

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 March 2012

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

#### Decision (including any steps ordered)

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1. The complainant has requested all documents relating to the validity of a VAT clause within a lease. The Commissioner's decision is that Wandsworth Council has correctly applied the exemption for legal professional privilege and the exemption where the cost of compliance exceeds the appropriate limit. However, the Commissioner found that Wandsworth Council took too long to respond to the request.

#### Request and response

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2. On 30 August 2011, the complainant wrote to Wandsworth Council ('the council') and requested information in the following terms:  

"...please now provide copies of all documents and correspondence both internal and external relating to the validity of the VAT clause. You need not provide copies of correspondence with me."
3. After intervention from the Information Commissioner, the council responded on 14 October 2011 stating that the information is exempt under section 42 of the FOIA as it is legal opinion and advice. It stated that legal professional privilege is intended to protect confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice. It further stated that the public interest test has been considered and in this case the public interest in maintaining the exemption outweighs the public interest in disclosure.

4. Following an internal review request on 18 October 2011, and again after intervention from the Information Commissioner, the council wrote to the complainant on 12 December 2011. It upheld the decision to apply the exemption at section 42 for legal professional privilege and provided details as to the public interest test. It also stated that the litigation privilege element of the exemption applies due to the complainants frequent allegations against council officers. It further stated that, on reviewing the information held in relation to the complaints made to the Local Government Ombudsman ('LGO'), the exemption at section 42 does not apply to all of this information and it therefore disclosed such documents. In addition, the council applied the exemption at section 12 FOIA where the cost of compliance exceeds the appropriate limit and notified the complainant that, owing to the tone and nature of the correspondence, further requests will be considered in accordance with the vexatious and repeated exemption at section 14 FOIA.

### **Scope of the case**

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5. The complainant contacted the Commissioner to complain about the way his request for information had been handled and requested that the Commissioner overrule the council's decision. He stated that he believed the council had made a mistake in relation to the validity of the VAT clause and are conspiring to conceal that mistake. He also stated that the public interest arguments don't relate to the context of the case, that the council have waived legal professional privilege by disclosing some information and provided reasons why litigation privilege and the vexatious exclusion do not apply.
6. The complainant also stated that the information requested might acknowledge a number of trading standards offences, caused by using a business lease in a consumer transaction, and that the council's reluctant to disclose the information may be because the information has not been disclosed to the LGO and its disclosure now would prove contempt of court under s.29(8) of the Local Government Act 1974.
7. The Commissioner has considered whether the exemptions at sections 12 and 42 of the FOIA apply in this case.
8. The Commissioner has not considered whether the vexatious exclusion applies as the council has confirmed that it did not apply the section 14 provisions in this case.
9. The Commissioner also has not considered whether any trading standards offences or contempt of court under s.29(8) of the Local

Government Act 1974 have been committed as these are not within his jurisdiction.

## Reasons for decision

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### Section 42

10. This exemption 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.
11. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege and litigation privilege. In this case, the council primarily sought to rely on advice privilege.
12. Advice privilege will apply where no litigation is in progress or being contemplated. In these 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.
13. In response to the Commissioner's enquiries, the council have confirmed that:
  - the information is correspondence between a legal professional, the Deputy Borough Solicitor, and council officers;
  - the information was created for the purpose of advising the council on the complainants allegations of illegality and criminal offences, namely that the council has breached the Consumer Protection from Unfair Trading Regulations 2008;
  - the information includes discussions of the council's response to the allegations and advice relating to the interpretation and meaning of the VAT clause;
  - the information has not been disclosed to any individuals outside the council nor has it been provided to any member of staff other than those dealing with a complaint or request for information from the complainant therefore the council is satisfied that the confidentiality of the advice is retained.

14. The Commissioner has reviewed the withheld information. Based on that review and the council's submission detailed in paragraph 13 the Commissioner is satisfied that the withheld information is subject to legal professional privilege.
15. In the relation to the complainants assertion that the council have lost legal professional privilege by disclosing some information, the Commissioner does not consider that disclosure of documents within the scope of the request but to which legal professional privilege does not apply, does not constitute loss of legal professional privilege.
16. Furthermore, the council have confirmed that the information which has been disclosed to the complainant was included in the documents submitted to the LGO as part of its complaint investigation but none of the withheld information has been disclosed to the LGO. The supporting evidence provided to the LGO does not contain any information within the scope of the request.
17. Having decided that legal advice privilege applies in this case, the Commissioner has not gone on to consider whether litigation advice privilege also applies.

### **The public interest test**

18. As section 42 is a qualified exemption, the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of disclosing the requested information**

19. The council submitted that one argument in favour of disclosing the withheld information is that it would assist in creating accountability and transparency in the actions and decisions being taken by the council and some weight must be attached to this in support of disclosure.
20. The Commissioner agrees with the council's submission in favour of disclosing the information as its release would promote accountability and transparency and allow the public to better understand the basis of the council's decision and its legal justification for a particular course of action.
21. The complainant has quoted ICO guidance which states that there may be a private interest in withholding information which would reveal incompetence on the part of, or corruption within, the public authority or which would simply cause embarrassment to the authority, however, the public interest will favour accountability and good administration and it

is this interest that must be weighed against the public interest in not disclosing the information. He is of the opinion that this describes this case exactly.

22. He has further stated that disclosure of the requested information is in the public interest because of his suspicion of misrepresentation of the status of the VAT clause by the council.
23. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO [EA/2007/0092]*, which considered the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

'...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained...' (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

24. Having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.

### **Public interest arguments in favour of maintaining the exemption**

25. The council stated that the inherent public interest in maintaining the principle behind legal professional privilege, of safeguarding openness in communications between client and lawyer to ensure access to full and frank legal advice, applies to this information.
26. It further explained that despite the council making it clear that it considers there to be no illegality or wrongdoing in this matter, the complainant does not consider the matter closed. The complainant has threatened legal action against the council and made two complaints to the LGO. For this reason the council considers the matter to which the withheld information relates to still be live. It stated that in the event that the complainant commenced legal action against the council, the legal advice would be relied upon in support of the council's case.

27. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
28. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:
- "Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".
29. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
30. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:
- "...there is a strong element of public interest inbuilt into 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 case..."
31. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

## **Balance of the public interest arguments**

32. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
33. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
34. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.

## **Section 12**

35. Section 12 of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit which, in this case, is £450 as laid out in section 3(2) of the fees regulations.
36. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would exceed the appropriate limit, can only take into account the costs it reasonably expects to incur in:
  - determining whether it holds the information;
  - locating the information, or documents containing it;
  - retrieving the information, or documents containing it; and
  - extracting the information from any documents containing it.

37. As the costs are calculated at £25 per person per hour for all authorities regardless of the actual cost or rate of pay, the limit will be exceeded if the above activities exceed 18 hours.
38. The council stated that it had carried out searches and identified 46 council officers and councillors who have been included in correspondence relating to the complaints about the land adjacent to [the complainant's address]. It stated that two key officers have been involved in every stage of the complaints and that the vast majority of correspondence that falls within the scope of the request would have included, or been copies to, these two officers. It then stated that to further process the request and to identify and extract the detailed information relating to the validity of the VAT clause that is held by the remaining 44 officers would take in excess of 18 hours and therefore applied the exemption at section 12 FOIA.
39. Although the council expressed its view that to further process the request would exceed the cost limit, it did not provide a breakdown or details to support this until requested to do so by the Commissioner.
40. The council provided the Commissioner with a description of the process of identifying the information held by the council in response to the request. This included the search terms used and copies of the email index spreadsheets created and used throughout the information identification process. The council also provided the Commissioner with internal emails updating the council's Corporate Information Management Team of the progress in identifying the information and details of the actual time spent which was 14.5 hours on identifying and extracting emails and 4 hours searching through manual files held by the two key officers.
41. The council did not carry out a sampling exercise on the information held by the remaining 44 officers that have been included in correspondence relating to the proposed letting that was subject to the VAT clause. It explained that as the appropriate limit had been exceeded in identifying the information held by the two key officers and on the LGO file, it felt it was not obliged to carry out a sampling exercise of the remaining information.
42. In correspondence to the Commissioner, after the initial response and internal review, the complainant stated that he was surprised the two key officers were so closely involved and is '...much more interested in the internal correspondence with people with no vested interest in concealing the council's silly mistake'.
43. The council explained to the Commissioner that in initial meetings regarding the scope of the request, the council's proposed course of



action was to identify the information held by the two key officers and in the LGO complaint file and then to provide the complainant with a list of the 44 remaining officers and councillors to allow him to determine whose records he would most like information to be provided from. The council initially considered this course of action in line with the duty under section 16 of FOIA to provide advice and assistance. However, as the information search actually undertaken in relation to the two key officers and the LGO complaint file took in excess of 18 hours, the council considered that providing the further list of officers and councillors was no longer appropriate.

44. Although the council did not provide a breakdown of costs it would incur in locating further information, or conduct a sampling exercise, the Commissioner has examined the evidence provided in relation to the searches actually undertaken and considers the claimed time of 18.5 hours to be reasonable. The Commissioner further considers that to carry out a similar exercise on the remaining 44 officers would clearly exceed the appropriate limit.
45. The Commissioner finds that the council correctly refused the complainant's request on the grounds of cost for compliance under section 12(1) of FOIA.
46. Section 16 of the FOIA states that it shall be the duty of a public authority to provide advice and assistance to requesters, so far as is reasonable, and where a public authority conforms with the code of practice under section 45 in relation to the provision of advice and assistance, it will be taken to comply with the duty imposed.
47. Where a public authority cites s.12, paragraph 14 of the section 45 code of practice indicates that the authority should consider providing an indication of what information could be provided within the costs limit. This allows the applicant to choose how to refine the request to successfully obtain a more limited piece or section of the requested information.
48. In this case, as the search actually undertaken was in excess of the appropriate limit, and information was provided where an exemption did not apply, the Commissioner considers that the council has complied with the section 16 duty to provide advice and assistance.

### **Procedural matters**

49. The Commissioner considers that the council took too long to respond as the request was made on 30 August 2011 and responded to on 14 October 2011, significantly outside of the 20 working days statutory time limit contained at section 10(1) FOIA.

## Other matters

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### Internal review

50. Paragraph 39 of the Code of Practice issued under section 45 of the Act (the 'Code') recommends that complaints procedures should:

"...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

51. Paragraph 40 of the Code states that in carrying out reviews:

"The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

52. As he has made clear in his published guidance on internal reviews, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the Commissioner notes that complainant first requested an internal review on 18 October 2012 but the council did not provide an internal review response until 12 December 2012, nearly eight weeks later. The council should ensure that internal reviews are carried out promptly in future.

## Right of appeal

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53. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

54. 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.
55. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**