

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 May 2018

**Public Authority:** Royal Borough of Windsor and Maidenhead  
**Address:** Town Hall  
St Ives Road  
Maidenhead  
SL6 1RF

### Decision (including any steps ordered)

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1. The complainant has requested information from the Royal Borough of Windsor & Maidenhead ("the Council") relating to advice received from a barrister for the Council about the proposed Borough Local Plan.
2. The Commissioner's decision is that the Council has correctly withheld the information under section 42(1) of the FOIA – legal professional privilege.
3. The Commissioner does not require the Council to take any steps.

### Request and response

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4. On 3 October 2017, the complainant wrote to the Council and requested information in the following terms:  
  
*"I wish to complaint about the failure to perform the public interest test (FOI 2017-71275)... I therefore request that the information be published immediately."*
5. The background to this was a request from a third party which had been sent to the Council on 2 August 2017, as follows:

*"Please could you provide copies of all legal correspondence relating to the Borough Local Plan between 1st January 2017 and today (August 2) between the council and its legal team and/or solicitors/barristers. The specific document I am interested in [is] a written opinion sent from the RBWM barrister whether the Borough Local Plan Regulation 19 document is lawful/unlawful following legal correspondence from [named barrister]."*

6. This request had been given the reference FOI 2017-71275 by the Council, and was refused under section 42 of the FOIA – legal professional privilege ("LPP").
7. On 18 October 2017, the complainant wrote to the Council again reminding it that its response was outstanding.
8. On 19 October 2017, the Council responded. From its response, it was evident that it had carried out a review of its handling of request reference FOI 2017-71275. It upheld its position regarding the application of section 42 of the FOIA.
9. After contacting the ICO, the complainant wrote to the Council on 1 November 2017 requesting an internal review into the handling of his request of 3 October 2017, and explaining that, in his view, it should have been considered as a new request for information and allocated a different reference number, as he was not the requester of 2 August 2017.
10. The Council responded on 7 November 2017. It upheld its position that the request should be refused under section 42 of the FOIA.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 23 October 2017 to complain about the way his request for information had been handled.
12. The following analysis covers whether the requested information was correctly withheld under section 42 of the FOIA. That information is the document identified in the information request of 2 August 2017, which is what was sought in the complainant's request of 3 October 2017.

## Reasons for decision

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### Section 42 – Legal professional privilege

13. Section 42(1) of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
14. Legal professional privilege was defined by the Information Tribunal in *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023)<sup>1</sup> ("Bellamy") as:  
  
*"...a set of rules or principles which are designed to protect the confidentiality 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 [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."*
15. 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. In order to attract privilege, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
16. In this case, the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.
17. As explained in the Commissioner's guidance on section 42 of the FOIA<sup>2</sup>, advice privilege covers confidential communications between the client and lawyer made for the dominant purpose of seeking or giving legal advice.

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<sup>1</sup>

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

18. The Commissioner has viewed the withheld information. It comprises a legal opinion provided to the Council by a barrister, which explains that he has been instructed by the Council to give advice in relation to the relevant aspects of planning legislation. The opinion is marked as "Confidential".
19. The Commissioner is satisfied that the legal opinion constitutes communication between a lawyer and their client and that it clearly provides advice in relation to legal matters. It is therefore "legal advice" for the purposes of the FOIA, and legal professional privilege attaches to it.
20. The Commissioner has considered whether the legal professional privilege was waived. She notes that the leader of the Council had previously stated that the opinion would be published, and moreover that a former monitoring officer at the Council had summarised aspects of the opinion in a briefing note dated 14 August 2017, which had been issued to some councillors.
21. However, the Commissioner is satisfied that there is no evidence to suggest that the opinion itself has been disclosed, and therefore has determined that legal professional privilege has not been waived.
22. Consequently, the Commissioner considers that the exemption at section 42(1) of the FOIA is engaged, and she has gone on to consider the public interest test.

### **Public interest test**

23. Section 42 is a qualified exemption, and, as such, is subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section, the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### *The complainant's view*

24. The complainant put forward arguments in favour of disclosing the information. He explained that his request concerns the procedures followed by the Council with regard to the proposed Borough Local Plan, in relation to its obligations under current planning legislation. Specifically, Regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 requires that, before a local plan can be submitted to the Secretary of State, certain procedures must be followed, enabling the plan to be publicly inspected and representations to be made by certain consultation bodies. This can be referred to as a consultation period.

25. The complainant has explained that a residents' action group obtained advice from a senior barrister, a Queen's Counsel ("QC"). The QC advised that, in his view, the consultation process carried out by the Council was not compliant with the legislation and should be judicially reviewed. Specifically, the QC commented that the process had been *"unduly restrictive, misleading and fail[ed] to accord with regulation 20 in particular. The present consultation process should be abandoned and a fresh consultation process commenced."*
26. This then led to the Council seeking its own legal advice on the lawfulness of its approach, and the legal opinion, which has been withheld in this case, was issued.
27. The complainant has some knowledge of the withheld information from the briefing note, mentioned previously, which was issued to some councillors on 14 August 2017. He is therefore aware that that the Council's barrister disagreed that the Council's approach had been unlawful, but advised that it would be *"prudent"* to extend the period in which residents and statutory partners could make representations, and to re-state the purpose of Regulation 19.
28. The complainant considers that the Council's following of procedures in respect of Regulation 19 is a matter of considerable public interest and has stated that *"matters relating to public consultations are quintessentially public"*.
29. The complainant is also concerned that the Council's consideration of the public interest test, when handling his request under the FOIA, may have been flawed. He argues that the Council does not appear to have considered the public interest in the disclosure of the document in a coherent or balanced way. He notes that the public interest test has only been referred to briefly in the Council's responses, and that there is no evidence as to which factors in favour of disclosure were considered.
30. Specifically, the complainant considers that the Council ought to have considered the reasons why the leader of the Council had, at one stage, indicated that he thought the opinion ought to be published.
31. The complainant is also concerned that (according to the leader of the Council) the Council apparently decided not to publish the opinion on the basis of legal advice. He considers that the advice in question may have come from the barrister who provided the withheld opinion, and that this was not, therefore, an impartial way to consider whether or not to publish the document.
32. The complainant has also considered the Commissioner's guidance, referenced previously, in detail, and considers that certain factors in

favour of disclosure apply in this case. He has referred to the Commissioner's explanation that additional weight may be added to the above factors in favour of disclosure if the following issues are relevant in the particular case:

- large amount of money involved;
  - whether or not a significant group of people are affected by the advice or resulting decision;
  - lack of transparency in the public authority's actions;
  - misrepresentation of advice that was given;
  - selective disclosure of only part of advice that was given
33. With reference to these factors, the complainant has argued that the matter of the new Borough Local Plan involves the expenditure of billions of pounds, and that there is a great need for transparency in all areas pertaining to whether or not the plan is adopted. He has argued that a very large number of people will be affected by the Plan.
34. He is also concerned that selective disclosure and possibly misrepresentation has occurred, since the briefing note of 14 August 2017, referred to previously, contained a summary of certain facts prior to concluding that the document should not be disclosed.
35. The complainant is aware of the inherent public interest in the upholding of legal privilege in relation to communications between a lawyer and his or her client, but in this case he considers that the factors in favour of disclosure - most importantly, the need for transparency with regard to a public consultation over significant developments in the local area - outweigh the factors in favour of withholding the information.

#### *The Council's view*

36. In conducting the public interest test, the Council considered certain factors in favour of disclosing the document. Specifically, it considered its own Transparency Agenda which supports openness and is intended to allow scrutiny of its activities. It observed that disclosure would make it clearer how the Council had acted, point out flaws in the residents' action group's arguments, clarify misunderstandings, and inform future activities. It would enable scrutiny of both of the lawyers' arguments. The Council also confirmed that it had considered specifically the fact that the leader of the Council had stated that the opinion would be published.

37. The Council also considered factors which supported maintaining the exemption at section 42(1). Specifically, it considered the inherent public interest in the concept of legal professional privilege, which allows clients to seek full and frank advice from their legal advisers in confidence. It considered that this matter carried more weight due to the opinion relating to an issue which at the time of the request was still relevant and "live".
38. The Council also explained that it was concerned that disclosing the opinion may have the effect of weakening its legal position in any legal dispute that may arise. In its view this could lead to a more guarded approach when seeking legal advice in future, lessening the effectiveness of the advice process.

*The balance of the public interests*

39. In *Bellamy*, the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information requested. Explaining the balance of factors to consider when assessing the PIT, it said:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".*

40. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account this inbuilt public interest: that is, the public interest in the maintenance of legal professional privilege.
41. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: to safeguard openness in all communications between client and lawyer in order to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.
42. In this case, therefore, the Commissioner considers that there is inherently a strong public interest in the exemption being maintained.
43. The Commissioner also recognises that additional weight may be added in favour of maintaining the exemption if the advice is recent and concerns a live issue. She notes that this is the case here, since the Borough Local Plan is still in the process of being developed.
44. However, although she considers there will always be an initial weighting towards maintaining the exemption, the Commissioner



recognises that there are circumstances where the public interest will favour disclosing the information.

45. As explained in her guidance on section 42, referenced previously, the Commissioner considers that the factors in favour of disclosure include an assumption in favour of disclosure and the rationale behind this assumption, including accountability, transparency, and furthering public debate. She also considers that the factors described above in paragraph 32 may lend additional weight, as argued by the complainant.
46. The Commissioner considers that there is no doubt in this case that the redevelopment of the area is likely to cost billions of pounds and to affect thousands of local residents. She therefore agrees with the complainant that these factors lend weight in favour of disclosure.
47. She has considered whether the "selective disclosure" of parts of the opinion in the briefing note would also lend weight to this side of the argument. However, in her view, the Council was aiming to conduct itself effectively by summarising part of the opinion, since this then enabled it to move towards the completion of this stage of proceedings, while still being fair to residents by extending the period during which individuals could make representations. The Commissioner does not have evidence that the Council was in any way seeking to mislead the public as to the contents of the advice, and therefore does not consider that this factor adds weight to the arguments in favour of disclosure.
48. The Commissioner is aware that public consultation is a vital part of the development of a new Local Plan and that any Council is expected to take into account the views of local residents. Like many areas, Windsor and Maidenhead is seeking ways to accommodate hundreds of new homes, and members of the public are entitled to have their views taken into account. It is therefore reasonable for the complainant to expect that all areas of the decision-making process and public consultations should take place in a transparent manner.
49. In cases where she is asked to consider the balance of the public interest, the Commissioner will focus on the value of the withheld information itself; that is, its significance and what it reveals. In this case, the information concerns the Council's compliance with planning legislation. The relevant issue is whether the Council had correctly advised members of the public of their rights to make representations about any aspect of the proposed plan, before submitting the draft Borough Local Plan to the Secretary of State. The Commissioner notes that any representations are also then made available to the Secretary of State, as well as being publicly accessible.



50. As previously explained, the complainant wishes to shed light on the Council's decision to extend the consultation period rather than to abandon and re-start the process, in view of the advice issued by the residents' QC.
51. The Commissioner notes that the request was made shortly after the extended consultation period came to an end. However, she is not aware of any evidence that residents' ability to make representations was significantly compromised, and notes that several thousand submissions had been received on the Council's website during the period.
52. The Commissioner also considers that there is a public interest in the Council being able to conduct its business effectively. She is aware that the Council sought to address the concern that was raised by residents about its compliance with Regulation 19 by extending the consultation period, and that, in view of the advice it had received, the Council considered this to be an adequate response in order to progress towards the next stage of the process.
53. The Commissioner also agrees with the Council that in the event of subsequent legal challenges the Council's right to a "level playing-field" would be adversely affected by the disclosure of the legal advice it had received.
54. Taking the above factors into consideration, the Commissioner's decision in this case is that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Council was not, therefore, obliged to disclose the requested information.

## Right of appeal

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55. 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)

56. 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.
57. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**