

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2017

Public Authority: The Royal Borough of Kingston upon Thames
Address: High Street
Kingston upon Thames
KT1 1EU

Decision (including any steps ordered)

1. The complainant has requested from the Royal Borough of Kingston upon Thames (the "Council") information relating to the Decant Policy for the Council's regeneration programme. The complainant has asked the Commissioner to consider the Council's reliance on section 40(2) (third party personal data) and section 42(1) (legal professional privilege) of the FOIA to withhold parts of the requested information. He has also challenged the Council's redaction of some material on the grounds that it was not captured by the request.
2. The Commissioner's decision is that section 40(2) and section 42(1) of the FOIA were correctly cited. However, the Commissioner requires the Council to issue a fresh response to the complainant with regard to the documents specified in paragraph 23 that she has found do fall within the scope of the request.
3. The Commissioner also requires the Council to disclose the information contained within the documents specified in paragraph 39 which the Council agreed during the investigation, could be provided.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 February 2016 the complainant wrote to the Council and requested information in the following terms:

"I am writing to make a Freedom of Information request for the following information. Any information held, including emails and other electronic records, printed or handwritten notes, relating to the Decant Policy (including the drafting of said policy) for the council's regeneration programme."

6. On 10 March 2016 the Council responded. It asked the complainant for further clarification and invited the complainant to resubmit his request.

7. On the same day the complainant responded. He requested information in the following terms:

The information I am seeking is that showing why and when the decision was made to produce/draft a Decant Policy and who made, or was involved in, that decision; any records pertaining to discussions or decisions about the content of said Policy; any records showing what plans have been made to further discuss, modify, or ratify, internally or with input from residents or other persons, said Policy.

It was my understanding that a decision was made recently to postpone the publication of the draft Decant Policy until June. If this is incorrect, please advise when it is due to be published. Just to be clear, this doesn't affect my request for the information specified above."

8. On 2 April 2016 the complainant wrote to the Council expressing his dissatisfaction with its failure to respond to his request. He informed the Council that he would complain to the Information Commissioner's Office (the "ICO") if it did not provide the requested information on receipt of his correspondence.
9. On the same day the Council acknowledged receipt of the complainant's chaser letter.

10. On 4 April 2016 the Council informed the complainant that it was working on his request and aimed to provide him with a response by 11 April 2016.
11. On 7 April 2016 the complainant contacted the Commissioner to complain about the Council's failure to respond to his information request.
12. On 8 April 2016 the Council provided the complainant with its response to his request. It confirmed that the Council does hold some of the information requested and refused under section 22 of the FOIA to disclose it. The Council considered the information requested is intended for future publication.
13. Following the advice of the Commissioner, on 27 April 2016 the complainant requested from the Council an internal review of the handling of his request.
14. On the same day the Council acknowledged receipt of the request.
15. On 2 June 2016 the complainant contacted the Commissioner again to complain about not receiving a response from the Council.
16. The Council responded on 15 July 2016. It provided information, some of which had been redacted on the grounds that it was personal data or was otherwise not caught by the request. The Council also confirmed to the complaint that it had previously sent him a copy of both the draft Leaseholder and Tenant Decant Policy in respect of his request.

Scope of the case

17. The complainant contacted the Commissioner on 18 July 2016 to complain about the way his request for information had been handled. Specifically, the complainant expressed his dissatisfaction with the information provided which contained redactions. He considered the redactions to be extensive and said that they are not justified. Therefore, the complainant asked the Commissioner to review the un-redacted documents and to advise on whether or not the Council was correct not to disclose the information.
18. During the course of the Commissioner's investigation, the Council withdrew its reliance upon section 22 of the FOIA. The Council provided the complainant with some information and relied on section 40(2) and section 42 to withhold parts of the information.

19. The Commissioner considers the scope of the case is to determine whether the Council has correctly withheld information under section 40(2) and section 42 of the FOIA. She has also separately assessed whether the Council was entitled to redact other records on the grounds that the information did not fall within the scope of the request.

Reasons for decision

Information which is captured within the scope of the request

20. The complainant had challenged the Council's redactions which had been made on the basis that information was not caught by the request. In response to the Commissioner's investigation, the Council said that it considered the information is unrelated to the decant policy.
21. The Council explained that the material that is redacted should have been removed in its entirety as it is not relevant to the request. It said that it does leave the impression that it is related and that this is an error in the response creation process and the Council apologised for this error.
22. The Commissioner had reviewed the information and noted that there are parts which appear to be unrelated to the decant policy and therefore this information is not captured by the scope of the request. The information contained correspondence in regards to group meetings and various other housing issues where the decant policy is not the topic of discussion either directly or indirectly.
23. The Commissioner notes however that the request is fairly broad, in that it essentially covers any records relating to the discussion and development of the policy. Taking this into account, the Commissioner notes that there are items of correspondence which specifically refer to the development of the Decant policy and which are therefore deemed to be relevant to the request. These items are:
 - 160704a
 - 160519
 - 160304b
 - 160302a
 - 160223b
 - 160106

24. In light of her finding that these items do fall within the scope of the request, the Commissioner requires the Council to provide a response under the legislation for each of these.

Section 40(2) third party personal data

25. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the DPA.
26. The Council has withheld under the exemption, the names and contact details of a number of individuals from non-Council employees and also of the residents. It considered that these individuals have an expectation of privacy, specifically as their names are not in the public domain.
27. In considering these arguments and whether the disclosure of this information is in breach of the DPA, the Commissioner is mindful of the fact that disclosure under the FOIA is to be considered as disclosure to the world at large.
28. Firstly, the Commissioner must consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

"'personal data' means data which relate to a living individual who can be identified –

- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."
29. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes that in this case, Delta considered disclosure would breach the first data protection principle.

Whether the requested information is personal data

30. The Commissioner accepts that the names and contact details are personal data as they relate to individuals who are identifiable from the information.

First data protection principle

31. The first data protection principle requires, amongst other things, that the processing of personal data is fair. In considering fairness the Commissioner will take into account the reasonable expectations of the data subjects, what would be the consequences of disclosure, and the legitimate interests in the disclosure of the information in question.
32. When considering whether the disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their own expectations do not necessarily determine the issue of whether the disclosure would be fair. Instead, public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
33. The Commissioner notes that some of the individuals were either acting in a private capacity or were not senior staff at the organisations taking part in discussions relating to the Council's proposals. In the Commissioner's view, this would enhance the individuals' reasonable expectations that their personal data would not be placed in the public domain. The Commissioner further considers that the legitimate interest in the personal data is relatively slight.
34. For these reasons, the Commissioner has decided that disclosure would be unfair and therefore in breach of the first data protection principle. Accordingly, she has found that section 40(2) of the FOIA is engaged.

Section 42 – legal professional privilege

35. Section 42(1) of the FOIA provides that information which attracts legal professional privilege (LPP) is exempt information.
36. In broad terms, legal professional privilege protects the confidentiality of communications between a client and their legal adviser. This allows the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses or criticism of their client's position.
37. In order to attract legal professional privilege the communication must have been made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created as opposed to the sole purpose. The final test is whether the advice has remained confidential.

38. There are two types of legal professional privilege: litigation privilege and 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. Advice privilege applies where no litigation is in progress or contemplated. The Council confirmed that in this case it is relying upon advice privilege.
39. During the Commissioner's investigation, the Council was asked to review its use of section 42. Following a discussion which it had with the relevant affected third party, the use of section 42 was withdrawn with regard to the following documents:
- 151230
 - 160203
 - 160223c
40. Therefore, the Commissioner orders the Council to disclose the information within the above documents to the complainant.
41. The Council is of the view however, that section 42 still applies to the following document:
- 160301c
42. The content of this document refers directly to legal advice relating to the Decant policy.
43. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because it represents a brief summary of legal advice which was provided in a restricted setting. The Commissioner considers this information to be confidential as it has not been made publicly available and remains with the Council staff and its legal advisers. Within the correspondence the only parties included the Council staff working in the housing department.
44. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

45. The public interest arguments in favour of the information being disclosed revolve around creating greater transparency in the workings of the Council. In particular disclosure may assist the public in understanding how the Council makes decisions.

46. The complainant considers that it is in the public interest that residents are given the opportunity to see information relating to discussions of the Council's decant policy, which will subsequently have an impact on the residents in question.

Public interest arguments in favour of maintaining the exemption

47. There is a strong element of public interest inbuilt in this exemption - the central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence.
48. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.
49. The Council argued that there is a strong inherent public interest in maintaining the confidentiality of legally privileged information so that it is able to seek frank legal advice from legal advisors in relation to its activities. The Council stated *"the redevelopment of the estate is ongoing and the ability to seek advice on the changing nature of this activity is an important element of designing solutions for the residents and council alike."*
50. The Council referred to the Information Tribunal's decision in *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* in which it was stated:
- "If either the lawyer or the client could be forced to disclose what either said to the other (whether orally or in writing) as part of that process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there was a possibility that disclosure might later be ordered..."*

51. The Council also referred to the *Bellamy v the Information Commissioner and The Secretary of State for Trade and Industry (EA/2005/0023)* case in which the Information Tribunal accepted that "...there is a strong element of public interest inbuilt into the privilege itself." The Council argued that this is an ongoing programme and legal advice will be considered and be rejected as circumstances change. It said that it is not in the public interest for the Council to be tied to previous legal advice through disclosure. It added that changing environments and programmes and variable require the ability to "flex", seeking new legal advice when required.
52. The Commissioner asked the Council to state details of any exercise it had performed to determine where the balance of the public interest lies. The Council replied saying it accepts that disclosure could be in the public interest to disclose the advice. However, it said that this was balanced against the long term nature of the programme and the requirement of the Council to be able to seek legal comment and advice in an unhindered manner.
53. According to the Council, there is a strong interest in allowing the Council to explore issues with its legal advisors and to make analyses of any proposed scheme. The disclosure of advice would inhibit council officers in future dealings with legal advisors.
54. Disclosing the information would in the event of future decisions, prejudice its interests by exposing its legal position to potential challengers. The Commissioner also acknowledges that disclosing advice may have an impact upon the extent to which legal advice is sought. This in turn may have a negative effect upon the quality of decisions made by the Council which would not be in the public interest.

Balance of the public interest arguments

55. The Commissioner has considered the arguments put forward by the complainant, in addition to the stated position of the Council and the prior findings of the Commissioner in relation to legal professional privilege.
56. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions, particularly where these decisions may impact upon residential housing.

57. However, there is also a strong opposing public interest in maintaining the Council's right to communicate with its legal advisors in confidence. Following inspection of the withheld information and consideration of all the circumstances in this case, the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in this exemption.
58. The Commissioner has ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption. The exemption provided by section 42 for legal advice privilege has been correctly applied to the information in the document listed as 160301c.

Right of appeal

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

Website: 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

Alun Johnson
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