

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2020

Public Authority: Kirklees Metropolitan Council

Address: Town Hall
Ramsden Street
Huddersfield
West Yorkshire
HD1 2TA

Decision (including any steps ordered)

1. The complainant has requested information relating to a building dispute which occurred between a school and a building company in 2015. The council refused to disclose some information on the basis that section 40(2) of the Act applied (personal data), section 32 (court records) and section 42 (legal professional privilege). During the course of the Commissioner's investigation the council also applied section 41 in place of its application of section 32.
2. The Commissioner's decision is that the council was correct to apply section 40(2), section 41, and section 42 to withhold information. She has also decided that on a balance of probabilities no further information is held by the council. She has, however, decided that the council did not comply with section 10(1) of the Act.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 1 January 2019, the complainant wrote to the council and requested information in the following terms:

"Under Freedom of Information act, can I please request in electronic format:

- 1. Details of what project methodology / project management framework was used and copies of all relevant project management documents.*
- 2. Names of all consultants including contractors hired for purpose of the school extension, their qualifications and their CVs with personal details removed. If it helps, anonymous CVs are acceptable so for instance Bob Smith would be BS and their role as a Building Manager.*
- 3. Copies of Professional Indemnity & Public Liability Insurances for all consultants hired by the school and its contractors/sub-contractors such as [redacted].*
- 4. Copies of all email (internal or external) or written letter correspondences relating to [redacted], its Directors or relating to the school extension whether sent or received. For clarity, these are all correspondence from commencement of project to present day.*
- 5. Copies of all Minutes of Meetings relating to [redacted] for the school extension.*
- 6. Copies of school staffs' CVs involved in the project, their respective roles and responsibilities.*
- 7. Copies of CVs for the school governors involved in school extension project and their roles within the project.*
- 8. Copy of a project brief briefly describing what lead to justification of this project.*
- 9. Copy of complaint received from [redacted].*
- 10. Electronic copy of Adjudicator's decision along with supporting documentations submitted by both parties.*
- 11. Copies of Legal advice received by the school.*
- 12. Copies of all invoices relating to the school extension, schedule of payment confirming the amount, date and invoice number being paid.*
- 13. Details of Interests Register of all personnel involved with this project.*
- 14. Copies of project progress reports issued by [redacted] or the school to its stakeholders. Photos showing areas that led to the dispute*
- 15. Any other relevant documentation relating to the school extension that has not been covered above."*

5. Following a request for clarification, the complainant wrote providing this on 9 January 2019.
6. The council responded on 9 May 2019 and provided some of the information requested. It said that other information would be provided in due course. It also clarified that some of the information requested is not held. Specifically it stated that information is not held in respect of the following parts of the request: 1, 2, 3, 5, 6, 7, 8, 13, 14, and 15 (other than in the information it had or would provide in due course).
7. It responded again on 13 June 2019 and provided further information, however, it withheld some information on the grounds that section 32(2) (court records) and section 40(2) applied (personal data of third parties). It also confirmed that no information is held falling within the scope of parts 8 and 11 of the request.
8. Following an internal review the council wrote to the complainant on 14 June 2019. The review did not though consider the redactions or information it had withheld. It simply acknowledged that the council's response had failed to comply with the requirements of section 10(1) of the Act (time to respond).

Scope of the case

9. The complainant contacted the Commissioner on 13 June 2019 to complain about the way his request for information had been handled.
10. He argues that the council was not correct to withhold information from disclosure to him. He also argued that further information should be held.
11. During the course of the investigation the Commissioner informed the council that section 32(2) could not be applicable to parts of the information as the Adjudicator's decision and associated witness statements were neither a court record nor documents prepared for the purposes of Arbitration.
12. The council therefore reconsidered its position and applied section 41 to this information. The Commissioner therefore considered the application of section 41 to the information in addition to the above.

Reasons for decision

Is the information environmental information for the purposes of the Environmental Information Regulations 2004?

13. The Commissioner asked the council to consider whether the requested information falls within the definition of environmental information for the purposes of the Environmental Information Regulations 2004.
14. The council clarified that it considered that the request did not amount to environmental information because much of the information requested, which it considered would be environmental information, was not in fact held by the Council.
15. It said that what it does hold is primarily concerned with payments and complaints about the handling of the dispute which arose between the construction firm and the school, rather information relating to the building itself.
16. It therefore considered that the information which it held fell to be considered under the FOI Act rather than the EIR.
17. Having considered the withheld information the Commissioner considers that the council's decision is correct. The information falls to be considered under the Freedom of Information Act (2000) (the Act).

Information not held

18. The council responded to some parts of the request stating that information is not held. It argues that it has disclosed all of the information which it holds, subject to the exemptions being applied.
19. The complainant argues that further information is held. In particular he drew attention to the council's response to part 3 of the request:
"Copies of Professional Indemnity & Public Liability Insurances for all consultants hired by the school and its contractors / sub-contractors..."
20. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
21. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

22. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Council held further information within the scope of the request.
23. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.
24. The Commissioner therefore asked the Council to describe the searches it carried out for information falling within the scope of the request. She also asked the council to explain how it had established that no further information is held falling within the scope of the request.
25. The council said that it had carried out a number of searches to determine whether it holds information falling within the scope of the complainant's request. It clarified, however, that the principal reason it does not hold the extent of the information which the complainant believes it does is that its involvement in the dispute between the parties was limited. Both the contract, and the subsequent dispute, were between the school and the building company, and the council had not been involved in these wider issues. The council clarified that its role was limited to providing assistance in respect of the school making a payment, and then, subsequent to this, in considering a complaint made to it by the building company.
26. It further explained that a different request for the information had previously been received by the council in 2015 from another party. It's response to that request was still held, as was the information which was relevant to that request. It said that the information falling within the scope of this request was for 'all information held' regarding the issue, and that due to this, it was therefore able to locate the information requested in this case reliably and quickly.
27. Further to this, it said that FOI co-ordinators for Customer Services, Legal Services, Audit & Risk, The Learning Service and Capital Development & Delivery were all asked to conduct searches for information falling within the scope of the request. The individual departments' responses were that no information was held.
28. It said that due to the council's limited involvement in the dispute, the only departments which were involved were the Corporate Customer Standards Team (which deals with complaints), senior managers in Finance and Education, the Chief Executive's Office and its Internal Audit team.

29. A meeting was held with officers from Customer Standards, Audit and Legal who were the main holders of information, and they provided all of the information which is held relating to this request. A small amount of legal advice was also located regarding a technical aspect of the complaint. This information was considered further under the consideration of section 42.
30. The council clarified that any information held would be a mixture of both manual and electronic data, however the majority of it would be held as electronic data.
31. It clarified that it does not hold a copy of the Professional Indemnity & Public Liability Insurances for all consultants hired by the school and its contractors / sub-contractors. It said that the school, as a separate public body, managed its own affairs in such business. Aid was only provided by the council as it was requested to do so.
32. The council provided details regarding the statutory requirements for the retention of information. Essentially information relating to finance and to the complaint which was made is retained for a period of 6 years. Other information may have been destroyed, however it provided no record of that.
33. Following the searches described above it considered that it has located and provided all the information it holds to the complainant based on the description of the requested information and the search parameters used.

The Commissioner's conclusion

34. The Commissioner has reviewed the submissions of both parties and the arguments put forward.
35. Under the circumstances described she believes that the council has provided a description of having carried out adequate and appropriate searches across relevant departments in order to determine whether any further information is held falling within the scope of the complainant's request.
36. The question for the Commissioner to consider is not whether information 'should' be held, but whether relevant information 'is' held.
37. The Commissioner has considered the complainant's arguments that further information may be held. However, in the absence of evidence to the contrary, and given the substantive searches described by the council as having been carried out, she considers that there is no evidence demonstrating that further information is held falling within the scope of the complainant's request for information.

38. This being the case, the Commissioner's decision is that, on a balance of probabilities, no further information is held by the council falling within the scope of the complainant's request for information.

Section 40(2) personal information

39. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
40. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
41. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
42. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

43. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
45. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

46. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
47. The council withheld the identities of some council officers and other third parties. It said that it had redacted names, job titles, internal Council and mobile phone numbers, detailed accounts of conversations and encounters between third parties, signatures, bank account details and hourly rates of pay, email addresses, and reference numbers containing initials.
48. The Commissioner is aware that the building company was a small family based limited company. Limited companies have their own legal personality. Therefore, information relating to them is not personal data under the DPA as the information does not relate to a living, identifiable individual. That being said, the actions of individuals working for the company will often still be personal data relating to them. This includes the actions of the directors of limited companies. It should be borne in mind, however, that the actions of an individual on behalf of a limited company may hold lesser weight as regards their personal rights and freedoms under the DPA in any balancing test which is carried out.
49. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to council officers and other third parties. She is satisfied that this information both relates to and identifies the individuals concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
50. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
51. The most relevant DP principle in this case is principle (a).
Would disclosure contravene principle (a)?
52. Article 5(1)(a) of the GDPR states that:
"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
53. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

54. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

55. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.

56. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².

57. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

² Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

58. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

59. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
60. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
61. The council accepted that there was a legitimate interest in the disclosure of the redacted personal data. It said that the legitimate interest was in respect of understanding how the Council has handled a dispute between a building contractor and a school in the Borough.

Is disclosure necessary?

62. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
63. The central issues involved in this case relate to a dispute between a building company and a school. The dispute surrounded the question of costs for work carried out. The matter went to adjudication, however issues continued even after this had been decided. The requested information relates to this dispute. The complaint related to how the school handled the issue of the dispute.
64. The Commissioner accepts that the public has a legitimate interest in having access to some of that information, however she notes that much of the information held by the council was disclosed.
65. The disclosed information provides a clear account of the nature of correspondence disclosed, and therefore the issues under discussion, with only the correspondent's identities and contact details being withheld. Senior council officer's identities are disclosed in addition to some identities such as the headmaster of the school. The Commissioner is therefore satisfied that there is already transparency

over the actions of the council, purely from the information which has already been disclosed. She does not consider that knowing who the other individuals are would greatly add to that transparency.

66. The council's involvement in the issue was limited. The main parties involved in the dispute are the school, (in the form of the school governors and the school headmaster), and the building company. The council said that it was contacted by the construction firm regarding payment by the school. The council said that it had arranged the payment on the school's behalf in order that the contractor could receive the payment more quickly. It said that it then became further involved in resolving a complaint made by the construction firm, but again, this related to the school, not to the council.
67. The council clarified that the information which is held is historic, and the complaint and matters relating to the dispute were settled. The information which council has already disclosed provides a reasonable oversight of the council's involvement in the process, and a wider oversight into what occurred.
68. The question for the Commissioner is whether the disclosure of the redacted personal data would meet any further legitimate interests over and above that met through the disclosure of the information which has already occurred.
69. The legitimate interest of the public are in knowing why events occurred as they did, what decisions were taken by authorities which led to public money being expended, and the actions the public authorities, (both the council and the school), met with the standards expected of public bodies.
70. The Commissioner accepts that the public has a legitimate interest in knowing more details about what occurred in this instance. It is reported in the media that the school paid significant costs following the adjudicators report. In addition, she accepts that the public has a legitimate interest in knowing what actions individuals representing the public bodies took which led to that situation.
71. Having considered all of the above points, the Commissioner is satisfied that a disclosure of the information is necessary in order to meet the legitimate interests of the public.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

72. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For

example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

73. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

74. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

75. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

The potential harm or distress that disclosure may cause

76. The Commissioner considers that a disclosure of the information would be likely to cause harm and distress in that it is likely to bring up memories of the dispute into the public domain which common sense would suggest were stressful to the individuals involved at the time. The details of the actual dispute are largely known, however they are also historical. A disclosure of the identities of the individuals at this time would primarily only serve the purpose of reopening any issues relating to those individuals.

Whether the information is in the public domain.

77. As stated, there is a degree of press coverage related to the issues in the local press following, it is reported, a leak of some documents previously. The majority of the parties involved in the dispute are already known, or are easily discernible. Not all of the details are known however, and so a disclosure of the information would shed greater light into what occurred and provide more detail as to the individuals involved.

78. A leak of information will not always affect a decision as to whether a subsequent, formal disclosure of the same information would result in breaches of the DPA.

Whether the information is already known to some individuals

79. The press stories will have informed members of the public about the dispute and the fact that there were issues between the third parties. Some of the facts are therefore already in the public domain.

Whether the individual expressed concern to the disclosure;

80. The council said that given the historical nature of the information, and the nature of the information held, it has not contacted the parties for consent to disclose the information. The Commissioner considers that under the circumstances this is an acceptable approach.

The reasonable expectations of the individual.

81. The individuals in the building company approached the council, initially to facilitate a quick payment, and subsequently to make a complaint. They would have no expectations that details of their correspondence with both the council and the school might subsequently be disclosed by the council, and this would not have been obvious to them at the time they provided that information.
82. Whilst the information primarily relates to their company, as a family based company, albeit a limited company, details of their actions do affect them personally, and a disclosure of their detailed correspondence some time after matters have been concluded may be distressing to them.
83. Insofar as individuals representing the school, they would have some degree of expectation that information about their actions would be disclosed as a result of their positions within a public authority. The school governors and as the school headmaster would have an expectation that the representations and actions they take on behalf of the school would be open to public scrutiny to some extent. The council has recognised this and disclosed the headmaster's identity in some sections of the correspondence it has disclosed.
84. The Commissioner notes however that the information about their actions is intertwined with the personal data of other third party individuals. Additionally, as regards any complaint made about their actions, there is a degree of expectation that such issues would remain private and not disclosed to the whole world as a result of an FOI request.
85. Council officers were merely facilitating the payment, and then dealing with the subsequent complaint. Although they will have an understanding their details may be made public at times during the course of carrying out their roles, they would not expect information to

be disclosed more widely in association with their actions in relation to this issue.

The Commissioner's conclusions

86. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
87. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
88. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 41

89. The Commissioner informed the council that it was unlikely to be correct to rely upon section 32 to withhold copies of the adjudicator's decision and the associated witness statements. However, recognising that adjudicator's decisions are generally considered to be confidential, she asked the council whether any other exemptions might be applicable.
90. The council responded on 10 November 2019 stating that it wished to apply section 41 to withhold the adjudicator's decision and the associated witness documents. The Commissioner has therefore considered whether the documents held by the council are held under a duty of confidence.
91. Section 41(1) of the FOIA states that information is exempt from disclosure 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.*
92. The Commissioner's guidance on section 41 states that a public authority wishing to rely the exemption should consider the test of confidence set out in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* in assessing whether a disclosure would constitute an actionable breach of confidence.

93. The decision in *Coco* 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.
94. The Commissioner is aware that The Technology and Construction Solicitors' Association (TeCSA)³ rules on Adjudicator's decisions are that they are confidential. TeCSA guidance on adjudication, 'TeCSA *ADJUDICATION RULES 2018 Version 3.2.2*' states at paragraph 33 that:
- "Unless the Parties otherwise agree the Adjudication and all matters arising in the course thereof are and will be kept confidential by the Parties except insofar as necessary to implement or enforce any decision of the Adjudicator or as may be required for the purpose of any subsequent proceedings."*⁴
95. The Commissioner notes that under the circumstances the council will not be in a position to verify whether the parties agreed the matter not to be confidential, however in reality it would be extremely unlikely that such an agreement had been made.
96. The Royal Institute of Chartered surveyors guidance "*Surveyors acting as adjudicators in the construction industry 4th edition, January 2017*"⁵ also states at paragraph 3.1.2, in respect of adjudicators seeking outside assistance that: "*the confidential nature of the adjudication process should be maintained*". The adjudication decision in this case demonstrates that RiCS was the body responsible for allocating the adjudicator to make the decision on the dispute over costs.
97. The Commissioner also notes that there is a general expectation that adjudicators decisions will be in confidence, albeit that there are no specific statutory provisions which require that to be the case⁶.

³ <https://www.tecsa.org.uk/>

⁴ https://www.tecsa.org.uk/media/1286/tecsa-adjudication-rules-322_08-01-18.pdf

⁵ <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/dispute-resolution/surveyors-acting-as-adjudicators-in-the-construction-industry-4th-edition-rics.pdf>

⁶ <http://constructionblog.practicallaw.com/is-there-a-duty-of-confidentiality-in-adjudication/>

98. The adjudicator, the school and the building company will therefore have considered the decision and the associated witness statements to be held under a duty of confidence.
99. The building company passed the decision and the witness statements to the council for the purposes of supporting their complaint against the school. The council confirmed that it considered that:
- "... the construction firm provided the report to the Council in confidence, with no expectation that the Council would then disclose it in to the public domain. The provider of the report was under no obligation to provide it and did so voluntarily; it contains detailed information about the construction firm's financial claim and as such the information is not trivial. Certainly, the Council does not have the consent of the provider of the report to disclose this information."*
100. A limited disclosure of information to the council, for the limited purpose of resolving its issues with the school, will not be a waiver of confidentiality. It is questionable, in any case, whether the building company had it within its power to waive confidentiality. Both the school and the building company were tied to the duty of confidence, and it is likely that both parties would need to agree in order for the duty to be waived.
101. The Commissioner has therefore decided that the information was imparted to the council with an expectation that it would be held under a duty of confidence. The necessary obligation of confidence was therefore present
102. The Commissioner is also satisfied that the documents had the necessary quality of confidence. The decision, and the associated witness statements were not trivial, and were not otherwise generally known, although the Commissioner is aware that there a local newspaper did report on some findings relating to the decision through a leaked document.
103. The Commissioner is further satisfied that that duty of confidence was passed on to the council with the provision of the documents. The council's explanation of the receipt of the documents is that they were provided to be used for the purposes of informing the council's consideration of the building company's request to facilitate a payment to it. They demonstrated that the amount which the company claimed was due had been decided upon by the Adjudicator.
104. The Commissioner is also satisfied that a disclosure of the information would create a degree of detriment to the owners of the building company and to the governors of the school. The matters at hand were dealt with under contract, in confidence, via the adjudication process.

Neither party would subsequently expect that the council, which was not a party to the adjudication process itself, would subsequently disclose detailed financial information and detailed information about the party's dispute into the public domain some years later.

105. The Commissioner considers that were the council to disclose this information it would create an actionable breach of a duty of confidence for either of the parties who were subject to the decision.
106. Whilst there is no public interest test in section 41, a public authority must consider whether, if it were required to defend itself in an action for a breach of confidence, it might be able to rely on a public interest defence.
107. The documents were provided for facilitating the consideration of the complaint by the building company. The council confirmed that they were not provided to the council, nor used by the council, for any other purpose.
108. There is clearly a public interest in providing information which aids the public in understanding the factors which led to a public authority, in this case, the school, owing substantial amounts of public money to third parties for work carried out.
109. Disclosures under the FOI Act are considered to be to 'any person'. The Commissioner recognises that the building company will not have envisaged that the information which they were providing to the council for the limited purposes they envisaged would be subsequently disclosed, some years later, to the wider public. The Commissioner therefore recognises that a disclosure of the information is likely to lead to a degree of reluctance to provide information of this sort to the council in the future. As a result, the decisions of the council may be less informed, and/or parties wishing to ask the council for aid in similar circumstances may be more reluctant to do so.
110. The Commissioner accepts that there is a public interest in greater transparency over the issue as public money was spent both by the school in defending its position, and by the council in providing aid in resolving the dispute. However, the council's participation in the wider matters was limited, and the matters under review were essentially between a different, separate public authority for the purposes of the Act and a private building company under the expectation from all parties that these matters would remain in confidence, as per the general expectation on all adjudicator's decisions.
111. The adjudicator's decision is a technical document relating primarily to the work carried out, and what payments were due for that work. Whilst they create greater transparency on the nature of the dispute which

occurred between the school and the company, they would not particularly add any broader transparency as to the actions of the council in this instance.

112. The Commissioner therefore considers that the public interest in the exemption being maintained outweighs the public interest in the documents being disclosed in this instance.

Section 42 – legal professional privilege

113. 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.

114. 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) (Bellamy) 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."

115. There are two categories of 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.
116. The Council considered that the information withheld by virtue of section 42(1) is exempt from disclosure because it is subject to advice privilege. It clarified that the withheld information is advice provided by one of the council's senior legal officer's to council officers in its legal services department regarding a technical aspect of the complaint.
117. Having had the benefit of viewing the small amount of information withheld by virtue of section 42, the Commissioner is satisfied that it constitutes communications between a legally qualified professional and their client for the dominant purpose of providing legal advice.

118. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived because of earlier disclosures.

119. The Commissioner's published guidance on section 42⁷ of the FOIA states:

"...under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential".

120. The Commissioner regards the key to deciding whether the right to claim LPP has been lost will be to consider whether previous disclosures to the world at large mean that the information can no longer be said to be confidential.

121. In this case, the Commissioner is not aware of any previous disclosure of the information under consideration to the world at large.

122. She therefore finds that section 42 is engaged in respect of the withheld information.

The public interest test

123. 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

124. The Commissioner accepts that there is public interest in creating greater transparency on the issue of the dispute given that public money was spent on the building contract, and defending the schools position prior to, and subsequent to the adjudicator's decision. Press reports surrounding the incident will also have raised public concern over the issue.

⁷ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

125. The information withheld under section 42 relates more to the council's position under the circumstances than to the wider issue of the dispute, however details of this are obviously included within the withheld information.

Public interest arguments in favour of maintaining the exemption

126. The council argued that disclosure of the information would be contrary to the principle behind legal professional privilege – namely safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice.

Balance of the public interest arguments

127. 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".

128. 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.

129. 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.

130. In accordance with her guidance on section 42, the Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (i.e., accountability, transparency, furthering public debate etc).

131. She recognises that additional weight may be added to the above factors 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.

132. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals.

Conclusion

133. 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.

134. In reaching her decision in this case, the Commissioner has considered the arguments towards a disclosure of the information and the stated position of the Council, in addition to the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. She has also had regard to the content of the withheld information.

135. 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.

136. The Commissioner has also taken into account that, at the time of the request, the legal advice was no longer 'live' and the council has provided no arguments supporting the suggestion that the advice is still relevant to it, or that it may still be used on an ongoing basis, although the Commissioner recognises that the advice which was provided may be applicable in other similar circumstances.

137. The Commissioner has seen no evidence that there was any lack of transparency of the council's actions, nor misrepresentation of the advice which it received. There has been no partial or selective disclosure of the advice by the council.

138. In order to outweigh the inherent public interest in maintaining the exemption, the Commissioner considers that there must be public interest arguments for disclosure which outweigh the public interest arguments in the exemption being maintained.
139. In all the circumstances of this case, the Commissioner does not consider that there are factors present that would equal or outweigh the strong public interest inherent within the exemption.
140. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied.

Section 10(1)

141. Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

142. The council received the request on 1 January 2019. He provided clarification of his request on 9 January 2019.
143. The council responded on 9 May 2019 and provided some of the information requested.
144. It responded again on 13 June 2019 and provided further information, however it withheld some information on the grounds that section 32(2) (court records) and section 40(2) applied (personal data of third parties). It also confirmed that no information is held falling within the scope of parts 8 and 11 of the request.
145. This period exceeds the 20 working days required by the Act.
146. The Council did not therefore comply with section 10(1) of the Act.

Right of appeal

147. 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

148. 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.

149. 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

Andrew White
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