

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2022

Public Authority: Uttlesford District Council

Address: London Road
Saffron Walden
Essex
CB11 4ER

Decision (including any steps ordered)

1. The complainant requested from Uttlesford District Council (the Council) information relating to a Compulsorily Purchase Order (CPO) over a specific property. The Council provided some information within the scope of the request but withheld information under section 42(1) (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on section 42(1) of FOIA to withhold some of the information requested. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 11 March 2022 the complainant wrote to the Council and requested information in the following terms:

"1. Any and all supporting documentation created or used by [name redacted] when making his [date redacted] decision to proceed to served the General Vesting Declaration, to vest ownership of [name redacted] home to the council.

- a. Please include all supporting documentation, notes, meeting minutes, emails etc., including his reasoned assessments of all available evidence (if any) and his reasoned consideration or rejection of any alternative courses of action (if any).
 - b. For the avoidance of doubt, the decision is the decision described within his letter to members dated 4th February 2021.
2. Similarly, (under OLGR 2014), please provide me with copies of all documentation/information used by [name redacted] in reaching her 2015/16 decision to commence the process of Compulsorily Purchasing [name redacted] home and then to present her proposal to Cabinet for ratification.
- a. Please included all supporting evidence that she used when reaching her decision
 - b. Please identify any and all alternative options, strategies or courses of action that she considered
 - c. Please included all/any evidence or reasoning for why these alternatives were discounted.
 - d. Please provide us with copies of the 8th December 2016 Housing Committee Report that is referenced at the top of the "7 Housing Board Report 01-12-2016" document and to which it was appended, before being sent (ironically) to 'Democratic Services'.
 - e. Please provide us with copies of the 12th January 2017 Cabinet Committee Report, as described in [name redacted] email to us of 14th December 2021 @ 16:01, which is referenced at the top of the "8 CPO Cabinet Report RM 05-01-2017" documents and to which it was appended, before being sent to 'Democratic Services.'
3. With reference to documentation that supports [name redacted] investigation into our complaint of maladministration 2(d), to which she responded on 28th January 2021, thank you for confirming that there is no supporting documentation or documented record of her decision-making process and that [name redacted] made her decision based exclusively on her discussions with Officers, including: [names redacted].
4. Please provide us with a copy of the instruction [name redacted] sent to counsel that generated the council's 25th January 2021 opinion.
- a. Since you have already shared this legal opinion with us in its entirety, without restriction, your continuing claim to FOIA s42 (para 30,33,55) (Sch. 2 Part 4 (p19) DPA 2018) (Legal Professional Privilege)

protection is preposterous, and contrary to the Nolan Principles, as well as the general principle of open, honest and accountable government [Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel (EA/2007/0052, 15 February 2008)].

b. Since [name redacted] stated intention in sharing [name redacted] statement and this legal opinion with us was "... in the interests of transparency...", please explain by what right and for what reason [name redacted] continues to prevent proper scrutiny of her instruction."

4. On 11 April 2022, the Council responded and stated that points 1 and 2 consisted of the complainant's personal information and withheld it under section 40(1) (personal information) of FOIA. The Council also responded under SAR and provided the complainant with a number of documents but withheld some information under section 42 (legal professional privilege) of FOIA.
5. On 21 April 2022 the complainant made a further request which the Council treated as a request for an internal review under FOIA.
6. On 20 May 2022 the Council provided its internal review response and identified two aspects of the complainant's initial request with which he remained dissatisfied; (1) Instructions to Counsel and (2) Note of a meeting. The Council maintained its original position to apply section 42 of FOIA to the withheld information.
7. The following analysis focuses on whether the Council was entitled to rely on section 42(1) of FOIA to withhold some of the information requested.

Reasons for decision

Section 42 – Legal professional privilege

8. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege and this claim to legal professional privilege could be maintained in legal proceedings. The concept of Legal professional privilege protects the confidentiality of communications between a lawyer and client.
9. In this case, the complainant has requested information relating to a decision to seek a CPO against a specific property, and instruction to Counsel for advice. Although the complainant has been provided with a full unrestricted copy of the advice, he has asked for copies of all documents not previously supplied. He specified that he is seeking full

disclosure for complete understanding, and assessment of the Council's decision-making. He also disputes the Council's refusal for information under section 42 of FOIA.

10. The Commissioner notes the Council's explanation regarding previously disclosed information and accepts that it had not disclosed to the complainant, Counsel's advice "in its entirety, without restriction" as the complainant had asserted. The Council said the complainant has been provided with "a truncated, redacted and amended version which did not disclose legally privileged information but only that on which the Council had opted to waive privilege for the benefit of the complainant." The Council said it remained satisfied that the instructions to Counsel remain privileged.
11. The Commissioner also notes that the Council, in making its analysis and application of the exemption, considered the ICO's recent decision notices¹ relating to the legal privilege exemption², and the Council referred to these notices³ within its submissions.
12. The Council was asked to provide the Commissioner with the withheld information which are copies of the two documents (the subject of this complaint). The Commissioner considers that the withheld information is in its entirety legally privileged and is exempt from disclosure.
13. The Commissioner is satisfied from the wording of the request that the information falling within the scope of this request would constitute confidential legal advice provided by a qualified legal adviser to their client. This means that this information is subject to legal professional privilege, and the Commissioner is aware of no evidence suggesting that this privilege has been waived. The exemption is therefore engaged in relation to this information.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022857/ic-175010-p4t5.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4021940/ic-136737-f8q0.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022480/ic-137375-s7h6.pdf>

Public interest test

14. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the inbuilt public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
15. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, inbuilt weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

“...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”.
16. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the Council’s ability to obtain free, frank and high quality legal advice without the fear of premature disclosure. The Commissioner is not aware of any public interest arguments that are enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege.

The Commissioner’s conclusion

17. The Commissioner has concluded that the public interest in maintaining this exemption outweighs the public interest in disclosure. Therefore, the Council is entitled to rely on section 42(1) of FOIA to withhold the requested information.

Right of appeal

18. 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@justice.gov.uk.

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

19. 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.
20. 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

Phillip Angell
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SK9 5AF