

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

### **Decision notice**

**Date:** 11 April 2016

**Public Authority:** Hampshire County Council

**Address:** The Castle  
Winchester  
Hampshire  
SO23 8UJ

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

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1. The complainant has requested recorded information from Hampshire County Council. The complainant seeks the advice given by the Council's Legal Services and Governors' Services to North Baddesley Infant School.
2. The Commissioner's decision is that Hampshire County Council has properly applied section 42 of the FOIA to certain pieces of information which have been withheld from the complainant.
3. The Commissioner requires the public authority to take no further action in this matter. The Commissioner will make a separate assessment under section 42 of the Data Protection Act 1998 in respect of whether the Council is likely to have complied with the subject access provisions of that Act.

### **Request and response**

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4. On 28 October 2014, the complainant wrote to Hampshire County Council ("the Council") asking to be sent information under the following terms:
  - "A detailed description of the services provided to NBIS ("North Baddesley Infant School")
  - Whether the service was provided in-house or contracted out by HCC ("Hampshire County Council")
  - The category of the service provided, e.g. legal, professional, clerical or otherwise

- Whether the service was provided as part of a Service Level Agreement (SLA)
- Date that the service was provided
- Estimation of the time spent providing the service to NBIS
- Estimation of the cost per hour to HCC of providing the service to NBIS
- If not provided as part of an SLA, the cost to NBIS for the service provided by HCC, including:
  - Whether cost of the service has been invoices, settled, yet to be submitted or waived
  - Amount invoiced or yet to be invoiced, settled, yet to be submitted or waived
  - Date of invoice (if applicable)
  - Date of payment by NBIS (if applicable)
- An estimation of the likely *total* cost of the services provided by HCC to NBIS to date

For all of the above, I would like copies of the relevant supporting documentation."

5. On 4 December 2014, the Council's Information Compliance Officer wrote to the complainant under reference FOI 4813. The Council provided explanations to each of the elements (bullet points) of the complainant's request.
6. The Council informed the complainant that it had provided advice and support to NBIS and that this advice was mainly constituted of telephone and email communication. The nature and content of the advice provided by the Council's Legal Services was withheld from disclosure under section 42 of the FOIA, being subject to legal professional privilege.
7. The Council also advised the complainant that the cost of the service is withheld from disclosure under section 43(2) of the FOIA. It informed him that disclosure of the rates charged by Hampshire Legal Service to external clients would be likely to cause commercial prejudice to the County Council.
8. The complainant responded to the Council's refusal notice on 22 January 2015. He challenged the Council's response to his request, pointing out that his request was for information from both the Council's Legal Department and the Governor Services Department. He also complained that the Council had not given due weight to the public interest factors which favour disclosure of the information.
9. The complainant asserted that the Council had not provided the information it holds in respect of the date the Council had provided services to NBIS. He referred to the 4 and 6 hours of Governor and

Legal Services support given to NBIS and he stated that it is reasonable to expect that records of specific dates when the support was provided would exist.

10. The complainant challenged the Council's application of section 43(2), referring the Council to its own website in respect of the prices and hourly rates for legal services provided to schools. He restated his request to be provided with a copy of the invoice dated 10 November 2014.
11. The complainant pointed out that the Council had taken 27 working days to respond to his request and he asserted that the Council had not investigated his request thoroughly. He referred the Council to a charge made to the school for £40, for additional workload created for the clerk, [a named individual] and he pointed out that this had been omitted from the response the Council had provided. The complainant asked the Council to revisit his request, asking it to supply all elements, including any information which was omitted or withheld.
12. Finally, the complainant challenged the Council's application of section 42. He asserted that he has a plausible suspicion of wrong-doing and therefore he considered that there is a strong public interest in the withheld legal privileged information being disclosed.
13. The Council completed an internal review of its handling of the complainant's request and wrote to him on 24 April. The Council pointed out that he had clarified his request on 29 October, to say that it related to information about services provided to the school in respect of the accusations made against him of breaches of confidentiality.
14. On reviewing its response, the Council concluded that it had not fully considered whether the complainant was entitled to receive information under section 7 of the Data Protection Act ("the DPA"). Likewise it considered its application of section 43(2) to the invoice sent to the school on 10 November 2014 and it determined that the complainant should be given the information previously withheld under this exemption.
15. The Council's reviewer examined the correspondence it holds which concerns the breach of confidence issue. As a result of this examination, the Council provided the complainant with information which it considers is comprised of his personal data. The Council withheld some information in its entirety and other pieces of information were withheld by way of redaction.
16. The Council's review upheld its application of section 42 of the FOIA to information which it considers is subject to legal professional privilege.

The reviewer stated that she is, 'satisfied that the public interest was correctly applied in respect of this information'.

17. Having received the Council's internal review, the complainant wrote again to the Council on 10 May 2015. He expressed his confusion about the 'invoice' which the Council supplied. He stated that the invoice was a scan of what appeared to be a ledger entry. The complainant also asked for further clarification concerning the information which the Council has previously provided.
18. On 22 May 2015, the Council responded to the complainant's email of 10 May. Again the Council provided explanations to each of the bullet points where he had sought clarification.
19. On 23 May 2015, the complainant sent the Council a further letter. This contained 38 points which concerned his information request and information which he believes he is entitled to receive under the FOIA or the DPA.
20. On 5 June, the Council confirmed to the complainant that further legal services had been provided to the school under the SLA since October 2014.
21. On 10 July the Council wrote to the complainant again. The Council advised him that it considered it had addressed many of the points he has raised and that it did not intend to revisit those points again. The Council re-confirmed its reliance on section 42 of the FOIA in respect of withheld information subject to legal professional privilege.

## **Scope of the case**

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22. The complainant contacted the Commissioner 8 October 2015 to complain about the way his request for information had been handled.
23. For the purpose of this decision notice, the Commissioner has investigated whether the Council has handled the complainant's clarified request of 29 October 2014 in accordance with the FOIA. The focus of his decision is therefore whether the Council is entitled to rely on section 42 of the Act – legal professional privilege, to withhold relevant information.
24. The complainant has also complained about the extent of the information which the Council disclosed to him following his subject access requests. He is particularly concerned about the redactions made in some of the documents which the Council had provided to him under section 7(1) of the DPA.

25. This specific redacted information is not considered in this decision notice. The Commissioner will make a separate assessment of whether the Council is likely to have complied with section 7(1) of the DPA and this will be undertaken under section 42 of that Act.

## Reasons for decision

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### Background information

26. North Baddesley Infant School ("NBIS") is a maintained school in Hampshire.
27. The Commissioner understands that the complainant was previously a governor at NBIS.
28. A large amount of correspondence has passed between the complainant, the school and the Council.
29. Contained within the complainant's correspondence are requests for information made under the FOIA and subject access requests made under the Data Protection Act 1998 ("the DPA").
30. Much of the information which the Council holds comprises the complainant's personal data as defined by section 1 of the DPA. As such that information is exempt from disclosure under the FOIA by virtue of the absolute exemption provided by section 40(1). This is why the Council has disclosed this much of this information to the complainant under his right of subject access provided by section 7(1) of the DPA.
31. The Council has provided the Commissioner with all of the information it holds which falls within the description specified in the complainant's request. The Council has identified for the Commissioner the information which it considers is the complainant's personal data, and which therefore falls to be considered under section 7(1) of the DPA.
32. In some instances, the complainant's personal data is associated with the personal data of third parties. Here, the Council has relied on section 7(4) of the DPA to withhold that information. Section 7(4) states:

Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

33. In other instances the complainant's personal data is associated with the advice given by the Council's solicitor in respect of the responses given to the complainant by NBIS in respect of his requests for information and his subject access requests. This information has been withheld under section 10 of Schedule 7 of the DPA and section 42 of the FOIA. Both of these provisions provide exemptions to the duty to disclose information/personal data, where a claim to legal professional privilege could be maintained in legal proceedings.

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

34. Section 42 provides that information is exempt from disclosure if the information is protected by legal professional privilege and where the claim to privilege could be maintained in legal proceedings.
35. There are two categories of legal professional privilege: advice privilege and litigation privilege.
36. In this case the Council has informed the Commissioner that it is relying on legal advice privilege.
37. The Commissioner has examined the withheld information. He has found it to comprise of professional advice, which has been requested by the NBIS and provided by Governors' Services and the Council's Legal Services department to the NBIS. The advice is provided to the NBIS and discussed both with the school and internally within the Council. It relates to a live and an on-going matter, at the time the request was made and when the NBIS was arranging a governor's complaints panel hearing to consider the complainant raised by the complainant.
38. The Commissioner is satisfied that the withheld information consists of privileged communications: He accepts the assurance given by the Council that the communications have not been disclosed to a third party or disclosed to the public. The Commissioner therefore finds that legal privilege has not been lost.
39. It is clear to the Commissioner that the primary or dominant purpose of the withheld information is the obtaining or provision of legal advice. The legal advice was provided to the NBIS by legally qualified persons and was communicated by these persons in their professional capacities.
40. It is also clear to the Commissioner that the information was sent and received with the implied expectation of confidentiality.

41. The Commissioner has decided that the withheld information properly engages the exemption provided by section 42 of the FOIA. As section 42 is a qualified exemption, the Commissioner is now required to consider whether the public interest favours the disclosure of the withheld information or whether it should continue to be withheld.

## **The public interest**

### **Arguments in favour of disclosing the requested information**

42. 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.
43. Disclosure of publicly held information can help foster greater trust in public authorities and may allow greater public participation in the decision making process.
44. In this case, disclosure of the requested information would help the public to understand some of the issues associated with events which led to the resignation of a school governor. It would also allow the public to consider the quality of the legal advice which was provided by the Council to the NBIS.

### **Arguments in favour of maintaining the exception**

45. 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.
46. It is very important that individuals and public authorities – the NBIS, are able to consult with lawyers in confidence and be able to obtain confidential legal advice.
47. Should the 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.
48. 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."*

49. Where a public authority – the NBIS, 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 his own position or legal advice beforehand.

50. 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..."*

51. This does not mean that the counter arguments favour 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**

52. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.

53. 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.

54. 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 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. The Commissioner finds none of these circumstances present in this case. He considers that the governor's complaints panel hearing is the appropriate place for the complainant to air his grievance with the NBIS and to satisfy his personal interests in the matter of concern to him.

55. Having considered this case, 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.
56. The Commissioner has decided that the council has properly applied section 42 to the withheld information

### **Other matters**

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57. The Commissioner will assess whether Council is likely to have complied with the subject access provisions of the DPA. The Commissioner will make his assessment under section 42 of the DPA.
58. The Commissioner's assessment is not part of this notice: It will be sent to the complainant and to Council – the data controller, separately.

## Right of appeal

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59. 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)

60. 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.
61. 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**  
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**Cheshire**  
**SK9 5AF**