

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2023

Public Authority: London Borough of Haringey
Address: 7th Floor, River Park House
225 High Road
Wood Green
London
N22 8HQ

Decision (including any steps ordered)

1. The complainant requested, from the London Borough of Haringey ('the council'), correspondence between a named councillor and the council's Monitoring Officer. The council refused the request on the basis that section 42 of FOIA applied (legal professional privilege).
2. The Commissioner's decision is that the council was correct to apply section 42 to withhold the information from disclosure.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 18 April 2022, the complainant wrote to the council and requested information in the following terms:

“Please may I have all documents relating to any and all correspondence between [name of councillor redacted by the ICO] and the monitoring officer since 5th February 2022 as well as any correspondence between the monitoring officer and any other persons relating to the correspondence between her and [name of councillor redacted by the ICO].”
5. The council responded on 1 June 2022. It confirmed that there was no correspondence between the Councillor and the Monitoring Officer, however it disclosed a copy of correspondence which it considered fell within the second part of the request. However, it redacted information from this under section 40(2) (personal data of third parties), and section 42 (legal professional privilege).
6. Following an internal review, the council wrote to the complainant on 13 November 2022. It disclosed further information and withdrew its reliance upon section 40(2), providing the information previously withheld under that exemption. However, it continued to rely upon section 42 to withhold other information.

Scope of the case

7. The complainant contacted the Commissioner on 14 November 2022 to complain about the way his request for information had been handled. His complaint was that the council was not correct to apply section 42 to withhold the information from disclosure.
8. During the course of the Commissioner’s investigation the council also applied section 41 to withhold the same information (information provided in confidence).
9. The Commissioner therefore considers that the scope of the investigation is to decide whether the council was correct to withhold the information under section 42(1) and 41.

Reasons for decision

10. Section 42(1) of the 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.

11. The council withheld one paragraph from the correspondence it disclosed on the basis that the paragraph reiterated legal advice which the council had received from Homes for Haringey (HfH). The complainant questioned whether the council could apply legal professional privilege when it did not have the necessary client/adviser relationship in place under the circumstances. This is because the advice was originally sought and provided by a legal adviser at HfH to their client, HfH, not the council.
12. The Commissioner's guidance on legal professional privilege¹ notes that litigation privilege: "...can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation."
13. The council argued that the information was subject to legal professional privilege due to ongoing litigation, or the prospect of future litigation, which it was soon to become involved in.
14. The council clarified that:
 - The initial advice was provided by a professional legal adviser to their client (HfH). The redacted section of the email essentially reiterates that legal advice.
 - The advice was shared with the council in the context of an anticipated transfer of HfH's services, (including the day-to-day management of the ongoing litigation with the complainant), back 'in house' to the council.
 - The relevant paragraph was shared solely with the council's Head of Legal and Monitoring Officer, and not more widely within the council and/or to the world at large.
15. Having viewed the withheld information, together with the council's arguments, the Commissioner is satisfied that the information constitutes confidential legal advice provided by a qualified legal adviser to their client in respect of ongoing litigation, or the prospect of ongoing litigation. The information was clearly subject to litigation privilege whilst it was retained by HfH.

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

16. The Commissioner further considers that the council received the information as an intended future party to the litigation, and it therefore retained its status as privileged information under these circumstances. The disclosure to the council was a restricted disclosure.
17. The information received by the council was a reiteration of the legal advice which HfH had received from its legal adviser, and it was provided with the intention that the council would take over conducting the proceedings once HfH's services reverted back to the council. The information was shared in confidence, with a limited number of people at the council, for the purposes of the council continuing that litigation.
18. Due to the transfer of responsibilities for conducting the litigation, the transfer was also not a waiver of privilege in this instance as the confidentiality of the advice was maintained purely between HfH and relevant individuals at the council with the purpose of informing them of legal advice it had received regarding the ongoing claims, and due to the intention that the council would take over HfH's role in the proceedings.
19. The Commissioner is therefore satisfied that, even with the transfer of the advice to the council, the relevant information retained its privileged status.
20. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.
21. The central public interest in terms of the information being disclosed relates to creating greater transparency over the actions of HfH as regards a previous court case. There is a public interest in ensuring that justice is served, and the complainant argues that there were errors and, he alleges, serious concerns about the integrity of the evidence provided to the court in that case. The Commissioner notes these allegations, however he has no powers or remit to consider or make decisions as to whether a court case was conducted or decided appropriately. That is a matter for the courts.
22. 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 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.

23. 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.”

24. 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.
25. 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.
26. As the Commissioner has decided that the council was correct to apply section 42(1) to withhold the information, he has not found it necessary to consider the council's application of section 41 further in this decision notice.

Right of appeal

27. 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

28. 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.

29. 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
Cheshire
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