

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 February 2011

Public Authority: Wandsworth Council
Address: Town Hall
Wandsworth High Street
London
SW18 2PU

Summary

The complainant submitted a request to Wandsworth Council ('the Council') for a copy of a legal opinion obtained by the Council regarding whether it is lawful for certain events to be held in Battersea Park. The Council withheld this information under the exemption at section 42(1) of the Act, on the grounds that it was subject to legal professional privilege. The Commissioner has investigated and found that the Council has applied the exemption at section 42(1) correctly, and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Consequently, he does not require the Council to take any further action.

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.

Background

2. Battersea Park ('the Park') is a public park in the London Borough of Wandsworth. On occasion, the Council allows public and private events to be held within the Park.

The Request

3. On 20 February 2010, the complainant wrote to the Council to request a copy of "the Counsel's opinion". Due to the significant amount of previous correspondence between the complainant and the Council, it is clear that by this the complainant meant a copy of the legal opinion obtained by the Council regarding the legality of holding certain events in the Park.
4. On 16 March 2010, the Council responded to the complainant. This response stated that the requested information was exempt under section 42 of the Act as it was covered by legal professional privilege. The Council provided an explanation of the factors it had taken into account when considering the public interest in relation to the exemption.
5. On 18 June 2010, the complainant wrote to the Council to ask that it conduct an internal review of its decision to withhold the requested information.
6. On 21 July 2010, the Council provided the outcome of its internal review to the complainant. This upheld the initial decision to withhold the requested information.

The Investigation

Scope of the case

7. On 23 July 2010, the complainant contacted the Commissioner to make a valid complaint about the Council's decision to withhold the requested information.

Chronology

8. On 30 July 2010, the Commissioner wrote to the Council to inform it that a complaint had been received. The Commissioner asked that the Council provide him with a copy of the withheld information.
9. On 31 August 2010, the Council provided the Commissioner with a copy of the withheld information along with a submission explaining why it relied upon section 42 of the Act.

10. The Commissioner wrote to the complainant on 9 and 23 September and 15 November 2010 to explain that his preliminary view was that the Council had applied the exemption at section 42 correctly. The Commissioner consequently invited the complainant to withdraw his complaint. On 18 November 2010 the complainant confirmed that he wished to pursue his complaint and made a submission for the Commissioner to consider in relation to the exemption.

Analysis

Substantive Procedural Matters

Section 42

Is the exemption engaged?

11. Section 42(1) of the Act provides an exemption for information that is subject to legal professional privilege. The Commissioner must first assess whether the withheld information is subject to legal professional privilege.
12. Legal professional privilege protects the confidentiality of communications between a lawyer and client. The Information Tribunal in the case of [*Bellamy v the Information Commissioner and the DTI \(EA/2005/0023\)*](#) defined legal professional privilege 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.”
(para.9)

13. There are two types of legal professional privilege: 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.
14. Legal advice privilege applies where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and legal advisor acting in a professional

capacity, and for the sole or dominant purpose of obtaining legal advice. Communications made between an advisor and client in a relevant legal context attract privilege.

15. After reviewing the requested information, the Commissioner is satisfied that it is subject to legal advice privilege. This is because it is confidential advice provided to the Council by a legal professional regarding the legality of holding various events in the Park. Although the Commissioner considers that the requested information is subject to legal advice privilege, he also notes the Council's assertion that it would rely on the advice if it faced any legal challenge in relation to events held in the Park. The Commissioner consequently finds that the exemption at section 42 of the Act is engaged.

Public interest test

16. However, section 42 provides a qualified exemption. The Commissioner must therefore consider whether the public interest favours maintaining the exemption or disclosing the requested information. Both the Council and the complainant have advanced public interest arguments and the Commissioner has considered these below.

Factors in favour of maintaining the exemption

17. The Council argues that there is a strong inherent public interest in maintaining the confidentiality of legally privileged information so that it is able to seek frank legal advice from legal advisors in relation to its activities. This will ensure that it is able to make fully informed decisions about its activities.
18. The Council also points out that it continues to hold events in the Park. Although the legal advice was obtained in 1999, the Council continues to rely on it in order to make decisions about these events. Therefore the Council argues that the advice is still relevant and 'live'. It also states that it would rely on the advice if it faced any legal challenge about the events held in the Park. The Council considers that there is a possibility of litigation, especially given that the complainant has issued such proceedings in the past and continues to campaign about the Council's management of events held in the Park.

Factors in favour of disclosing the requested information

19. The Commissioner notes that disclosure of the requested information might enable the public to understand the basis behind the Council's decision making in relation to events held in the Park and consequently create greater transparency. Disclosure might also enable the public to

ascertain the extent to which the Council followed the legal advice received and thereby promote accountability. The complainant points out that there is public interest in resolving the matter of whether the Council's actions are lawful.

Balance of the public interest arguments

20. The Commissioner accepts that there is a public interest in ensuring that the Council is transparent in its actions and accountable for the decision making process relating to events taking place in the Park.
21. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exemption. The Council argues that it is vital that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made. The Commissioner accepts that ordering disclosure of the requested information could inhibit the Council's ability to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. In the case of [*Kitchener v Information Commissioner and Derby City Council*](#) [EA/2006/0044] the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."

22. In its summary of [*Bellamy v the Information Commissioner and the DTI*](#) [EA/2005/0023], the Information Tribunal commented that:

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

The Tribunal referred to legal professional privilege as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases.

23. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in the non disclosure of legally privileged documents. Whilst the Commissioner recognises the weight of the arguments in favour of releasing the requested information he has, on balance, decided that they are outweighed by the arguments in favour of maintaining the exception,

especially given the inherent public interest in allowing decisions to be taken on a fully informed basis. He therefore concludes that the Council correctly withheld the requested information under the exemption at section 42.

The Decision

24. The Commissioner finds that Wandsworth Council has complied with the provisions of the Freedom of Information Act in relation to the complainant's request. In particular he finds that the Council applied the exemption at section 42 to the withheld information correctly.

Steps Required

25. The Commissioner does not require the Council to take any further action.

Right of Appeal

26. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 21st day of February 2011

Signed

**Andrew White
Group Manager – Complaints Resolution**

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

Legal Annex

Section 1(1) provides 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."

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."