

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 December 2019

**Public Authority:** Birmingham City Council  
**Address:** Council House  
Victoria Square  
Birmingham  
B1 1BB

#### Decision (including any steps ordered)

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1. The complainant requested from Birmingham City Council (the Council) information in the form of correspondence prior to a Council's decision to restore an indemnity to a named primary school. The Council confirmed that it held information within the scope of the request but refused to disclose it under section 42(1) (legal professional privilege) of the FOIA. It also cited section 40(2) (personal data) of the FOIA in relation to some of the information.
2. The Commissioner's decision is that the Council was entitled to rely on the exemption at section 42(1) of the FOIA to withhold the information.
3. Bearing in mind that the Commissioner decided that the withheld information is exempt under section 42(1) in its entirety, she did not deem it necessary to also consider the application of section 40(2).
4. Therefore, the Commissioner does not require any steps to be taken as a result of this decision notice.

## Background information

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5. On two separate occasions, towards the end of 2012 the Head Teacher of Adderley Primary School (the School) received enveloped resignation letters from four school employees. Three of the resignation letters were received by the Head Teacher on 6 December 2012, whilst the last one was received a day later.
6. On the following days the Head Teacher communicated with relevant officials from Human Resources Services for Schools (Schools HR) for the purpose of receiving advice in relation to the resignation letters received. The School was advised to accept the resignations.
7. On 12 December the School received letters from all four employees who stated that they had not submitted the resignation letters and contested the genuineness of the letters claiming that their signatures were forged.
8. Following their dismissal, the four employees brought cases to the Employment Tribunal, alleging that they were subject to unfair dismissal.
9. In March 2013 the Council decided to withdraw the School's indemnity – *"meaning the Council would not fund the School's legal action or subsequent costs."*<sup>1</sup>
10. In March 2014, legal representatives of the School met with the Council's officer to discuss the ongoing issues. This was followed with a formal letter before action claiming that the Council breached its statutory and contractual obligations when it decided to withdraw the indemnity.
11. The letter before action was followed with a number of communications which form the withheld information in this case.

## Request and response

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12. On 27 February 2019, the complainant wrote to the Council and requested information in the following terms:
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<sup>1</sup> <https://www.theguardian.com/education/2015/dec/08/trojan-horse-adderley-primary-school-birmingham-tribunal>

*"In a letter dated 9th December 2014 with reference PD/E&C/SD/ST/cf117 sent from [name redacted] (Service Director, Education & Commissioning) to [name redacted] (Chair of Governors, Adderley Primary School), with [name redacted] and [name redacted] copied, [name redacted] writes in paragraph 3(a): 'The indemnity will be reinstated to the School with effect from 22nd October 2014, provided that the pre-action correspondence between the Council and the School are withdrawn.'*

*I am requesting under the Freedom of Information Act a full copy of the 'pre-action correspondence' referred to in this paragraph."*

13. On 21 March 2019 the Council responded. The Council confirmed it held information within the scope of the request but refused to provide it citing section 42(1) (legal professional privilege) of the FOIA as a basis for its refusal, stating that the information requested consists of correspondence that attracts litigation privilege.
14. Remaining dissatisfied with the response received, on 7 June 2019 the complainant wrote to the Council and requested an internal review.
15. The Council provided the complainant with the outcome of its internal review on 5 July 2019. It upheld the application of section 42(1) of the FOIA. In addition, the Council concluded that parts of the withheld information contained personal data of third parties, which was exempt from disclosure under section 40(2) (personal data) of the FOIA.

## **Scope of the case**

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16. The complainant contacted the Commissioner on 8 July 2019 to complain about the way his request for information had been handled.
17. The following analysis covers whether the Council relied on section 42(1) correctly.

## **Reasons for decision**

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### **Section 42 FOIA – Legal professional privilege**

18. Section 42(1) of the FOIA states that:

*"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information".*

19. Legal professional privilege (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)<sup>2</sup>:

*"... 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."*

20. Section 42(1) is a class based exemption, which means the requested information only has to fall within the class of information described in that section for it to apply. This means that the information simply has to be capable of attracting LPP for the exemption to be engaged. There is no need to consider the harm that would arise by disclosing the information. However, as the exemption is subject to the public interest test this issue will be considered later.
21. 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. Communications made between adviser and client in a relevant legal context will, therefore, attract privilege.
22. The Council has argued that the requested information is contained in documents that attract litigation privilege on account of the withheld information being correspondence created in response to a letter before action against the Council.
23. The Council asserted that there was a real likelihood of litigation and the communications recorded in the withheld information were conducted in the course of this process. These communications were between the Council's legal adviser, the Council and the other party's legal

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<sup>2</sup>[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

representatives. The dominant purpose of this correspondence was to assist in the preparation of the case by better understanding the anticipated litigation arising from the letter before action that the Council received.

24. The Council confirmed that the communications withheld were confidential and neither the Council nor any other party has made them available to the public. Therefore, the privilege has not been forfeited at any stage.
25. The complainant argued that there was not a real likelihood of litigation taking place. He stated that *"in fact the Council took drastic steps to severely reduce the possibility of litigation in this instance"* by reinstating the indemnity to the School which was followed by the pre-action correspondence being withdrawn.

*The Commissioner's view*

26. In order to determine whether litigation privilege is engaged in this matter, the Commissioner refers to her guidance on section 42<sup>3</sup>, which states the following on litigation privilege:

*"Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation."*

27. As part of her investigation, the Commissioner asked the Council to provide her with a copy of the withheld information.
28. Having reviewed the withheld information, the Commissioner notes that it consists of a communication initially between the School's legal representative with the Council's legal adviser which took place between 30 April 2014 and 17 October 2014. The initial correspondence contained a previous email exchange between the Council and the

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

School's legal representatives, which is closely related to the topic of the discussion and forms part of the withheld information.

29. It is the Commissioner's view that at the time when the information was created, there was a clear intention expressed by the School's legal representatives to proceed with legal action against the Council.
30. In response to the complainant's argument that there was not a real likelihood of litigation taking place, the Commissioner would note that it has been confirmed by case law<sup>4</sup> that the words "in prospect" in the phrase "litigation reasonably in prospect" could be said to mean "may happen", namely a real prospect of litigation is considered to be more than a mere possibility but not necessarily more than 50%.
31. In addition, the Commissioner notes that from the moment that litigation is pending, reasonably contemplated or existing, all communication between the client and the client's solicitor or agent, or between one of them and a third party, will be privileged if they came into existence for the dominant purpose of giving and receiving advice in relation to the litigation, or collecting evidence for use in the litigation.
32. The Commissioner finds that all the withheld information – the communications and attachments enclosed – attracts litigation privilege because:
  - i. it is evident that the withheld information consists of correspondence that was initiated with the letter before action, which indicates an intention to litigate;
  - ii. the correspondence that followed the letter before action are confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation.
  - iii. it is the Commissioner's view that the withheld information cannot be disentangled and the disclosure of any part of it would result in revealing information that is covered by litigation privilege.
33. With regard to the attachments, in her published guidance on section 42, the Commissioner states that any enclosures or attachments to a

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<sup>4</sup> Westminster International BV and Others v Dornoch Ltd and Others [2009] EWCA Civ 1323 (<https://www.bailii.org/ew/cases/EWCA/Civ/2009/1323.html> )

communication are usually only covered by LPP if they were created with the intention of seeking legal advice or for use in litigation. Having reviewed them, the Commissioner considers that the attachments in this case satisfy that criteria.

34. The Commissioner is also satisfied that the correspondence remained confidential and the Council had not made it available to the public or any third party without restriction.
35. Therefore, the Commissioner has concluded that the withheld information is protected by litigation privilege and that section 42(1) of the FOIA is engaged in this case.

### **Public interest test**

36. Section 42(1) is a qualified exemption. This means that, having found that the exemption is engaged, the next step is to consider the balance of the public interests. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.

#### *Public interest in disclosing the information*

37. The Council told the Commissioner that it recognised the importance of being open and transparent towards members of the public. Disclosure of the requested information would enable the citizens to have a better understanding of the subject matter in question and further the public debate.
38. The Council is aware that the matters discussed in the withheld information were subject to media attention, so there is a public interest in disclosure to better inform public debate.
39. The complainant maintains that even if section 42(1) is engaged, public interest in this case "*would clearly balance in favour of disclosure.*"
40. The Commissioner agrees that, taking into account all the circumstances of the case, there is clearly a public interest in making the information requested available to the public at large, so there is a clearer picture about the events that took place in this case and how the Council handled this matter.

#### *Public interest in maintaining the exemption*

41. The Council considers that disclosing the requested information would undermine the concept of LPP itself, which protects confidential communications between lawyers and clients and is a fundamental legal principle.

42. The Council maintains that the subject matter of this correspondence remains sensitive and live.
43. The Council insists that disclosure of the requested information would be detrimental to its legal position as it would provide information on the Council's legal tactics to the world at large.

*Balance of the public interest*

44. The Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption due to the long standing and important principle of LPP and the clear and important need for all to have access to free, frank and candid legal advice. Only in very exceptional circumstances can this be overridden when considering where the public interest lies.
45. The Commissioner recognises that care should be taken to ensure that freedom of information principles do not undermine the well-established common law right to legal professional privilege, which enables a client to put all relevant facts before their legal advisers, and to receive advice based on them, without fear that either facts or advice will be disclosed to others without their consent<sup>5</sup>.
46. Therefore, in the particular circumstances of this case, the Commissioner finds that the balance of the public interest lies in maintaining the exemption provided by section 42(1) of the FOIA. Birmingham City Council was not, therefore, obliged to disclose the requested information.
47. Having decided that the withheld information is protected by LPP in its entirety, the Commissioner did not deem it necessary to also consider the application of section 40(2).

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<sup>5</sup> Shipton v Information Commissioner and National Assembly of Wales, IT, 11 January 2007 (<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i109/Shipton.pdf> )

## Right of appeal

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48. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Ben Tomes  
Team Manager  
Information Commissioner's Office  
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SK9 5AF**