

Freedom of Information Act 2000 (FOIA)

Date: 7 June 2021

Public Authority: Southwater Parish Council
Address: Beeson House
26 Lintot Square
Fairbank Road
Southwater
West Sussex
RH13 9LA

Decision (including any steps ordered)

1. The complainant requested correspondence relating to conveyancing queries concerning the leasehold agreement for a specific property.
2. Southwater Parish Council (the Parish Council) refused to provide the requested information, citing sections 42 (legal professional privilege) and 43 (commercial interests) of the FOIA.
3. The Commissioner's decision is that the Parish Council correctly applied section 42(1) (legal professional privilege) of the FOIA to the withheld information.
4. However, she found procedural breaches of sections 1(1) (general right of access) and 17 (refusal of request).
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 13 March 2020, the complainant wrote to the Parish Council and requested information in the following terms:

"Under the Freedom of Information Act I should be grateful if you would provide me with electronic copies of all the correspondence relating to the conveyancing queries in relation to the leasehold

agreement for Easteds Barn signed on 29 March 2019 between the landlord, the Southwater Parish Council, and the tenant, Little Barn Owls Limited

The correspondence I am specifically interested in are those referred to in section 39.2 and 39.3 of the lease agreement.

1. Section 39.2 states:-

"Each party acknowledges that in entering into this lease it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) other than those contained in any written replies that Coole Bevis LLP has given to any written enquiries raised by PDT Solicitors LLP before the date of this lease."

I am interested in all correspondence, including letters, reports, planning permissions, plans, title deeds and emails sent by Southwater Parish Council and/or its individual Councillors and/or its Officers to the council's conveyancer, Coole Bevis LLP, in response to the written enquiries raised by PDT Solicitors LLP, the conveyancer for Little Barn Owls Limited.

2. In relation to section 39.3, I'm interested in the copies of the completed CPSE.1 [Commercial Property Standard Enquiries] (version 3.7) and the CPSE.3 (version 3.1) forms referred to".

7. The request was made using the 'whatdotheyknow' website.
8. The Parish Council responded on 16 March 2020. It refused to provide the requested information. While the Parish Council told the complainant the information "*is considered privileged/Commercially sensitive information*", it did not explicitly state the sections of the FOIA being relied upon.
9. The complainant expressed dissatisfaction with that response.
10. On 17 March 2020, the Parish Council told him that his request had been passed to all Councillors for a review. It also told him that, if he was unhappy with the refusal, he was entitled to contact the ICO.
11. On the same day, 17 March 2020, the Parish Council wrote to him maintaining its position. It told him that, as the Parish Council does not have a review procedure under section 17(7) of the FOIA, if he wished to make a complaint he could contact the Commissioner.

Scope of the case

12. Following earlier correspondence, on 27 March 2020, the complainant provided the Commissioner with the necessary documentation to support his complaint about the way his request for information had been handled.
13. On the basis that the Parish Council was citing sections 42 and 43 of the FOIA, albeit the Council had not formally cited those exemptions, he disputed its application of those exemptions and noted that the Parish Council had made no mention of the public interest test.
14. Having received notification that the Commissioner had carried out an initial assessment of this case and considered it eligible for formal consideration under section 50 of the FOIA, the Parish Council wrote to the Commissioner regarding the amount of recorded information within the scope of the request.
15. During the course of her investigation, the Parish Council provided the Commissioner with a copy of the withheld information, marked up to show which exemption(s) applied. The Parish Council subsequently located further information that falls within the scope of the request which the Commissioner has also considered.
16. The Parish Council confirmed its application of section 42 of the FOIA to all the withheld information. It also considered that section 43 additionally applied to some of the withheld information.
17. The Commissioner has considered the Parish Council's application of exemptions to the withheld information.
18. In light of the apparent difficulty in determining the extent to which it held information within the scope of the request, the analysis below first considers whether the Parish Council conducted the necessary searches to identify all the information it held that fell within the scope of the complainant's request, as required by section 1 of the FOIA.

Reasons for decision

Section 1 - general right of access

19. Section 1 of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

20. When a public authority receives a request, its first task is usually to determine whether it holds the requested information. In many cases it will be simple to locate information, particularly if the public authority practices good records management. However, there will be occasions when a public authority has difficulty in determining whether it holds the information.
21. In the Commissioner's view, the Parish Council had difficulty in this case in determining the extent to which it holds information of the description specified in the request.
22. Following the lead of a number of Information Tribunal decisions, the ICO applies the civil standard of the balance of probabilities in scenarios such as this, in order to decide whether a public authority holds information which falls within the scope of the request.
23. For clarity, the Commissioner is not expected to prove categorically whether information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
24. This is in line with the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.
25. It is also important to note that the Commissioner's remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the public authority at the date of the request.
26. In order to ascertain that adequate searches had been made in this case, and that all relevant information had been retrieved, the Commissioner asked the Parish Council questions regarding the extent of the recorded information that falls within the scope of the request. She also asked the Parish Council how it reached the view that it did not hold further relevant information.
27. In response to her enquiries, the Parish Council told the Commissioner that it had conducted a search of hard copy files, electronic folders and

emails in order to determine whether the requested information was held.

28. With regard to the amount of information it had located and retrieved, the Parish Council told the Commissioner:

"... from looking through the files/folders there is limited information/correspondence available..".

29. It explained that most of the advice received from the solicitors was provided by telephone and by face-to-face meetings at which no minutes/notes were taken.

30. In that respect, the Parish Council told the Commissioner:

"It is worth noting that there is reference to phone call discussions and meetings, which helps explain why correspondence is limited regarding conveyancing and the lease".

31. The Parish Council also confirmed that most correspondence with the Solicitor regarding conveyancing would have been by the previous Clerk to the Council.

32. The Parish Council advised that it did not have access to any of the previous Clerk's emails and also explained that it had recently changed IT provider.

33. During the course of the Commissioner's investigation, the Parish Council contacted its new IT provider, requesting a search of the available archived emails for the previous Clerk to the Council.

34. The Parish Council confirmed that the keywords used in the search of the archived emails were the property name and the name of the solicitors specified in the request for information. It also confirmed that the keywords:

"... [were] searched individually and also in combinations or entirety...".

35. The Parish Council told the Commissioner that, having reviewed the resulting output, there were no emails of relevance to the FOI request made by the complainant.

36. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (FOIA).

37. Having considered the Parish Council's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that the Parish

Council carried out necessary searches to identify the requested information that was held at the time of the request. She is therefore satisfied that, on the balance of probabilities, the Parish Council does not hold further information within the scope of the request.

38. Having had the opportunity to consider the information provided to her by the Council, the Commissioner acknowledges that it comprises correspondence between the Parish Council and its solicitors.
39. However, she finds that the information provided does not meet the description specified in part of the request, namely "*copies of the completed CPSE.1 (version 3.7) and the CPSE.3 (version 3.1) forms referred to*".
40. She finds that, in failing to tell the complainant that that information was not held, the Parish Council failed to comply with its obligation under section 1(1)(a) of the FOIA with respect to that information.
41. The Commissioner has next considered the Parish Council's application of exemptions to the withheld information.
42. That information comprises emails, some with attachments. The Commissioner recognises that the information contains duplicates because some of it is in the form of email chains which overlap.

Section 42 - legal professional privilege

43. 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.
44. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
45. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the 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."

46. 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.

The complainant's view

47. The complainant disputed that section 42 applies. He told the Parish Council:

"... In the case of the information I have requested, there is no litigation involved or contemplated. It is simply the production and transmission of responses to queries raised by the prospective tenant's conveyancer"

and

"Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be for the sole purpose of obtaining legal advice. In this instance, however, the sole purpose is to provide answers to the council's conveyancer to pass on to the prospective tenant's conveyancer. The purpose is not to receive legal advice".

The Parish Council's view

48. In its submission to the Commissioner, the Parish Council confirmed that the solicitors named in the request for information were those:

"... who advised the [Parish] Council and worked on the Lease to Easteds Barn".

49. With regard to the withheld correspondence between Southwater Parish Council and legal advisors, Coole Bevis LLP, the Parish Council simply stated:

"...It is not suitable for disclosure as Legal and Professional Privilege is applicable hence Section 42 applies".

Is the exemption engaged?

50. As noted above, section 42 is a class-based exemption, which means that if the information is of the type described in the exemption, then it is covered by that exemption.
51. Having had the benefit of viewing the information withheld by virtue of section 42, the Commissioner is satisfied that, although some of it is somewhat mundane, it constitutes communications between a lawyer acting in their professional capacity and their client, or evidence of those communications, and that it relates to legal matters. She is also satisfied that the communications were made for the dominant (main) purpose of seeking or giving legal advice in the course of a legal process.
52. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived.
53. The Commissioner is not aware of any disclosure of the information under consideration to the world at large. Nor has the complainant put forward any arguments claiming that privilege has been lost or waived.
54. Therefore she finds that section 42 is engaged in respect of the withheld information.

The public interest test

55. Section 42 is a qualified exemption, 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.
56. The Commissioner accepts that, during her investigation, the complainant made her aware of recent developments:

"... which have meant that the level of public interest around the subject of my complaint has increased over the last few weeks".

57. The Commissioner's guidance¹ on the public interest test states:

¹ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

"When dealing with a complaint that information has been wrongly withheld the Commissioner will consider the situation at the time at which the authority originally dealt with the request, or the time of the authority's internal review".

58. Accordingly, in this case, the circumstances to be considered when carrying out the public interest test are those at the time at which the PCC refused the request, namely 16 March 2020.

Public interest arguments in favour of disclosing the requested information

59. Having viewed the 'whatdotheyknow' correspondence between the complainant and the Parish Council in relation to this request, the Commissioner accepts that the correspondence between the parties was limited. She also accepts that neither party addressed the public interest in the course of that correspondence.
60. As is her practise, during her investigation, the Commissioner asked the Parish Council what public interest arguments were taken into account when considering the public interest in disclosure. The Parish Council was silent on this matter.
61. Nevertheless, the Commissioner recognises that there will always be a general public interest in transparency and accountability. She also accepts that there may also be a public interest in transparency about the issue the information relates to.

Public interest arguments in favour of maintaining the exemption

62. The public interest arguments in favour of maintaining an exemption must relate specifically to that exemption. The Commissioner considers that the views put forward by the Parish Council were not relevant to the exemption cited in this case.

Balance of the public interest arguments

63. In her guidance on section 42², the Commissioner describes LPP as 'a fundamental principle of English law'.

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

64. Of relevance in this case, the Commissioner's guidance on the public interest test states:

"As a general rule there is no inherent public interest in class based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle".

65. Similarly, her guidance on section 42 states:

"The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice".

66. 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 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".

67. In balancing the opposing public interest factors under section 42 in this case, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer 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.

Conclusion

68. The Commissioner's guidance³ on section 2(2) of the FOIA states:

³ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

"...the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption".

69. The Commissioner is mindful that the public interest in the context of the FOIA means the public good, not what is of interest to the public.
70. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions. However, she must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
71. The Commissioner also recognises that it is important to take into account the significance of the actual information and what it reveals.
72. In reaching her decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. She has also had regard to the content of the withheld information.
73. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
74. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence she has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
75. She therefore concluded that the Parish Council correctly applied section 42.
76. In light of that decision, the Commissioner has not gone on to consider the other exemption cited by the Parish Council in relation to the parts of the same information.

Section 17 refusal notice

77. Public authorities have two basic duties under the FOIA: to confirm or deny whether requested information is held and to provide the requester
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with that information. If a public authority is refusing to meet either of these duties it will usually need to issue a refusal notice to the requester explaining why.

78. The Commissioner's guidance '*Refusing a request*'⁴ explains when and how to refuse a request made under the FOIA. Her guidance also states:

"If a public authority is refusing a request because it has decided that a Part II exemption applies then its refusal notice will usually need to include the following information:

- The exemption(s) on which the authority is relying, including section, subsection, and wording of the exemption concerned.*
- The reasons why the exemption applies.*

AND, where applicable

- A breakdown of the public interest factors which were taken into account.*
- The reasoning behind the authority's conclusion that the public interest lay in maintaining the exemption".*

79. In this case, the Commissioner considers that the refusal notice issued on 16 March 2020 was inadequate because it did not inform the complainant which sections of the FOIA applied or provide a breakdown of the public interest factors taken into account.
80. She also observes that it did not state whether or not the Parish Council has an internal review procedure and did not inform the complainant of his right, under section 50 of the FOIA, to bring a complaint to the Commissioner.
81. She therefore considers that the Parish Council breached section 17 of the FOIA in responding to the request.

⁴ https://ico.org.uk/media/for-organisations/documents/1211/refusing_a_request_writing_a_refusal_notice_foi.pdf

Right of appeal

82. 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

83. 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.
84. 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

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