

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 November 2014

**Public Authority:** Cornwall Council

**Address:** County Hall  
Truro  
Cornwall  
TR1 3 AY

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to a specific procurement process. The Commissioner's decision is that Cornwall Council has correctly applied the exemption for legal professional privilege at section 42 of the FOIA to the withheld information. He does not require the public authority to take any steps to ensure compliance with the legislation.

#### **Request and response**

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2. On 9 May 2014, the complainant wrote to Cornwall Council ('the council') and requested information in the following terms:

"Cornwall Council – Care and Support at Home and in the Community (Project Ref: 2013.27F) and Care at Home (Domicillary Care) Services (Project Ref: 2012.26F)

We refer to the above projects, both of which comprised an initial Pre-Qualification Questionnaire and subsequent tenders and in connection therewith, submit the following Freedom of Information Request in respect of the following matters:-

1. The two Tenders in the Pre- Qualification Questionnaire section incorporated different financial tests and we request that we be provided with all information and documentation in whatever

form it is held that relates to and explains the decision made by Cornwall County Council in the second Tender to call for different financial tests to that contained in the first Tender.

2. We require copies of all records in respect of the marking of the Pre-Qualification Questionnaire submitted by Selbourne Care Ltd t/a The DOVE Project in regard to the financial questions contained there-in and any other documentation relevant or which relates to the same.
  3. We require all information or documentation relating to the issue as to whether Cornwall County Council considered the fairness and reasonableness of imposing the new financial tests when in connection with the first Tender, it was already in possession of financial information from each of the providers who had submitted Pre-Qualification Questionnaires of their audited accounts which upon inspection by Cornwall County Council would have been able to have determined whether those new financial tests would be met or not met in any new Pre-Qualification Questionnaire submission in respect of the second Tender.
  4. We require anonymised advice as to the number of providers who failed the financial test in the second Tender but who passed the financial test in the first Tender and the number of providers who passed the financial test in the second Tender with advice as to whether all of those had passed the financial test contained in the first Tender."
3. The council responded on 6 June 2014 and provided some information within the scope of the request but refused to provide the remainder citing the exemptions at section 42(1) and 43(2) as its basis for doing so.
  4. The complainant requested an internal review on 12 June 2014. The council provided its internal review response on 2 July 2014 in which it maintained its original position.

### **Scope of the case**

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5. The complainant wrote to the Commissioner on 16 July 2014 to complain about the way his request for information had been handled.

6. The council applied the exemptions for legal professional privilege and commercial interests to the withheld information.
7. The Commissioner first considered whether the exemption for legal professional privilege applies to the withheld information.
8. As the Commissioner has decided that the exemption for legal professional privilege at section 42 applies to all the withheld information, he has not deemed it necessary to consider whether the exemption commercial interests at section 43 also applies.

## **Reasons for decision**

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### **Section 42**

9. This exemption provides 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.
10. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*<sup>1</sup> 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 communication or exchanges come into being for the purpose of preparing for litigation." (paragraph 9)
11. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their

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<sup>1</sup> Appeal no. EA/2005/0023

professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

12. In its response to the Commissioner's enquiries, the council have confirmed that:
  - all the withheld information constitutes communications to or from the councils lawyers acting in their professional capacity; and
  - the communications were made for the sole purpose of obtaining legal advice for the purpose of considering the fairness of imposing new financial tests in connection with the first tender.
13. The Commissioner has reviewed the withheld information. Based on that review and the council's submission the Commissioner is satisfied that the withheld information is subject to legal professional privilege.
14. Information will only be privileged so long as it is held confidentially. In this case, the council has confirmed that the information has not lost privilege.

### **The public interest test**

15. As section 42 is a qualified exemption, the Commissioner has considered whether, in all the circumstances of the case, 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**

16. The council said that disclosure of the information would promote transparency in the council's procurement process, assist the requestor in understanding how the council approached the matter and assist the requestor in considering if a legal challenge should be brought.
17. The complainant has said that 103 unsuccessful providers face the possibility of losing business they have worked hard to develop with no compensation and that it is unfair to withhold responses to questions raised about the decision making process. It said that the council's unwillingness to be open and frank in disclosure only fuels the fire of suspicion about the impartiality of the process and the changes made to the financial testing.
18. The Commissioner considers that disclosing the withheld information would promote accountability and transparency and allow the public to better understand the council's justification for changing the procurement process.

### **Public interest arguments in favour of maintaining the exemption**

19. The council said that by maintaining legal advice privilege it is safeguarding communications between a lawyer and client. It explained that the information discusses, in part, the risk of a successful challenge to the procurement process and the information could assist the requestor in bringing a challenge. It also said that it is likely to be re commencing the tender process within the next 18 months and releasing the information could prevent it taking similar decisions in the future and therefore limit its ability to get a genuine 'market value' for the services tendered.
20. The Commissioner considers that the council's argument relating to its ability to get a genuine 'market value' for the services tendered should not be considered as it doesn't relate to the specific exemption. However, it does show that the issue can be considered as 'live' which is relevant to the public interest test.
21. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the *Bellamy* case, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
22. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
23. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...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..."
24. The above 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 as described above.

### **Balance of the public interest arguments**

25. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, including the fact that the council is likely to retender within the next 18 months, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
26. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
27. In relation to the complainant's argument at paragraph 17, the Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO*<sup>2</sup> which considered the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..." (paragraph 29).

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<sup>2</sup> Appeal no. EA/2007/0092

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).]

28. Having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.
29. The Commissioner acknowledges that even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'. However, he does not consider this to be an overriding factor in this case.
30. The Commissioner also acknowledges that in this case, the council provided the complainant with an explanation as to why it changed its approach to the financial assessment and considers that this goes some way to satisfying the public interest in understanding the council's justification for changing the procurement process.
31. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.

## Right of appeal

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32. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

33. 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.
34. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**