

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2012

Public Authority: Forest Heath District Council
Address: District Offices
Mildenhall
College Heath Road
Suffolk
IP28 7EY

Decision (including any steps ordered)

1. The complainant had requested the legal advice from Forest Heath District Council (the council) that had been provided in respect of the report and the interpretation of the standards committee assessment and review procedure, received by the committee on 7 March 2011.
2. The Commissioner's decision is that the council correctly applied section 42(1) – legal professional privilege - to the requested information and requires no further steps to be taken.
3. However, the council breached section 17(3) by taking more than 20 working days after the refusal notice was issued to provide its public interest arguments for maintaining the exemption.

Request and response

4. On 12 April 2011, the complainant wrote to the council and requested information in the following terms:

"Will you please release under the Freedom of Information Act the report and the interpretation of the Standards Committee Assessment and Review Procedures which was received by the Committee on 7 March 2011."

5. The council provided a response to the complainant on 15 April 2011 in which it refused to disclose the information he requested on the basis of the exemption contained in section 42 – legal professional privilege.
6. The complainant requested an internal review of the council's decision on 3 May 2011.
7. Following an internal review on 1 June 2011, the council wrote to him with the details of the review it had carried out. The council upheld the application of section 42.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He outlined his arguments that the information should have been disclosed to him in the following manner:
 - He could not understand why he was unable to see legal advice that had been used to decide a matter relating to him.
 - That the council had not provided any public interest arguments as it was obliged to do.
9. The Commissioner therefore considers that the scope of this case is concerned with the question of whether legal professional privilege applies to the requested information.
10. On 21 November 2011, the council provided its arguments to the Commissioner.
11. The Commissioner wrote to the complainant on 24 November 2011 outlining the reasons why he accepted the council's arguments in applying section 42(1). He also explained that he had asked the council to release the opening section of the withheld information because it merely provided a contextual background that the Commissioner did not accept was subject to legal professional privilege.
12. On 29 November 2011, the council copied the Commissioner into the release of the background section (see previous paragraph) which it agreed was not subject to legal professional privilege.
13. The complainant wrote to the Commissioner on 6 December 2011 to explain that he did not accept the Commissioner's view. He presented the following arguments:

- That the individual who gave the advice was not a monitoring officer from an authority outside Suffolk, as was suggested by the standards committee.
- That he had not been provided with the council's public interest arguments. These were subsequently provided to him on 26 January 2012.

Reasons for decision

Section 42(1)

14. Information is exempt from disclosure by virtue of the exemption at section 42(1) if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
15. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Tribunal as
*"... a set of rules or principles which are designed to protect the confidentiality 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."*¹
16. There are two types of legal professional privilege: litigation privilege and 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. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
17. Firstly, the Commissioner does not propose to consider whether the legal advice was sought from a monitoring officer outside Suffolk as he considers this is to be immaterial, as long as the criteria for advice privilege have been met.

¹ Bellamy v the Information Commissioner and the DTI (EA/2005/0023)

18. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. The requested information is a legal opinion provided to the council by a professional legal adviser acting in his professional capacity. The communication was also made for the sole or dominant purpose of obtaining legal advice regarding a complaint made by the complainant in this decision notice about an alleged breach of the code of conduct by a named councillor.
19. The Commissioner consequently finds that the legal professional privilege exemption is engaged.
20. This exemption is a qualified exemption. This means that where the exemption is engaged, a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

21. The council argued that the release of the information might aid understanding of the decision-making process of the council's standards committee. It also acknowledged the fact that the FOIA favoured transparency.
22. The complainant provided his view that the FOIA favoured disclosure and transparency in public life.

Public interest arguments in favour of maintaining the exemption

23. The council maintained that there is a general public interest principle in legal professional privilege being preserved. It is possible that the actions of the standards committee and its decision-making might be subject to litigation and that the advice given be utilised. The council further argued that the complainant had been made aware of the outcome of its deliberations and that the complainant's interest in seeing the full legal advice could be seen as mere curiosity.
24. The Commissioner recognises that there is a strong and established interest in allowing clients to seek full and frank advice from their legal advisers, in confidence. A disclosure of that advice could potentially undermine the client's position in any legal dispute which arose. The possibility that this may occur might prevent the client being able to seek full and frank advice in the first instance. This could lead to a more guarded approach to seeking advice and the provision of the advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or his ability to make fully informed and robust legal decisions.

Balance of the public interest arguments

25. Legal professional privilege is rarely overturned because of the tradition that communications between a lawyer and a client should not be disclosed. This concept underpins our legal system. Despite this, legal professional privilege is not an absolute exemption. The Commissioner considers that, if legal professional privilege is overturned, it would have to be for reasons of at least equal weight.
26. The Commissioner considers that none of the factors that favour the FOIA's presumption in favour of disclosure are present in this instance. These factors are:
- the involvement of a large amount of public money;
 - that a large number of people are affected;
 - a lack of transparency in the council's actions.
27. Conversely, factors in favour of maintaining the exemption are present. The legal advice was sought only 2 months before the request for information was made. For the same reason, the advice given could be considered a 'live' issue which might be the subject of legal action. The Commissioner has also taken into account the fact that there is no reason to suppose that the legal advice sought has been misrepresented.
28. The Commissioner considers that there is a very strong public interest in the council being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent that legal advice is sought which would not be in the public interest. He therefore concludes that the council correctly withheld the requested information under the exemption at section 42(1).

Section 17(3)

29. The council failed to provide its public interest arguments as to why the public interest in maintaining the exemption outweighed the public interest in disclosing the requested information within a reasonable time. By not doing so, the council breached section 17(3). However, as the public interest arguments were provided after the Commissioner began his investigation, there are no further steps required.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

Andrew White
Group Manager
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Wycliffe House
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