

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 22 December 2022

Public Authority: Ashfield District Council
Address: Council Offices
Urban Road
Kirby in Ashfield
Nottingham
NG17 8DA

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between Ashfield District Council (the Council) and its legal advisors regarding Papplewick Green Pavilion and Sports Gateway being granted use of the site. The Council withheld the information requested under section 42(1) of the FOIA (Legal Professional Privilege). The Commissioner's decision is that the Council correctly applied section 42(1) to the request. However, in failing to respond to the request within the statutory timescale the Commissioner finds that the Council breached section 10 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

2. On 20 November 2021, the complainant wrote to the Council and requested information in the following terms:

"Under FOI please can you share all correspondence between ADC and both internal or third party legal counsel since May 2021 on the general subject of Papplewick Green Pavilion and Sports Gateway being granted use of the site".

3. The Council issued a refusal notice on 16 August 2022 stating that the information requested was exempt under section 42 of the FOIA. This position was upheld in the Council's internal review response dated 9 September 2022.

Reasons for decision

4. This reasoning covers whether the Council is entitled to rely on section 42(1) of the FOIA to refuse to provide the requested information.
5. 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.
6. In this case, the complainant has requested legal advice sought by the Council relating to the granting of use of the site at Papplewick Green to Sports Gateway. The Commissioner has also viewed the withheld information, which comprises internal communications between client officers within the Council and the Council's legal department regarding the leasing of the site in question. The Commissioner is satisfied that the information comprises confidential communications between a lawyer and client for the sole or dominant purpose of providing legal advice. This means, therefore, that the information is subject to legal professional privilege, and the Commissioner is aware of no evidence suggesting that this privilege has been waived. 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.
7. 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.
8. 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".

9. The complainant considers there is a strong public interest in disclosure as the Council granted management of a publicly owned asset (Papplewick Green) to a commercial organisation (Sports Gateway). The complainant stated that this resulted in the eviction of a football team from the site. The complainant also advised that Sports Gateway has subsequently applied for planning permission and funding on fields they do not own whilst refusing general use by the public. In addition, the complainant stated that there was no tender process, not consultation and Sports Gateway has links with elected councillors.
10. The Commissioner accepts that there will always be a public interest in transparency, accountability and in members of the public having access to information to enable them to understand more clearly why particular decisions had been made and certain processes followed.
11. However, in this case 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.
12. 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.

Section 10 – time for compliance

13. Section 1 of FOIA states that "any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request".

14. Section 10(1) provides that a public authority must comply with section 1 promptly and in any event not later than the twentieth working day following the date of receipt of a request for information.
15. In this case, the complainant submitted their request on 20 November 2021 and the Council did not issue a response until 16 August 2022. The Council has advised that this was due to a human error in the request not being properly logged.
16. The Commissioner finds that the Council breached section 10(1) by failing to respond to the request within 20 working days.

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

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