

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2023

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
Mulberry Place
5 Clove Crescent
London
E14 2BG

Decision (including any steps ordered)

1. The complainant requested from London Borough of Tower Hamlets ("the Council") a report that it commissioned in relation to fire safety works on a housing estate. The Council withheld the requested information under section 42(1) (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the Council is entitled to withhold the requested information under section 42(1).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 17 August 2022, the complainant wrote to the Council and requested information in the following terms:

"I would like to see a copy of a fire safety report commissioned by Tower Hamlets Homes from a company called Oakleaf in the first half of 2020."

5. The Council responded on 14 September 2022. It withheld the requested information under section 42(1).
6. Following an internal review, the Council wrote to the complainant on 21 October 2022. It maintained the application of section 42(1).

Reasons for decision

7. This reasoning covers whether the Council is entitled to rely on section 42(1) of FOIA to refuse to provide the requested information.
8. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
9. The Commissioner's guidance on section 42(1) explains that such privilege includes that information which has been created for use in preparing a case for litigation. As such, it can apply to a wide variety of information including advice, correspondence, notes, evidence or reports.
10. In this case, the complainant has requested a report that was commissioned by the Council in respect of fire safety works on the housing estate where the complainant lives. The complainant argues that it is only the report that they seek, and not any legal advice that was subsequently added to it.
11. The Commissioner understands that the Council has previously been subject to litigation, and that those proceedings were concluded in October 2019. The Council has stated that the outcome of those proceedings led to the Council concluding that there was a real prospect of future 'estate-wide' litigation against the Council. The Council has explained that the report was therefore commissioned to inform the Council's case in respect of such litigation, which subsequently came to be initiated in February 2020. Whilst the Council has not since relied upon the report in litigation, it has not waived privilege to it.
12. Having considered the Council's explanation of how the information came to be held, and having viewed the withheld information, the Commissioner is satisfied that the information would constitute information that was created for use in preparing a case for litigation. This means that the information is subject to legal professional privilege, and the Commissioner is aware of no evidence suggesting that this privilege has been waived. Whilst the Council has not since relied on the

report, this is not a requirement for legal professional privilege to apply, as confirmed in the Commissioner's guidance on the exemption (paragraph 18)¹. The exemption provided by section 42(1) of FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

13. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built 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 legal advice. A weakening of the confidence that parties have that communications 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.
14. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built 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”
15. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the Council's ability to collate that information necessary to either give or obtain legal advice, or to use in preparing a case for litigation, 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.

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

16. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, the Council has correctly applied section 42(1). The Commissioner requires no further action to be taken by the Council in relation to this request.

Right of appeal

17. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

18. 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.
19. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF