

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2024

Public Authority: Powys County Council
Address: Llandindrod Wells, Powys
LD1 5LG

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence with a named individual and their solicitor. Powys County Council ("the Council") withheld the information under sections 40(2) (personal data) and 42 (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the Council is entitled to withhold the information under sections 40(2) and 42.
3. The Commissioner does not require further steps.

Request and response

4. On 29 July 2023, the complainant wrote to the Council and requested information in the following terms:

"Please supply copies of all correspondence with [redacted] or his solicitor [redacted] in connection with the alleged obstruction of the highway at Little Moelfre, since April 2016.

This should be within one set of files as a new Report has been 'imminent' for 2 years, so not exceed any time/cost limit."
5. The Council responded on 10 October 2023, and initially stated it considered the request manifestly unreasonable under 12(1) of the EIR. At internal review, the Council revised its position to rely on sections 40(2) and 42 of FOIA.

6. Subsequently, on 6 November 2023, the Council released some information within the scope of the request, but maintained its reliance on section 40(2) and 42 to withhold the remainder.

Reasons for decision

Section 40(2) – personal data

7. 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.
8. In this case the relevant condition is contained in section 40(3A)(a). 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 UK General Data Protection Regulation ('UK GDPR').
9. 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.
10. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

11. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.

15. In the circumstances of this case, the Commissioner is satisfied that the information does relate to the data subject(s). Because the request is for correspondence with a named individual and their solicitors, any information returned by definition would include some personal data.
16. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
17. 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.
18. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

19. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

20. 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.
21. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

22. 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.

23. In considering the application of Article 6(1)(f) of the UK 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
- 24. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
- 25. The complainant has stated this request is part of a seven year dispute with the Council over access to Moelfre Hill, and disclosure of the requested information is necessary to meet that legitimate interest.
- 26. The Commissioner acknowledges the complainant has a legitimate interest in this information. However, it is important to reiterate that a disclosure under FOIA is a disclosure to the world at large and not just a private transaction between the public authority and the applicant.
- 27. In balancing the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects involved, the Commissioner has not seen any evidence to suggest that the individuals involved would have a reasonable expectation that their personal data would be disclosed in response to an information request.
- 28. 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. He therefore has not gone on to separately consider whether disclosure would be fair or transparent.
- 29. The Commissioner finds that section 40(2) of FOIA is not engaged in respect of all of the withheld information.
- 30. The Commissioner has next gone on to consider the application of section 42.

Section 42 – Legal professional privilege

- 31. Section 42(1) of 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. LPP protects the confidentiality of communications between a lawyer and client.
- 32. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption. This means that the information simply has to be

capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.

33. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the 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."

34. 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.
35. The Commissioner has viewed the withheld information and based on this, and the wording of the request he is satisfied that the information is subject to legal professional privilege, specifically litigation privilege. Furthermore, the Commissioner is not aware of any 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.
36. The Council has acknowledged that there is a public interest in transparency and accountability. Disclosure of the withheld information would facilitate this, and allow further understanding of its handling of highway management.
37. In respect of the public interest in maintaining the exemption, the Council considers it to be of vital importance to maintain its ability to obtain confidential advice from its lawyers.
38. The Council referred to the strong public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. The Council considers it is important that any legal advice

given "is fully informed and reasoned". Full and frank advice ensures that the Council is able to make fully informed decisions.

39. 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.
40. 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".
41. Having regard to all the facts of the case the Commissioner is not aware of any public interest arguments that are sufficient to outweigh or override the inbuilt public interest in the information remaining protected by LPP. 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.
42. 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.

Right of appeal

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

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Duffy
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