

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2020

Public Authority: Wiltshire Council
Address: County Hall
Bythesea Road
Trowbridge
Wiltshire
BA14 8JN

Decision (including any steps ordered)

1. The complainant requested from Wiltshire Council ("the Council") information relating to a housing association. The Council refused to disclose the requested information and cited section 42(1) (legal professional privilege) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council was entitled to rely on the exemption at section 42(1) of the FOIA to withhold the information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

3. On 5 March 2019 the complainant wrote to the Council and requested information in the following terms:

"The issue is that the council, Wiltshire Council, appear to have given up their interest in Selwood Housing as indicated in the form below PSC07.

The form PSC07 informs Companies House that the council is 'ceasing to be a person of significant control'.

What discussions led to this happening resulting in the form being filed at Companies House?

Who took and in what way was the decision taken; letters, emails, minutes of meetings etc. All this needed to explain how the council gave up, 'ceased to be a person of significant control' as indicated in the form below.

The council, Wiltshire Council, no longer has significant control in Selwood Housing. How and why did they reach this specific 'reality'?"

4. On 11 April 2019 the Council responded and confirmed that it held the information requested. The Council withheld the information under section 42(1) (legal professional privilege) of the FOIA.
5. On 29 April 2019 the complainant asked the Council for an internal review.
6. On 17 May 2019 the Council provided its internal review response. It maintained its original position to withhold the requested information based on section 42(1) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 26 June 2019 to complain about the way his request for information had been handled. Specifically, he disputed the Council's reliance on section 42(1) of the FOIA in response to his request.
8. During the investigation, the Council was asked to clarify the information it was withholding under section 42(1) of the FOIA. The Council confirmed that the withheld information consists of three documents containing communications between the Council's legal advisor(s) acting in their professional capacity, and the Council's senior officers responsible for Housing.
9. The following analysis focuses on whether the Council was entitled to rely on section 42(1) of the FOIA to withhold the information requested.

Reasons for decision

Section 42 – Legal professional privilege

10. 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.

11. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023)¹

"...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."

12. Section 42(1) is a class based exemption, therefore, the requested information only has to fall within the class of information described in that section for it to apply. This means that the information simply has to be subject to LPP for the exemption to be engaged. There is no need to consider the harm that would arise by disclosing the information. However, as the exemption is subject to the public interest test this issue will be considered later.
13. There are two categories of LPP - litigation privilege and legal 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. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.
14. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
15. In this case, the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.

¹http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

Legal advice privilege

16. The Council stated to the Commissioner the following:

"We maintain that the communications were for the sole and/or dominant purpose of obtaining legal advice. In this regard legal advice is not confined to advice on the law, but also covers 'advice as to what should prudently and sensibly be done in the relevant legal context'. This will cover presentational, commercial or strategic advice provided that it relates to client's legal rights, liabilities, obligations and remedies. This is based on the Wiltshire Council protocol (copy attached) which is based on case law and is the process in which Wiltshire Council operates under when dealing with Wiltshire Council Legal Services. The protocol is set out for Wiltshire Council Members and Officers to provide an absolute and unqualified assurance to its client (Wiltshire Council) that whatever passes between Wiltshire Council and its legal advisors will never be disclosed without Wiltshire Council's consent. This is to ensure that there is full and frank disclosure so that the legal advice sought and given is based on all relevant facts and is therefore soundly based."

17. The Council confirmed that the withheld information consists of three documents and that it was relying on section 42(1) of the FOIA to the entire content of each document. The Council explained that the information relates to communications between the Council's legal advisor(s) acting in their professional capacity and the Council's senior officers responsible for Housing. Two of the emails are from a legal advisor to a client which provides advice, and the third email is from a barrister to their client also providing advice.
18. The information, the Council said, concerns the Council's involvement with Selwood Housing. It stated that the advice covers legal advice relating to the Council's involvement with Selwood Housing.
19. The Council explained that following a request from the Housing Department for advice on *"the likely impact on the council of the Regulation of Social Housing (Influence of Local Authorities) (England) Regulations 2017,"* a legal advisor had provided advice on the then upcoming changes to legislation. Further advice was provided to the client from a legal advisor regarding Social Housing.
20. The Council reported that the information had not been made available to the public or to a third party, and that the information had been limited to the relevant Council officers.

21. The Council informed the Commissioner of the purpose of the withheld information, and that this was *"to provide legal advice to the council officers with responsibility for housing on the effects of changes to legislation and the council's continuing relationship with the registered social landlords with whom we work collaboratively."*
22. In support of its view, the Council referred the Commissioner to a recent decision of the Court of Appeal – *Lee Victor Addlesee and others v Dentons Europe LLP [2019] EWCA Civ 1600*, and quoted statements from paragraphs 26 and 32 of the decision. This decision took a robust stance against an attempt to retrospectively redraw the boundaries of legal professional privilege.
23. The Council considered that these statements illustrate *"that privilege attaches to a communication because of the nature of the communication and the circumstances under which it is made; and that the privilege thus established remains absolute unless it is waived."*

Is the exemption engaged?

24. Having viewed the withheld information, the Commissioner notes that it constitutes communications between a legal advisor and their client, and that it clearly relates to legal matters. She also notes that the communications were made for the dominant (main) purpose of seeking or giving legal advice.
25. The Commissioner therefore accepts that the information attracts LPP on the grounds of legal advice privilege and that on this basis, section 42(1) of the FOIA is engaged.

Public interest test

26. Section 42(1) is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. Having found that the exemption is engaged, the Commissioner has gone on to consider the balance of the public interest. Although the Commissioner has found that section 42(1) is engaged, the information may still be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

27. In the complainant's submissions to the Commissioner, he explained that his request for information is required to make a comparison between the methods used by a landlord and Selwood Housing on how they conducted the required consultation process. The complainant believes that the disclosure of the information would assist the public interest in further understanding of the Council's decision-making process. Specifically, with regards to board members being selected by Selwood Housing.
28. The complainant disputed the Council's reason for withholding the information and said that he wished to challenge its reliance of LPP. In support of his arguments, the complainant referred the Commissioner to quoted paragraphs taken from case law on LPP, he highlighted that the public interest relates to fairness and asked *"how have tenants been treated in comparison with the Council?"* He said that the only way to achieve this is to see all the information presented to the Council in comparison with what tenants were given to consider for the process of consultation. The complainant considers that by not having the information he has requested, it is *"denying tenants the opportunity to seek fairness, to see if they are being treated equally."*
29. The Council said that it accepts there is a general public interest in openness and transparency, and acknowledges that disclosure of the information would serve the public interest in these principles. The Council also acknowledges that disclosure would assist the public interest in furthering understanding of council decisions.
30. The Commissioner considers that some weight must always be given to the general principles of accountability and transparency which are achieved through the disclosure of information held by public authorities.
31. She recognises that disclosure of the withheld information could assist the public in understanding the basis of how the Council made its decision. The Commissioner accepts that the disclosure of the three documents may assure the public that the Council is acting lawfully and is considering in detail its legal position relating to social housing.
32. The Commissioner fully accepts that disclosure of the withheld information would result in more detailed understanding of the decisions taken by the Council following its receipt of the advice. A disclosure of the advice would also allow the public to consider the quality of that advice and see if, and how, the Council acted on it.

Public interest arguments in favour of maintaining the exemption

33. The Council argued that there is a strong public interest in withholding the information because disclosure would be likely to inhibit the free and frank provision of legal advice. It also argued that the disclosure of the information would reveal the Council's legal position, which would undermine the principle of LPP.
34. The Council stated that it had considered the need to maintain LPP to ensure the client's absolute right to seek and obtain legal advice free from the fear of disclosure to ensure that such advice is sound and based on all of the facts.
35. The Council said that it maintained LPP in this case to also ensure that officers can obtain clear and frank legal advice on all of the risks on a change which might affect the Council's legal position and its responsibilities looking into the future. The Council explained that as the underlying rationale for the action – a legislative change – was already in the public domain and, therefore, the overarching reason for the Council's action was also public knowledge, it considered that this weakens the public interest in the withheld information being disclosed in this instance.
36. The Council considered that there was a strong public interest in maintaining LPP even once the legal advice is no longer current. It argues that this is because there must be a strong degree of confidence that lawyers will be able to give full and frank advice, without a disclosure of that advice subsequently damaging their client's position in the future.

Balance of the public interest

37. The Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption due to the long standing and important principle of LPP and the clear and important need for all to have access to free, frank and candid legal advice. Only in very exceptional circumstances can this be overridden when considering where the public interest lies. This may include instances where:
 - Large amounts of money are involved;
 - 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.

38. In this case, the Commissioner has considered those arguments favouring disclosure of the withheld information against maintaining LPP. She has also had regard to the content of the withheld information.
39. The Commissioner recognises that care should be taken to ensure that freedom of information principles do not undermine the well-established common law right to LPP, which enables a client to put all relevant facts before their legal advisers, and to receive advice based on them, without fear that either facts or advice will be disclosed to others without their consent².
40. In this case, having considered the factors the Commissioner's view is that the very strong public interest in maintaining the principle of legal professional privilege outweighs the factors in favour of disclosure of the withheld information.

Conclusion

41. The Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Therefore, the Council was not obliged to disclose the requested information and section 42(1) of the FOIA was correctly applied.

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i109/Shipton.pdf>

Right of appeal

42. 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@justice.gov.uk.

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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
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