

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2014

Public Authority: Guildford Borough Council

Address: Millmead House
Millmead
Guildford
Surrey
GU2 4BB

Decision (including any steps ordered)

1. The complainant has requested recorded information from Guildford Borough Council relating to four separate companies. The Council disclosed a large amount of information to the complainant but withheld some information in reliance of section 42 of the FOIA.
2. The Commissioner's decision is that the Council is entitled to withhold that information on the grounds that it attracts legal professional privilege.
3. He has also decided the Council has contravened section 10 of the FOIA by failing to respond to the complainant's request within the twenty working days compliance period.
4. The Commissioner does not require the Council to take any further action in this matter.

Request and response

5. On 21 March 2014, the complainant wrote to Guildford Borough Council to make four separate requests for information. Each request was identical in all respects other than specifying a different company – Extreme Oyster Ltd, Star Oyster Ltd, The Casino Ltd and Shell Shots Ltd.
6. The complainant made his request under the following terms:

"I request that all of the information held in connection with [a named company] be provided from 1 October 2013 to 5:00pm 24th March 2014. This information is to include:

- Correspondence
- Internal email correspondence
- Reports
- Internal communication i.e. memos
- Communications with outside authorities
- Video and Audio"

7. On 3 June, the complainant's representative wrote to the Council to complain about its failure to provide a response to each of the four requests. The complainant subsequently complained to the Commissioner about this.
8. Following the Commissioner's intervention, the Council wrote to the complainant on 26 June to inform him that it was finalising its response to his requests. The Council asked the complainant to confirm, in his capacity of owner of the businesses named, whether any of the information he is seeking has a commercial interest, as disclosure under the FOIA would place that information into the public domain.
9. The Council advised the complainant that the documents he seeks include communications between the companies and the Council and that his request could be refused if there is a commercial interest to his businesses. Nevertheless, the Council stated that it was still willing to provide the information but asked the complainant to confirm whether he would like the information under the FOI process or sent directly to him outside that process.
10. On 30 June the Council made its formal response to the complainant's information request. It provided some information but also explained that certain information had been withheld in reliance of the exemption to disclosure provided by section 42 of the FOIA – where the information is subject to legal professional privilege.
11. On 1 July the complainant asked the Council to conduct an internal review of its response to his information requests.
12. The Council completed its review and wrote to the complainant on 4 August to advise him of its conclusions. The Council acknowledged its failure to respond to the complainant's requests within the statutory compliance period and apologised for this. The review confirmed that the Council holds information which is subject to legal professional and

upheld its decision to withhold that information under section 42 of the FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 11 June 2014 to complain about the way his requests for information had been handled.
14. The complaint initially concerned the failure of the Council to respond to his requests. This subsequently developed into a complaint about the Council's refusal to supply the information it had withheld in reliance of section 42.
15. In this decision notice the Commissioner considers whether the Council is entitled to rely on the exemption provided by section 42 of the FOIA.

Reasons for decision

Section 42 – Legal Professional Privilege

16. On receipt of the complainant's requests the Council initially considered applying section 43 of the FOIA to all of the information he seeks.
17. Section 43 provides an exemption to disclosure where the requested information relates to commercial interests. In this case, the Council identified that the commercial interests were those of the complainant's own businesses.
18. The Council advised the complainant that it was possible to apply section 43 to the information he had requested, however the complainant made clear that he required disclosure by way of the Freedom of Information Act. The Council therefore decided to release a significant amount of information to the complainant without the need to apply any exemption.
19. The only information which the Council did not provide to the complainant was information which the Council determined could be properly withheld in reliance of section 42 of the FOIA.
20. Section 42 provides an exemption from the duty to disclose information where the information is subject to a claim of legal professional privilege.
21. There are two types of legal professional privilege: Advice privilege may be attached to information in circumstances where there is no

contemplated or pending litigation and where the information concerns the seeking or provision of legal advice. Litigation privilege may be attached to information which concerns contemplated or pending litigation.

22. The Council has confirmed that it is relying on the fact that the withheld information is subject to both advice and litigation privilege.
23. The information which the Council is withholding consists of email communications between the Council's solicitors and its Licensing Service. The emails were sent for the purpose of obtaining or providing legal advice in connection to applications for licences, variations in licences, litigation and claims.
24. Having reviewed the withheld information the Commissioner is satisfied that it attracts legal professional privilege. The information constitutes requests for legal advice or the provision of legal advice from a properly qualified person, or communications which discuss issues associated with that legal advice.
25. The Commissioner has therefore decided that section 42(1) is properly engaged.
26. The Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.
27. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
28. In this case, the Commissioner considers that disclosure of the withheld information would affect the council's ability to defend itself should it be faced with a legal challenge from the complainant in connection with his licence applications and complaints about the Council's services.
29. The Council has advised the Commissioner that at the time it received the complainant's request it anticipated further litigation involving the complainant and his representatives.
30. It is clear to the Commissioner that the complainant's concerns are current and remain the subject of potential litigation.

31. The Commissioner considers that the council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.

The public interest

32. Section 42(1) of the FOIA is a qualified exemption. The Commissioner is therefore required to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the requested information

33. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
34. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the council in respect of the complainant's licensing applications and complaints.
35. Disclosure would also allow the public to consider the quality of the legal advice which was sought and received by the Council.

Arguments in favour of maintaining the exception

36. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
37. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness

between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

38. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
39. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
40. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

41. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
42. However, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure. He is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.
43. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.

44. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
45. The Commissioner has decided that the council has properly applied section 42 of the FOIA to the information it has withheld.
46. The Commissioner notes that some of the withheld information would constitute the complainant's personal data and would therefore be potentially available to him under the subject access provisions of the Data Protection Act 1998.
47. The Commissioner is obliged to point out that the subject access provisions of that Act are themselves subject to exemptions to disclosure, in particular to provision 10 of Schedule 7. This provision states:

"Personal data are exempt from the subject information provisions if the data consist of information in respect of which a claim to legal professional privilege [...] could be maintained in legal proceedings."

Section 10(1) of the FOIA

48. Section 10(1) of the FOIA states:

"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 days following the date of receipt."

48. The Council has acknowledged that it failed to respond to the complainant's request within the twenty working days compliance period provided by section 10 of the FOIA. A consequence of this acknowledgement is that the Commissioner must find the Council has breached section 10(1) of the FOIA.

Right of appeal

49. 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

50. 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.
51. 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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