

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2018

Public Authority: Sedlescombe Parish Council
Address: April Cottage
Church Road
Catsfield
East Sussex
TN33 9DP

Decision (including any steps ordered)

1. The complainant requested information from Sedlescombe Parish Council (the Parish Council) relating to a decision about judicial review of a planning decision.
2. The Parish Council disclosed some information but refused to provide the remainder, citing sections 41 (information provided in confidence) and 42 (legal professional privilege) of the FOIA.
3. The Commissioner has investigated the Parish Council's application of section 42 of the FOIA to the information withheld by virtue of that exemption.
4. The Commissioner has concluded that the Parish Council was entitled to rely on the exemption at section 42(1) of the FOIA to withhold the information. She requires no steps to be taken as a result of this decision.

Request and response

5. On 2 October 2017, the complainant wrote to the Parish Council and requested information in the following terms:

"1. The reason why, according to the statement under 'Finance' on the PC website the 2016/17 accounts are still 'unaudited'.

- 2. A statement of the case made by SPC and [name redacted] for a judicial review of the RR/2017/1837/P planning decision. Please provide a copy of the actual wording.*
 - 3. A statement detailing the advice on which the Parish Council decisions relating to the judicial review were based including the costs that were likely to be incurred.*
 - 4. Confirmation of all the costs incurred during the judicial review process.*
 - 5. A statement of all resolutions passed by the Parish Council since 17/05/17 regarding the application for judicial review. The August 2017 Bulletin stated that 'SPC resolved to challenge this decision in the courts through a judicial review'. As no such resolutions have been included in any of the public Parish Council Minutes since 17/05/17, they must have been part of the confidential section of the meetings. Now that the result of the High Court deliberation has been announced, it is in the public interest that this information is made public.*
 - 6. A copy of the High Court statement of the decision not to permit a judicial review".*
6. The Parish Council responded in respect of parts (1) and (6) of the request on 2 October 2017. It provided its substantive response on 13 October 2017. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exception as its basis for doing so:
 - Regulation 12(5)(b) (legal professional privilege) of the Environmental Information Regulations 2004.
 7. The complainant expressed dissatisfaction with that response, including the application of Regulation 12(5)(b) in respect of part (3) of the request.
 8. Following an internal review, the Parish Council responded on 30 October 2017. With respect to part (3) of the request it confirmed that a written opinion exists and that section 42 of the FOIA (legal professional privilege) is engaged, rather than Regulation 12(5)(b) of the EIR. It also cited section 41 of the FOIA (information provided in confidence) in respect of the withheld information relating to costs in scope of part (3) of the request.
 9. It advised that it would respond in due course with respect to the public interest test.

10. The Parish Council responded to outstanding matters on 17 November 2017.

Scope of the case

11. The complainant contacted the Commissioner on 10 January 2018 to complain about the way her request for information had been handled, with particular referral to the Parish Council's refusal to disclose the information relating to the advice on which the Parish Council decisions relating to the judicial review were based - information within the scope of part (3) of the request.
12. The complainant disputed that the public interest test has been carried out correctly. She considered that the information:

"...should be released "in the public interest"
13. She was also concerned about whether a confidential report referred to in Parish Council minutes had been considered within the scope of her request.
14. The complainant raised other matters, for example with respect to what she considered to be the Parish Council's unnecessary closure of meetings where decisions were taken. Such matters are outside the Commissioner's remit.
15. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.
16. As is her practice, the Commissioner wrote to the complainant at the start of her investigation setting out the scope of her investigation. She explained that she would determine whether the Parish Council handled part (3) of the request for information dated 2 October 2017 in accordance with the FOIA. Specifically she explained that she would consider its application of section 42 of the FOIA to information within the scope of that part of the request. She invited the complainant to contact her if there were matters other than those that she considered should be addressed.
17. No such response was received.
18. With respect to the nature of the disputed information that falls within the scope of that part of the request, the Commissioner notes that the information is variously described in correspondence between the two parties. For example there are references to *'a statement detailing the*

advice on which...', 'Solicitor's advice', 'written opinion', 'Counsel's opinion' and a 'confidential report'.

19. In light of the above, the Commissioner asked the Parish Council to clarify the information it held that fell within the scope of part (3) of the request and which it was withholding by virtue of section 42.
20. During the course of her investigation, the Parish Council provided the Commissioner with a copy of the withheld information. Mindful of the variety of terms used to describe the information within the scope of part (3) of the request, the Commissioner is satisfied that the withheld information under consideration comprises Counsel's written opinion provided to the Parish Council.
21. The analysis below considers the Parish Council's application of section 42 of the FOIA to that information.

Reasons for decision

Section 42 legal professional privilege

22. Section 42(1) of the 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.
23. 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) (Bellamy)¹ 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."

24. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to
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¹http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

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.

25. In correspondence with the Commissioner, the complainant accepted that it was "*not unreasonable*" for the Parish Council to apply section 42 of the FOIA to Counsel's opinion.
26. 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, having considered the disputed information, the Parish Council's submissions and her guidance, the Commissioner is satisfied that it attracts LPP.
27. It follows that the Commissioner finds that section 42(1) of the FOIA engaged.

The public interest test

28. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether 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

29. The complainant considered that the release of information withheld by virtue of section 42 of the FOIA:

"...will allow the public to have more understanding of the reasons why the Parish Council took the decision to apply for permission to go to Judicial Review".

Public interest arguments in favour of maintaining the exemption

30. In relation to the public interest in favour of withholding the requested information, the Parish Council told the complainant that, while it acknowledged that there is always a public interest argument in favour of disclosure:

"...the amounts of money involved, number of people affected etc would not weigh in favour of disclosure of counsel's opinion..."

31. In correspondence with the Commissioner, the Parish Council confirmed that the factors considered in maintaining the exemption:

"... included the strong public interest in the Parish Council not being discouraged from obtaining full and frank legal advice".

32. It explained that this was vital to enable the Parish Council to make decisions without fear that its legal advice might be disclosed into the public domain, particularly:

"...in the context of contentious matters such as this particular case..."

33. In that respect, it explained that the information requested by the complainant related to *"a major site / development in the Sedlescombe Neighbourhood Plan"*.

Balance of the public interest arguments

34. 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 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".

35. 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.

36. The Commissioner recognises that additional weight may be added to the above factor in favour of maintaining the exemption if the advice is:-

- recent;
- live;
- protects the rights of individuals.

37. Although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
38. In accordance with her guidance on section 42², the Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (ie accountability, transparency, furthering public debate etc).
39. She recognises that additional weight may be added to the above factor in favour of disclosure if the following issues are relevant in the particular case:
 - large amount of money involved;
 - whether or not a significant group of people are affected by the advice or resulting decision;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
40. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals.

Conclusion

41. In reaching a conclusion in this case, the Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
42. In reaching her decision in this case, the Commissioner has considered the arguments put forward by the complainant and the stated position of the Parish Council in addition to the prior findings of the Commissioner and the Information Tribunal in relation to legal

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

professional privilege. She has also had regard for the content of the withheld information.

43. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. She gives weight to those arguments.
44. However, the Commissioner has also taken into account that, at the time of the request, the legal advice was relatively recent and was live in that it was still being relied on. She also considers that the privilege attached to the information had not been waived and was still relevant.
45. In all the circumstances of 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.
46. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied.

Right of appeal

47. 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

48. 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.
49. 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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