

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2019

Public Authority: Department for Communities Northern Ireland

Address: Causeway Exchange
1-7 Bedford Street
Belfast BT2 7EG

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Communities (DfC) in relation to the development of certain sites owned by the DfC. The DfC refused to disclose the information ('the withheld information') citing the exemptions as set out in sections 41, 42 and 43(2) of the FOIA.
2. The Commissioner's decision is that the DfC has correctly applied the exemptions as set out in sections 41 and 42 of the FOIA to the withheld information. As sections 41 and 42 cover the entirety of the withheld information, the Commissioner has not gone on to consider the DfC's application of section 43(2) of the FOIA.

Request and response

3. On 24 April 2017, the complainant made a request to the DfC in the following terms:-
 1. "Copies of all correspondence and emails in relation to any legal Advice sought by the Department from 2010 to date in relation to the Department sites at:

- a) Paisley Park
 - b) Craven Street Youth Club
 - c) Mica Drive
2. Copies of all correspondence and emails in relation to any rental/leasing of the following Department sites from 2010 to date;
 - a) Paisley Park
 - b) Craven Street Youth Club
 - c) Mica Drive
4. The DfC responded to that request on 22 May 2017, stating that it could not disclose information within the scope of that request, citing the cost limit at section 12 of the FOIA. The DfC suggested that the complainant narrowed or refined his request.
 5. The complainant submitted his refined request to the DfC on 19 May 2017. That request was in the following terms:-
 - "1. Copies of all correspondence and legal advice received by the Department for Communities / Department for Social Development from the Department of Finance including the Departmental Solicitors Branch in respect of the Department for Communities/Department for Social Development's sites and the occupiers/clubs from 1st April 2010 to date for the following sites:
 - a) Paisley Park - and the occupiers of the site Paisley Park Sportsplex, Albert Foundry Football Club, Albert Foundry Bowling Club and Albert Foundry Boxing Club;
 - b) Craven Street Youth Club - and the occupiers Cairn Lodge Boxing Club
 - c) Mica Drive - and occupiers Davitts GAC
 2. Copies of all correspondence and advice provided by the Land and Properties Service since 1st April 2010 to date in respect of the Department for Communities / Department for Social Development's sites at;

- a) Paisley Park - and the occupants of the site Paisley Park Sportsplex, Albert Foundry Football Club, Albert Foundry Bowling Club and Albert Foundry Boxing Club.
- b) Craven Street Youth Club - occupied by Cairn Lodge Boxing Club
- c) Mica Drive site - occupied by Davitt's GAC.

As required by law, please include copies of information held on paper or in electronic form. I would be grateful if you would supply this information in the form of photocopies or screen shots and, if possible, by email."

6. The DfC responded to that request on 16 June 2017, stating that it was withholding the requested information under sections 41, 42 and 43(2) of the FOIA.
7. The complainant requested an internal review of the DfC's response to his request of 19 May 2017, the result of which was provided to him on 6 July 2017. The reviewer upheld the original decision to withhold the requested information under sections 41, 42 and 43(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 7 July 2017 to complain about the way his request for information had been handled.
9. The Commissioner has considered the DfC's handling of the complainant's request, in particular its application of the above exemptions.

Reasons for decision

Section 41 – information provided in confidence

10. Section 41(1) of the FOIA states that:

Information is exempt information if–

- (a) *it was obtained by the public authority from any other person (including another public authority), and*
- (b) *the disclosure of the information to the public (otherwise than*

under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

Was the information obtained from another person?

11. The DfC states that it obtained the information from Land and Property Services (LPS) which sits within the Department of Finance (DoF). As the DoF is a separate public authority, the Commissioner is satisfied that the DfC obtained the information withheld under section 41 from 'another person'.

Would disclosure of the information by the DfC constitute an actionable breach of confidence?

12. The Commissioner uses the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as a framework for assessing whether a disclosure would constitute a breach of confidence. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:
- the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
13. Dealing with the first bullet point, information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The DfC states that the information is of a legal and commercial nature and is therefore not trivial. The information was not accessible to the public at the time of the request and this is still the case. Therefore, the DfC considers that the information withheld under section 41(1) does have the necessary quality of confidence and the Commissioner, having perused the withheld information, is satisfied that this is the case.

14. In relation to the second bullet point, the DfC has informed the Commissioner that, as part of the process of responding to the complainant's request, it consulted with LPS. Consent was not given to the disclosure of the information, as LPS stated that it had been provided in the expectation that it would be kept confidential and not disclosed to the public. The Commissioner is satisfied that the information was imparted in circumstances importing an obligation of confidence.
15. In relation to the final bullet point, the DfC has informed the Commissioner that LPS considers that disclosure of the information would undermine the confidence of public authorities in consulting LPS. Public authorities currently know that they can approach LPS in a confidential manner to seek guidance on the valuation of land and property. LPS must be able to maintain client confidentiality in order to preserve its relationship of trust with those who seek its guidance and disclosure of the withheld information would cause detriment to the overall client/service provider relationship.
16. The Commissioner considers that it is not necessary for there to be any detriment to the confider in terms of tangible loss in order for information to be protected by the law of confidence. The Commissioner considers that disclosure of the withheld information would cause detriment to LPS as loss of privacy can be a detriment in its own right.

Is there a public interest defence for disclosure?

17. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test within the FOIA. However, disclosure of information provided in confidence, where there is an overriding public interest is a *defence* to an action for breach of confidence. The Commissioner is therefore required to consider whether the DfC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
18. The Commissioner recognises that the courts have taken the view that very significant public interest factors must be present in order to override the strong public interest in maintaining confidence.

19. The complainant has put forward the argument that it is in the utmost public interest for the public to understand the decision-making process of the DfC in this case, as it involves considerable expenditure of public money. The Commissioner has considered this argument in the context of the ongoing political situation in Northern Ireland and the widely publicised issues which have arisen within the last few years regarding the expenditure of public funds.
20. Having considered the complainant's argument and perused the withheld information, the Commissioner is of the view that, whilst the concerns are valid, and it would be in the public interest to understand the processes which led to the DfC's decisions regarding allocation of funds in this particular case, that public interest is not of such significance that it outweighs the considerable interest in maintaining the confidence of LPS in order to preserve its relationship of trust with public authorities that consult it.
21. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. As the Commissioner finds that the exemption at section 41 does apply, she will not go on to consider the exemption at section 43(2)(commercial interests) in relation to this part of the withheld information.

Section 42(1) – information subject to 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 DTI* (EA/2005/0023):

"... 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 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. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

25. The Commissioner's view is that for legal professional privilege 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.
26. In this case the DfC has confirmed that it considers the withheld information to be subject to legal advice privilege. The communications are confidential, made between the DfC and its legal advisers, the Departmental Solicitor's Office (DSO) acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice regarding the development of specific sites owned by the DfC. The DfC has also confirmed that it is satisfied that privilege has not been lost by virtue of the advice losing any of its confidentiality.
27. Having considered the content of the correspondence, the Commissioner accepts that the withheld information is subject to legal professional privilege on the grounds of legal advice privilege as it consists of communications to and from a professional legal adviser for the purpose of seeking and providing legal advice. The Commissioner's guidance states that a communication under section 42 of the FOIA means a document which conveys information. The withheld information in this case consists of e-mails and correspondence between the DfC and its legal advisers, some with documents attached which have been compiled on the basis of the advice from the DSO, and which reflect that advice and therefore still attract privilege. On this basis, the Commissioner finds that section 42(1) of the FOIA is engaged in relation to the information withheld under it by the DfC.

Public interest test

28. The exemption provided in section 42(1) is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining

the exemption outweighs the public interest in disclosing the information. The Commissioner has considered the factors in favour of maintaining the exemption and has balanced them against those in favour of disclosure of the information withheld under section 42(1) of the FOIA.

Factors in favour of disclosure of the information

29. The DfC accepts that public authorities should be accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability, and indeed the complainant makes the argument that it would be in the public interest to know whether the DfC followed or went against legal advice when it came to the expenditure of public funds on development of the specified sites.
30. The DfC also accepts that transparency in the decision making process and access to the information upon which decisions have been made can enhance the accountability of public authorities.

Factors in favour of maintaining the exemption

31. The DfC states that it is vital for it, as a government department, to be able to obtain full and frank legal advice to aid it in complying with its legal obligations and conducting its business accordingly. As legal advice has to be necessarily fair, frank and reasoned, it is inevitable that it is likely to highlight the strengths and weaknesses of a course of action. If legal advice were to be routinely disclosed, public authorities such as the DfC may be reluctant to seek advice as the disclosed advice could contain information which may damage their position. As a result, reluctance to seek legal advice may render the DfC less able to properly comply with its legal obligations.
32. Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness and frankness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn goes to serve the wider administration of justice. The legal adviser needs to be able to present the full picture to his or her clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. If a legal adviser is unable to provide this comprehensive advice, without fear of subsequent disclosure, the quality of decision making may be adversely affected, which would not

be in the public interest at any level, but especially at government departmental level, where advice needs to be of the highest quality.

33. The DfC is also wary that future legal interests could be prejudiced. It is well aware that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. As a consequence, legal advice may well set out the perceived weaknesses of the DfC's position whilst presenting arguments for and against certain courses of action. Without such comprehensive advice, the effectiveness of the DfC's decision-making processes would be reduced because it would not be fully informed, and this would be contrary to the public interest
34. The DfC is also conscious that disclosure of legal advice would produce a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest, as the former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

Balance of public interest factors

35. The Commissioner is aware that there is a strong element of public interest inbuilt into maintaining LPP. This position was endorsed in the case of *DBERR v Dermot O'Brien* ([2009] EWHC 164 (QB))

".....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)...The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight"

36. In the case of *Calland v Information Commissioner & the Financial Services Authority* (EA/2007/0136) the Tribunal commented:

"What is quite plain, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

37. The Commissioner and the Information Tribunal have both expressed the view, in a number of previous decisions, that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the *Bellamy* case, as mentioned in paragraph 23 above, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
38. There will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept, and it is clear from previous decisions and from the Commissioner's guidance that, as was stated succinctly in the *Bellamy* case, that:

"there is a strong element of public interest inbuilt into the privilege itself and that at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
39. The Commissioner has considered the public interest arguments in favour of disclosure of the information withheld under section 42, and has concluded that, although significant weight can be attached to transparency and accountability in this case, also to the public interest in knowing the quality of legal advice received by the DfC and whether it chose to follow or go against it, the weight of all of these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption, such as the vital importance of the DfC being able to obtain free, frank and high quality legal advice without fear of premature disclosure. The arguments are also not sufficient to outweigh or override the inbuilt public interest in information remaining protected by LPP.
40. In view of the above, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42 of the FOIA outweighs the public interest in disclosing the information.

Right of appeal

41. 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

42. 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.
43. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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