

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 09 September 2009

Public Authority: Brighton and Hove City Council
Address: Hove Town Hall
Hove
BN3 4AH

Summary

The complainant requested information from the council regarding its decision to settle claims in relation to the phasing out of the Voucher Parking Scheme. The Council refused to disclose the information by virtue of section 42(1) of the Act. The Commissioner has investigated and concluded that the information is exempt by virtue of section 42(1) and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

The Commissioner's Role

1. 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 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following request to Brighton and Hove City Council (the council) on 25 February 2009:

"I understand that since I sued BHCC for a refund on my parking vouchers – which you eventually paid, including my legal costs and expenses – several others were refused refunds and ended up suing BHCC.

At first BHCC tried to have some of their claims struck out on the grounds that they had 'no reasonable chance of succeeding'. Subsequently BHCC has apparently agreed to pay all the claims and court costs. Why?

Has this not all been a grotesque waste of council time and money, not to mention the time and goodwill of the council taxpayers concerned? Are you aware that the council's attitude and actions in this matter has probably also resulted in stress and anxiety for these individuals? Is it not rather damaging to the council's good name and, more specifically, the reputation of its legal department?

Will you please now say whether or not BHCC will agree to pay any further claims for such vouchers others might still hold, without first going through the charade of refusing to do so and only caving in when people eventually decide to sue?"

3. The council responded on 25 March 2009 informing the complainant that his request for information about why the Council has settled certain County Court claims relating to the phasing out of the Voucher Parking Scheme and whether the council will pay further claims had been dealt with under the Act. The council confirmed that it held recorded information falling within the scope of the request but stated that this information is exempt under section 42(1) of the Act which provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained. The council stated that it had considered the public interest test but concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
4. The complainant wrote to the council on 14 April 2009 to request that the council carry out an internal review of its decision.
5. The council carried out its internal review and communicated the outcome to the complainant on 12 May 2009. The internal review found that the original decision to withhold the information under section 42(1) was correct.

The Investigation

Scope of the case

6. On 13 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The council's refusal to provide reasons behind its actions in relation to these claims prevents proper scrutiny of matters that are of public interest.

Chronology

7. The Commissioner began his investigation by writing to the council on 6 June 2009 to request further arguments and a copy of the withheld information.

8. The council responded on 16 July 2009 providing the Commissioner with a copy of the withheld information.

Findings of Fact

10. The withheld information is legal advice which relates to why the council have settled some claims made in relation to the phasing out of the Voucher Parking Scheme and whether the council will pay further claims.

Analysis

Exemptions

11. Section 42(1) provides that –

“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 (LPP) protects the confidentiality of communications between a lawyer and a client. The Information Tribunal has defined legal professional privilege in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* 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 (third) parties if such communication or exchanges come into being for the purpose of preparing for litigation.”

13. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. 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. However, litigation privilege can also cover communications with third parties created for the purposes of preparing litigation.
14. Having viewed the withheld information the Commissioner is satisfied that the relevant information is subject to litigation privilege because it is clearly legal advice about litigation in progress from a professional legal adviser within the council to another person within the council regarding certain claims and the council's intended actions. The Commissioner is therefore satisfied that section

42(1) is engaged. As the Commissioner is satisfied that section 42(1) is engaged, he has gone on to consider the public interest test below.

Public interest arguments in favour of disclosing the requested information

15. The complainant has argued that it is in the public interest that there is proper scrutiny of the reasons behind the council's actions with regards to the claims, and that this scrutiny is likely to bring the council into disrepute.
16. The Commissioner has also considered the following factors in favour of disclosing the information:
 - the assumption in the Act in favour of disclosure
 - the transparency of the public authority's actions in relation to the settling of claims relating to the phasing out of the voucher parking scheme
17. In *Pugh v the Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matters of the requested information would affect "a significant group of people".
18. Whilst the advice on why the council chose to settle some claims in relation to the phasing out of the Voucher Parking Scheme will affect some individuals in addition to the complainant, the Commissioner does not consider the number of individuals affected is significant.

Public interest arguments in favour of maintaining the exemption

19. The Commissioner recognises that there is a strong inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice is based upon a full exchange of information pertinent to the case. Eroding the principle of legal professional privilege could therefore harm the ability of parties to effectively determine their legal opinions, or to defend or seek legal restitution against other parties in accordance with their rights. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*:

“.. 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 interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear..”
20. The conclusion reached by the Commissioner and the MoD was that the public interest in favour of disclosure would have to be 'exceptional' where legal professional privilege is engaged. However the Tribunal did not require

'exceptional' factors in favour of disclosure, "...just as or more weighty than those in favour of maintaining the exemption."

21. The Council has considered the importance of ensuring that it continues to be able to receive confidential and candid advice from its legal advisors. The council has also taken into account the timing of the request with the possibility of future claims against the council in relation to the phasing out of the parking voucher scheme. The conclusion reached was that in order to fully understand and assess the legal advice for the benefit of the council and council taxpayers it needed to maintain the confidentiality of the advice.
22. The Commissioner considers that, in line with the Pugh decision, the principle of legal privilege is one that should only be overturned for compelling reasons. Whilst there is clearly public interest in understanding the council's position regarding previous and potential future claims in relation to the parking voucher scheme it is not an issue which affects large numbers of people.
23. Further, it could not be said that the passage of time is a factor which favours disclosure; the legal advice is recent and at the time of the request there was the possibility of future claims against the council.

Conclusion

24. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – particularly in this case in relation to why the council settled some County Court claims relating to the phasing out of the parking voucher scheme. Disclosure of the legal advice may therefore assist the public's understanding of why the council have settled in some cases but may pursue others. However, he does not consider the legal advice would affect a significant amount of people.
25. The Commissioner also accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court Case of *DBERR v Dermod O'Brien* who said:

"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)...The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53)
26. The Commissioner has taken into account the public interest in understanding the council's reasoning for settling certain claims in both the context of those claims and potential future claims, however due to the limited impact of this advice he considers that the public interest in disclosure is not particularly strong in this case. The Commissioner has concluded that the public interest in maintaining the

exemption outweighs the public interest in disclosing the information under section 42.

The Decision

27. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 9th day of September 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Legal Professional Privilege

Section 42(1) provides that –

“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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”