

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2014

Public Authority: Cornwall Council
Address: County Hall
Treyew Road
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant requested copies of information revealing the source of comments made in an email he received from Cornwall Council ("the council"), which the complainant said had accused him of disclosing confidential information inappropriately. The council refused to provide the information, relying on the exemption under section 42(1) of the Freedom of Information Act 2000 ("the FOIA"). This exemption relates to legal professional privilege. The complainant asked the Commissioner to decide whether the information had been correctly withheld. The Commissioner's decision is that some information has been correctly withheld using section 42(1). The remaining information is the complainant's own personal data and is therefore exempt under section 40(1) of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

2. On 8 July 2014, the complainant requested the following information from the council:

"...I request copies of the source of the information that has accused me of providing details of the agreed payment, to myself by the parish council, to [name] or others".
3. The council responded on 5 August 2014 and confirmed that it held some information. It said that it wished to withhold it however using the

exemption under section 42(1) of the FOIA. It said that it was not in the public interest to disclose the information.

4. The complainant requested an internal review on 9 September 2014.
5. The council responded on 10 September 2014 and said that it wished to maintain its refusal.

Scope of the case

6. The complainant contacted the Commissioner on 17 September 2014 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the information had been correctly withheld.
7. For clarity, a requester's own personal data is exempt under section 40(1) of the FOIA. Personal data is defined by the Data Protection Act 1998 ("the DPA") as any information relating to a living and identifiable individual. The Commissioner considers that the majority of the withheld information is actually the complainant's own personal data. The separate right of access provided by section 7 of the DPA therefore applies. The Commissioner has considered this matter separately. This notice only relates to the information that falls under the scope of the FOIA.

Reasons for decision

Section 42(1) – Legal professional privilege

8. 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.
9. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, the council sought to rely on advice privilege.
10. The council applied this exemption to emails sent to its solicitor. The council explained to the Commissioner that its legal department had been engaged in this case to provide legal support to Lanteglos Parish

Council ("the parish council"). Having considered the withheld information, the Commissioner was satisfied that it represents communications made with a qualified solicitor for the purposes of obtaining legal advice. There is no evidence available to the Commissioner suggesting that these communications have lost their confidential character. The Commissioner is therefore satisfied that the exemption was correctly engaged.

Public interest arguments in favour of disclosing the requested information

11. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

Public interest arguments in favour of maintaining the exemption

12. The Commissioner and the First-Tier Tribunal (Information Rights) ("the 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 case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
13. 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. 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".
14. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
15. 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 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..."

16. 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

17. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their business. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the right of a public authority to consult with its lawyers in confidence.
18. The Commissioner would observe 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 obvious signs that these factors were present in this case to tip the balance in favour of disclosure.
19. It is clear to the Commissioner that in the present case, the issue at the heart of the matter reflects the more personal concerns that the complainant has about an email he received from the council on 16 June 2014, connected to a private employment matter. The complainant disputes the contents of the email and in his letter of complaint to the Commissioner suggests that there is a public interest in ensuring that no personal detriment should arise to him or a third party. While it is understandable that the complainant is particularly interested in accessing information relating to this email, in the Commissioner's view, there is very limited wider public interest in the disclosure. This is particularly so because the majority of the information is actually the complainant's own personal data which cannot be disclosed under the FOIA. The Commissioner does not consider that disclosure under the FOIA would assist the public in any useful way and certainly not to the

extent that it would equal or outweigh the strong counter argument for protecting the general principle of legal professional privilege. The public interest does not therefore favour disclosure in this case.

Right of appeal

20. 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

21. 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.
22. 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
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