

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2020

Public Authority: Knowsley Council
Address: Municipal Buildings
Archway Road
Huyton
L36 9GL

Decision (including any steps ordered)

1. The complainant requested legal advice from Knowsley Council ("the Council") about Merseyside Dogs Home. The Council provided some information, but withheld the remainder under section 42(1) of the FOIA, stating that it was legally privileged.
2. The Commissioner's decision is that the withheld information is legally privileged, and that the balance of the public interest favours the exemption being maintained. She is therefore satisfied that it was withheld correctly under section 42(1).
3. The Commissioner does not require the Council to take any steps.

Background to the request

4. During February 2019, the complainant corresponded with an officer of the Council about Merseyside Dogs Home (MDH). He was concerned that stray dogs at MDH were being kennelled there overnight and sometimes for longer, despite MDH not being licensed to board dogs.
5. The Council, at that time, stated that it understood that since MDH was a charity rehoming centre, from which stray dogs were moved to

licensed premises to be kennelled overnight, there was no need for MDH to have a licence.

6. The Council explained that DEFRA had confirmed that rehoming centres did not need to have a licence, and that it had no power to issue a licence to a rehoming centre.
7. The officer at the Council stated that: *"Despite our previous legal advice on this matter we have recently clarified the position with DEFRA so that we could be certain that our interpretation was correct."*
8. In responding to this, the complainant asked the officer: *"Did you inform DEFRA that dogs were being kennelled for a short period during the day, or if they were being additionally kennelled there overnight? Either way, a license would be required in both cases... Part 3 of the Animal Welfare Regulations 2018 states that the provision of day care for other peoples' dogs is a licensable activity. Even if Merseyside Dogs Home are simply operating as a reception point and not kennelling dogs overnight, they are still providing day care commercially for other peoples' dogs, and are being contracted to do so by Animal Wardens Ltd."*
9. The complainant has explained that he did not receive a response, and this led to him making a request for information.

Request and response

10. On 11 September 2019, the complainant wrote to the Council and requested information in the following terms:

1) *"Please provide me with a copy of the advice received by DEFRA and a copy of all correspondence between Knowsley Council and DEFRA relating to the advice provided by DEFRA, to which [name of officer redacted] refers. If no correspondence exists, please provide me with a note or notes of any telephone or face to face discussions with DEFRA."*

Please confirm specifically whether or not DEFRA advised that the commercial boarding by Merseyside Dogs Home of stray dogs, which did not belong to them, was licensable activity.

2) *Please provide me with details of the previous legal advice relating to the kennelling of stray dogs to which [name of officer redacted] refers, including the specific legal advice sought and the legal advice received. Again, if no actual correspondence exists, please provide me with a note or notes of any telephone or face to face discussions relating to the advice received."*

Please confirm specifically whether or not the previous advice stated that the commercial boarding by Merseyside Dogs Home of stray dogs, which did not belong to them, was licensable activity."

11. On 22 October 2019, the Council responded and provided some information relating to point 1 of the request. However, it withheld the information requested in point 2, stating that it was exempt under section 42(1) of the FOIA: legal professional privilege.
12. The complainant requested an internal review into the handling of point 2 of his request. He stated that even if the information was legally privileged, he considered the Council had misrepresented the advice it had received. He therefore considered that the balance of the public interest favoured its disclosure.
13. The Council sent him the outcome of its internal review on 14 November 2019. It upheld its original position.

Scope of the case

14. The complainant contacted the Commissioner on 18 October 2019 to complain about the way his request for information had been handled. At this stage, he was waiting for a response to his request. Following the internal review, he complained again on 27 November 2019 and asked the ICO to investigate the application of section 42(1) to point 2 of his request.
15. This decision covers whether the Council correctly withheld the information which fell within the scope of point 2 of the request under section 42(1) of the FOIA.

Reasons for decision

Section 42(1) – legal professional privilege

16. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
17. 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) ("Bellamy") as:

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges 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 their parties if such communications or exchanges come into being for the purposes of preparing for litigation."

18. 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 where 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.
19. Communications made between adviser and client in a relevant legal context will therefore attract privilege.
20. The Commissioner's view is that for legal professional privilege to apply, the 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. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
21. In this case, the Council confirmed that it considered the requested information to be subject to legal advice privilege. It explained that the withheld information is an email from an Assistant Solicitor of the Council to their Environmental Health client colleagues. The Council explained that the email provided legal advice on *"the Council's statutory duties under legislation and guidance"*.
22. The Council confirmed that the communication was, therefore, between a professional legal adviser and their client, made for the sole purpose of obtaining and providing legal advice, and that the information had been communicated in the legal adviser's professional capacity.

23. The Commissioner notes that the withheld information also includes the email sent by the officer in Environmental Health to the Assistant Solicitor, asking for the advice.
24. She is satisfied that the communications are covered by LPP since they were made between a professional legal adviser and his client, with the dominant purpose of obtaining and providing legal advice.
25. The Commissioner asked the Council whether the privilege which attached to the communications had been lost. The Council confirmed that the information had not been disclosed to the public nor to a third party without restriction, and therefore remained confidential and privileged.
26. The Commissioner is satisfied that the exemption at section 42(1) of the FOIA is engaged. Since it is a qualified exemption, she has considered the balance of the public interest.

The balance of the public interest

27. 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 sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

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

28. In balancing the opposing public interest factors under section 42, therefore, it is necessary to take into account the inherent public interest in maintaining the exemption: that is, the public interest in the maintenance of LPP. In the Commissioner's view, the general public interest in maintaining this exemption will always be strong, due to the importance of the principle behind LPP: to safeguard openness in communications between client and lawyer. That principle is fundamental to the administration of justice, and disclosing any legally privileged information threatens that principle.
29. Although she considers there will always be an initial weighting towards maintaining the exemption, however, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
30. In accordance with her guidance on section 42, the Commissioner considers that the factors in favour of disclosure include the intentions behind the FOIA itself: accountability, transparency, and furthering public debate.

31. In addition, she recognises that 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.
32. In reaching a decision as to the balance of the public interest, and while keeping the above factors in mind, the Commissioner will consider any wider circumstances insofar as they are relevant to the contents of the withheld information. Her focus must be on the public interest in the disclosure of the withheld information itself, and the matters being discussed in it.
33. The Council has stated that it can see no clear and compelling reason for the advice to be disclosed. Nor does it consider that the complainant, if he sought to pursue any legal action against the Council, would be prejudiced by the information not being disclosed.
34. The complainant has provided much evidence to the Commissioner regarding the operation of MDH, which may be said to support his concerns that dogs are being kennelled there overnight and sometimes for longer. His concerns also extend to the terms of the Council's contract with Animal Wardens Ltd, who control some of the space in the relevant premises.
35. The complainant considers that there is a strong public interest in the disclosure of the correspondence being withheld, because he suspects that misrepresentations may have occurred at two stages of the process.
36. He considers that the Council may have misrepresented the situation at MDH, when seeking advice. He stated, in his request for an internal review: *"the Council has clearly misrepresented the facts about the boarding of dogs by Merseyside Dogs Home... when the advice was sought initially"*.
37. He also considers that if the Council did not, as he suspects, accurately represent the situation at MDH when seeking the advice, its subsequent position also, effectively, amounts to a misrepresentation. He has based

this second assertion on the contents of a letter dated 29th March 2019 in which, he reports, the CEO of the Council advised an MP that all stray dogs which are not claimed by the owner within 24 hours are kennelled by Animal Wardens Ltd *at licensed kennels* (emphasis added).

38. The complainant takes this to demonstrate that the Council has wrongly led the public to believe that stray dogs are, when staying at MDH, staying on licensed premises. He considers that this amounts to a misrepresentation of the legal advice it received.
39. The Commissioner has reviewed the withheld correspondence carefully. While she is unable to specify the contents in detail, she would note that, while it relates to MDH, it dates from several years ago and does not relate specifically to the requirements for MDH (nor any other premises) to be licensed.
40. As such, she is satisfied that the email seeking advice does not misrepresent facts about MDH in the manner suggested by the complainant. Nor indeed does it relate to the Animal Welfare Regulations 2018, dating, as it does, considerably before that legislation came into existence.
41. She is also satisfied that the response from the Council's assistant solicitor does not relate to the subsequent assertions by the Council, and referred to by the complainant, about dogs being boarded at licensed premises.
42. With regard to the withheld information, the Commissioner has no evidence either that the Environmental Health officer misrepresented any facts when seeking the advice, nor that the advice he received was, subsequently, misrepresented to the public. Nor does she have evidence that any of the factors listed at paragraph 31, above, come into play in this case.
43. The Commissioner has nevertheless considered the public interest in the disclosure of contents of the withheld information.
44. As previously stated, she is unable to discuss its contents in detail. However, she considers that, since the advice relates to the matter of the Council's obligations with regard to stray dogs, there is some public interest in its disclosure.
45. There is also some general public interest in transparency in relation to advice received by the Council, on which it may be likely to base subsequent actions or decisions, since this provides the public with a fuller picture.

46. However, in this case, the Commissioner is not satisfied that there is a compelling reason for the disclosure of the information in question. In all the circumstances of this case, she does not consider that there are factors present that would equal or outweigh the strong public interest inherent in the exemption.
47. The Commissioner is therefore satisfied that, with regard to the withheld information, the balance of the public interest favours maintaining the exemption at section 42(1) of the FOIA, and she does not require the Council to take any steps.

Right of appeal

48. 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

49. 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.
50. 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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