



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2021/0037

**Heard remotely by video conference
On 1 July 2021**

Before

**JUDGE HAZEL OLIVER
SUZANNE COSGRAVE
PIETER DE WAAL**

Between

JOHN DILWORTH

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is upheld.

SUBSTITUTE DECISION NOTICE

Caerphilly Borough Council was not entitled to rely on section 42 of the Freedom of Information Act 2000 (“FOIA”) to refuse to reply to the appellant’s request for information. Caerphilly Borough Council is to provide a fresh response to the appellant by 10 November 2021 which does not rely on section 42 FOIA. The Tribunal has provided a closed annex to this decision which sets out the information it considers to be within scope of the appellant’s request and which should be disclosed unless a different exemption applies.

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The appellant appeared in person. The Information Commissioner did not attend and was not represented.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 12 January 2021 (IC-46930-D8W6, the "Decision Notice"). It concerns information sought from Caerphilly County Borough Council (the "Council") about correspondence from Van Community Council ("VCC").

3. On 10 May 2019 the appellant made a request for information under the Freedom of Information Act 2000 ("FOIA") as follows (the "Request"):

"I am making...a request for a copy of the letter or email to [named individual A], Senior Committee Services Officer, Caerphilly County Borough Council, from [named individual B], Acting Clerk/RFO of Van Community Council which informed her that he has by resolution of the Council (agenda item) been appointed the Acting Clerk/RFO of Van Community Council in an honorary capacity."

4. The Council is a Welsh Borough Council. It is responsible for a geographical area which includes a number of community councils. One of these community councils is VCC. The appellant was previously the clerk of VCC.

5. The Council held an email which fell within scope of the Request, but refused the Request under section 42 FOIA, the exemption for legal professional privilege. The Council upheld this decision on internal review on 11 September 2019. The appellant complained to the Commissioner on 16 October 2019.

6. The Commissioner decided that the Trust was entitled to rely on section 42 to withhold the requested information. Having considered public interest factors in favour of disclosing the requested information and in favour of maintaining the exemption, the Commissioner decided that the weight of public interest in maintaining the exemption outweighed the public interest in disclosure.

The Appeal and Responses

7. The appellant appealed on 2 February 2021. His overall ground of appeal is that the Commissioner was wrong to find that section 42 was engaged, based on the following points:

- a. The requested information was not legal advice on staffing matters, it related to advice on procedural matters and notification of interim clerk arrangements.
- b. If the letter contains some privileged advice, this should have been redacted and the remainder disclosed.
- c. There was no client-adviser relationship between the Council and VCC.

d. The Commissioner should have investigated further rather than accepting the Council's assertions at face value.

8. The Commissioner's response maintains her decision. This was a request for legal advice (as explained further in the closed response). The appellant had requested the entire letter, and in any event factual information could not be separated from privileged information. She had sufficient evidence to conclude there was a client-adviser relationship, based on the qualifications of the individual and the information provided by the Council about its relationship with VCC.

9. The appellant's reply maintains that there is no client-adviser relationship, and that notification of the appointment of an interim clerk is not privileged or exempt information.

10. Having heard submissions from the appellant at the hearing, the Tribunal found that it would not be possible to reach a fair decision without first obtaining further information from the Council. By Directions dated 9 July 2021 we asked the Council to answer a list of questions. The Council replied on 9 August 2021, and the appellant provided further comments on 21 August 2021. The Tribunal met to finalise its decision on 20 September 2021.

Applicable law

11. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *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.*

.....
2 Effect of the exemptions in Part II.

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(2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....
42 Legal professional privilege.

- (1) *Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

12. Legal professional privilege protects the confidentiality of legal communications. It has two parts – legal advice privilege, and litigation privilege. Legal advice privilege concerns confidential communications between lawyer and their client. It applies to communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal advice or assistance in a relevant legal context (***Three Rivers District Council v Governor and Company of the Bank of England (no 6)*** [2004]

UKHL 48). Where the dominant purpose of a communication is legal advice, the whole communication will be privileged.

13. Section 42 FOIA is subject to the public interest test, meaning if information falls within this exemption it can be withheld if, "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*" (section 2(2)). It has been accepted in numerous cases that there is a strong public interest built into legal professional privilege, based on the interest in public authorities being able to receive frank legal advice in order to assist them to make appropriate decisions.

Issues and evidence

14. The issue the Tribunal has to decide is whether the requested information is exempt from disclosure under section 42 FOIA because:

- a. it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings; and
- b. the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

15. In evidence we had:

- a. An open bundle of open documents.
- b. A closed bundle of documents containing closed submissions from the Commissioner, an unredacted version of information provided by the Council to the Commissioner during her investigation, and a copy of the disputed information.
- c. Submissions from the appellant at the hearing.
- d. The response from the Council to the Tribunal's questions (part of which is closed material) and the appellant's comments on this response.

Discussion and Conclusions

16. In accordance with section 58 FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

17. Does the disputed information consist of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings? We find that it does not. Applying the test for legal professional privilege, we find that this was not a communication between a client and their legal adviser.

18. The appellant's submissions at the hearing were that the Council was not a formal legal adviser for VCC. He had sought some informal advice from the Monitoring Officer (who was also the Head of Legal Services) when he was the clerk to VCC, and this was on behalf of VCC. He had understood that he could not rely on this advice for the purposes of insurance, he would make the advice public by reporting it to VCC, and the Council was under no obligation to provide the advice to VCC. The formal legal adviser for VCC was One Voice Wales, which is specifically funded by the Welsh Assembly to provide legal advice to Town and Community Councils. In his reply to the responses from the Council, the appellant reiterates that only

informal advice would be provided by the Council (with the exception of formal advice on the Members' Code of Conduct).

19. We asked the Council some questions in order to help our understanding of the relationship between VCC and the Council, and whether there is a relationship of client and legal adviser. The Council's response states that there is no formal client/lawyer relationship. The Council says that the Head of Legal Services "*will try to assist the clerks of the town and community councils within the county borough with queries they have*", but does not explain the basis on which this assistance is provided. The Council confirms that there is no formal agreement, charging arrangement or contractual arrangement in relation to the provision of legal advice to VCC by the Council's Head of Legal Services/Monitoring Officer. There is also no specific indemnity insurance policy in place for legal advice provided to VCC. The Council explains that there is a professional indemnity policy in place for officers providing advice to the general public/third parties, and individual cases are referred to insurers for confirmation of coverage.

20. Having considered the withheld information, the appellant's submissions and the answers to our questions from the Council, we find that there was not a relationship of client and legal adviser between VCC and the Council. We have obtained additional information from the appellant and the Council that was not available to the Commissioner when she made her decision. It is for the public authority to show that the exemption relied on is made out, and they have failed to do so. The Council asserts in its response to our questions that "*VCC are the client as they made the request to the Council i.e. the Head of Legal Services and Monitoring Officer with the dominant purpose of seeking legal advice.*" However, this is not supported by the information we have been given. This was an example of informal advice having been sought and provided. As described by Mr Dilworth, this type of advice would often be made public and was not treated as formal legal advice which was privileged. The assertion that VCC was a client of the Council's Head of Legal Services and Monitoring Officer (for purposes of the withheld information) is also inconsistent with the Council's clear and unambiguous confirmation to the Tribunal that there was no formal client-lawyer relationship between it and VCC. Trying to assist clerks with their queries is a very different activity from provision of privileged legal advice under a relationship of client and legal adviser. We also note that One Voice Wales is made available to Town and Community Councils for legal advice, and Mr Dilworth's position that he believed he could not rely on informal advice provided by the Council's Monitoring Officer/Head of Legal Services for the purposes of insurance.

21. This finding means that the Council was not entitled to rely on section 42 FOIA in order to respond to the Request as the exemption for legal professional privilege was not engaged. We have also considered briefly whether the dominant purpose of the communication was seeking or giving legal advice or assistance in a relevant legal context. This is not clear either, as the communication appears to be an informal request for general advice which is consistent with the relationship described in the Council's answers to our questions.

22. These findings are supported by the nature and content of the withheld information, in particular who the relevant email is primarily addressed to (the Head of Legal Services only being copied in), and the absence of any reference to legal privilege or formal legal advice. These factors would not, in themselves, prevent the communication from being covered by legal professional privilege. However, they support the view that this was a request for informal advice to the Council, not a request for legal advice in the context of a relationship of client and legal adviser.

23. ***Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** It is not necessary for us to consider this issue as we have found that the exemption is not engaged.

24. We therefore find that the Council was not entitled to rely on section 42 FOIA and must provide a fresh response to the appellant that does not rely on this exemption.

25. We have considered whether we could simply require the Council to disclose specific information. This is not appropriate, as the Council should be given the opportunity to consider any potential (and permissible) application of a different exemption – particularly because the Council was not joined as a party to these proceedings.

26. We have also considered whether the Council is required to disclose the full email in response to the Request, or simply the parts that refer to the information that the appellant is seeking. The Commissioner took the view that the appellant was seeking the full email. Having considered the Request, we find this unclear. The appellant asked for the letter or email which informed a senior officer of the Council that a particular individual “*has by resolution of the Council (agenda item) been appointed the Acting Clerk/RFO of Van Community Council in an honorary capacity.*” In his oral submissions to the Tribunal, the appellant stated that what he wanted was to find out if the Council was properly informed of the change of identity of the clerk as required by law – he wanted the factual/procedural information showing the date and relevant sentence/phrase. In his reply to the Council’s response, the appellant again makes it clear that he is seeking to resolve this question. His final written reply states that he is “clueless” at the end of this paper trail and resolves that the following did not transpire: “*..the letter or email to [named individual A]...from [named individual B]...which informed her that he has by resolution of the Council ...been appointed the Acting Clerk/RFO of Van Community Council in an honorary capacity.*” We find that the Request is for information relating to notification from VCC to the Council about the appointment of an Acting Clerk/RFO.

27. We have therefore prepared a Closed Annex to this decision, which sets out the information from the email that the Tribunal finds falls within scope of the Request. This is a Closed Annex which cannot be seen by the appellant, since the effect of the Tribunal’s decision is that the Council may seek to rely on a different exemption to withhold the requested information if the Council deems it permissible to do so under FOIA. If the Council does not wish to rely on a different exemption, release of this information under FOIA would satisfy the Request.

28. The Commissioner’s decision was not in accordance with the law. The appeal is upheld and we make the Substitute Decision Notice set out above.

Signed: Hazel Oliver
Judge of the First-tier Tribunal
Date: 19th October 2021

