. While naturally this statement will have been guided by the legal advice received by the Council, it said that it did not reveal any of its detail. The Council is of the opinion that this is similar to the case quoted in the guidance of the ICO, Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel (*EA/2007/0052, 15*

February 2008[3]) where the public authority had obtained legal advice and had referred to it when dealing with the MTUA. The Tribunal found that: *"None of the references …… reveal the full advice, or anything approaching that, or quote directly from it"* and that the disclosed information did not reveal "…*the reasoning behind the legal advice or the other options considered"*.

~~54.~~53. The Council's position is that the statement of the Chief Executive did not have the effect of loss of legal advice privilege. It used the advice provided to shape the legal advice he gave to individual Members, tailored to their specific circumstances.

~~55.~~54. It is the Council's position that this was not a disclosure to the world at large and would not therefore have the effect of privilege being lost (indeed those communications themselves would be the subject of legal advice privilege between [name redacted] as legal adviser and the individual Members as clients).

~~56.~~55. Having viewed the withheld information, the Commissioner is satisfied that it constitutes communications between a lawyer and their client and that it clearly relates to legal matters. Furthermore, the Commissioner is also 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.

~~57.~~56. It follows that the Commissioner finds that section 42(1) of FOIA is engaged. She will now go on to consider the public interest test.

Public interest arguments in favour of disclosure

~~58.~~57. In his request for a review of the original decision, the complainant, whom the Commissioner understands is a homeowner within one of the potentially affected catchment areas, said:

> *"I disagree with your conclusion that maintaining LPP outweighs the public interest. There are council staff that are closely aligned to this consultation and councillors that have property within*

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[3] http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i46/MerseyTunnelDecision_website.pdf

existing catchment areas that are proposed to be changed. It is claimed that there will be no impact to the value of property if cited in an area that is not proposed to move catchment. Many members of the public, myself included, disagree with this assertion and wish to see the legal basis on which this opinion was formed. Given that the average member of the public believes there to be a financial gain by owning a property in a reduced catchment area, it is in the public interest that Section 42 is overturned."

~~59.~~58. The Council acknowledges there is a public interest in the disclosure of information which would increase transparency and accountability as well as enhancing the quality of discussions and decision making.

~~60.~~59. However, the Council also advised that were the withheld legal advice to be disclosed to the complainant, it would not provide any information concerning how any potential impact on property value has been assessed as the legal advice does not make any finding on this point.

Public interest arguments in favour of maintaining the exemption

~~61.~~60. The Council has argued that there is a strong public interest in preserving the principle of legal advice privilege. It states that it needs to be able to consult its lawyers fully and frankly in order to obtain high quality, comprehensive legal advice which enables the Council to effectively conduct its business.

~~62.~~61. The Commissioner recognises that this advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice may well set out perceived weaknesses of the Council's position. Without such comprehensive advice, the Council's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.

Balance of the public interest arguments

~~63.~~62. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

"…there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".

64.63. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

65.64. Further, there is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. This is necessary so that they can lay out all the issues relevant to the matter they require advice on and so that the lawyer can respond in full to those enquiries. This may include explaining any weaknesses in, or criticism of, their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights, or ensure they are acting in compliance with the law.

66.65. The Commissioner also recognises the public interest in openness and transparency and she understands the value in providing access to information to enable the public to understand more fully why decisions are made and to encourage public debate and scrutiny.

67.66. While the complainant clearly has a genuine interest in this matter, being a resident whose property value may be negatively impacted by a catchment change, his interest is of a personal rather than public nature, albeit the Commissioner recognises that other parties may be affected.

68.67. However, in this case, the Commissioner considers there are stronger public interest arguments in maintaining the exemption. The withheld information and the legal advice was still relevant at the time of the request, it discusses the Council's position on the matter of the declaration of interests and the reasons for this position. Disclosing the legal advice on this would not be in the public interest as it would undermine the principle of legal advice and hinder the Council being able to obtain full and thorough legal advice in order to make balanced decisions. To outweigh this clear public interest in maintaining the exemption there would need to be a compelling argument for disclosure and in this case the Commissioner has not been presented with any such argument and does not consider that there is a reasonable justification for disclosure. Furthermore, having viewed the information, the Commissioner does not consider that its disclosure is of particular relevance to the complainant's arguments regarding house prices.

69.68. If disclosure were ordered in this case, it would undermine the principle of legal professional privilege and the ability in future for the Council to obtain necessarily free, frank and candid legal advice, which in turn would hinder the Council's ability to carry out its functions and make fully informed decisions. The Commissioner does not consider such consequences are in the interests of the wider public and she finds that the public interest is best served in maintaining the exemption on this occasion.

Time for compliance with a request – procedural breaches

70.69. Section 1(1) of FOIA states that upon receipt of a request a public authority must confirm or deny whether or not the information is held and, if that information is held, it must be communicated to the requester.

71.70. Section 10(1) of FOIA states that public authorities must comply with section 1(1) within 20 working days of receipt of the request.

72.71. Section of 17(1) FOIA states that where a public authority refuses a request for information (or part of that request) it must provide the applicant with a refusal notice explaining the exemption(s) relied upon. This notice must be provided within the timescale set out in section 10(1), ie 20 working days.

73.72. The Council's response to the complainant withheld some of the requested information under sections 12(1) and 42(1) of FOIA. As this refusal notice was not issued within the time frame for complying with section 1(1) (ie 20 working days) the Council breached section 17(1) of FOIA. The Commissioner also finds that the Council breached section 10(1) of FOIA because it failed to confirm whether information was held within 20 working days. However, as the response has been issued no steps are required.

74.73. The Council also advised the complainant that it wished to rely on section 42(1) for part of his request, for which a public interest test is required. Section 17(3) of FOIA states that, if a public authority is relying on a qualified exemption, the time limit for compliance may be extended in order to consider the public interest in maintaining the exemption or disclosing the information. A public authority may take such time as is "reasonable in the circumstances", and must then either disclose the requested information or explain to the applicant why the public interest in maintaining the exemption outweighs the public interest in disclosure.

75.74. Although FOIA does not define what a reasonable time is, the Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which means that the total time spent dealing with the request should not exceed 40 working days. Any extension beyond 40 working days would require there to be exceptional circumstances fully justified by the public authority.

76.75. In the circumstances of this case, the total time taken by the Council has significantly exceeded 40 working days. Whilst noting the Council's explanation for the delay, it did not set out any potential 'exceptional circumstances' grounds to the complainant. As the Commissioner does not consider this to be a reasonable timescale she finds that the Council breached section 17(3) FOIA.

Other matters

77.76. The Commissioner has asked the Council about the reason(s) for the delays in providing its response to the request. In reply, the Council said that its proposal to change the school admission boundaries generated a large volume of FOIA requests, 24 in total, in addition to the usual workload. It explained that the answers to the questions raised, some of which had up to ten sub-requests within them, had to be sourced from a small number of subject specialists. Unfortunately these were the same people who were working on the pre-consultation exercise for the catchment revision and then the full consultation. The Council was also briefing local media, keeping Councillors informed and meeting with members of the public.

78.77. It received the complainant's request on 28 July 2017 and recognised that it should have been replied to by 24 August 2017, but its full response was not sent until 27 September 2017. During that same period 12 other FOI requests on the same subject were being responded to, ten of them in the period within which the complainant's reply was due.

79.78. As was explained to the complainant, there was an initial delay by the central Freedom of Information team in locating the source of the information he had requested and obtaining the data from them.

80.79. The Council explained that there was then a delay while the public interest test considerations took place in relation to the legal advice disclosure. It believes that the high volume of requests on the subject hampered the central team in monitoring deadline compliance and the amount of additional work generated for a small number of individuals made priorities difficult to manage for all concerned. It said,

however, that this in no way detracts from the fact that the Council did not meet

its obligation to respond on time which is why an apology was offered to the complainant for the delay.

Right of appeal

~~81.~~80. 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

~~82.~~81. 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.

~~83.~~82. 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 .....

Carolyn Howes
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