

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2012

Public Authority: London Borough of Lewisham
Address: Town Hall
Catford
London
SE6 4RU

Decision

1. The complainant requested copies of instructions and legal opinions relating to a proposal to hold a musical event on Blackheath Common and information relating to the circumstances in which the decision to obtain a second opinion was taken. The London Borough of Lewisham (the "council") confirmed that it did not hold any information relating to the circumstances in which the decision to seek a second opinion was taken. It refused to provide the requested instructions and opinions because it considered that these were subject to legal professional privilege and were exempt under section 42(1) of the FOIA. The Commissioner's decision is that the council has correctly applied section 42(1) of the FOIA to withhold the legal instructions and advice identified in the request. In providing information relating to the circumstances in which a second opinion was sought outside the statutory 20 working days, the council breached section 10(1) of the FOIA. The Commissioner does not require the public authority to take any steps.

Background

2. The council has statutory responsibility for part of Blackheath Common ("Blackheath"). During 2010, the council granted Nimby Events Ltd ("NIMBY") a premises licence under the Licensing Act 2003 for the sale of alcohol and the holding of a music festival (called "OnBlackheath") on Blackheath.

3. A local interest group, The Blackheath Society, appealed the decision to award the licence but after a court hearing Magistrates dismissed the appeal.
4. The legal advice referred to in the request relates to the council's consideration of whether, in order for OnBlackheath to go ahead, ministerial consent would be required or whether a decision could be taken by the relevant senior officer from the Council.¹

Request and response

5. On 29 January 2011, the complainant wrote to the council and, , requested the following information:

"(with reference to the question of the need for Ministerial Consent for the use of Blackheath for a music event)....copies of the instructions and opinions of both counsel, together with all internal memoranda, notes, meetings, etc., relating to the circumstances in which the decision to obtain a second opinion was taken on such terms as you may reasonably consider to be appropriate."

6. The council responded on 19 October 2011 and confirmed that it did not hold internal memoranda or notes of meetings relating to the circumstances in which a second opinion was taken. It also confirmed that it was refusing to provide the instructions and opinions of counsel because it considered that the information was subject to legal professional privilege and exempt under section 42(1) of the FOIA.
7. Being dissatisfied with the response, the complainant wrote to the council on 10 November 2011 asking it to review its handling of the request.
8. On 28 November 2011 the council issued its internal review response. This confirmed that no recorded information relating to the decision to seek a second opinion was held, stating that the matter had been discussed verbally. The council did not review its decision to withhold information under section 42(1) of the FOIA but provided the

¹ <http://www.lewisham.gov.uk/getinvolved/localassemblies/Blackheath-Assembly/Documents/BlackheathAssembly31March2011.doc>

complainant with its original considerations in relation to the public interest in disclosing the information or maintaining the exemption.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner agreed with the complainant that his investigation should address the following matters:
 - (i) Whether the council correctly confirmed that it does not hold information relating to the decision to seek a second opinion.
 - (ii) Whether the council has correctly applied section 42(1) to the withheld information

Reasons for decision

Section 1 - duty to provide requested information

"...all internal memoranda, notes, meetings, etc., relating to the circumstances in which the decision to obtain a second opinion was taken..."

11. Section 1(1) of the FOIA requires public authorities to confirm or deny whether information specified in a request is held and, where it is, to provide it to a requester.
12. In their complaint to the Commissioner, the complainant has alleged that the council has failed to identify all the information it holds which is covered by the element of the request identified above.
13. During the course of the Commissioner's investigation the council found an email which fell within the scope of this request and provided this to the complainant. The Commissioner has gone on to consider whether any further relevant information is held.
14. In their request for internal review the complainant asked the council to recheck whether any relevant information was held. They stated that it seemed unusual that there was no record of the decision to take this step.

15. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time a request is received, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities"².
16. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information *is* held, including whether it is inherently unlikely that the information so far located represents the total information held.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

17. The council explained that all the relevant departments were contacted and searches were carried out by each department. Members of staff provided email or verbal confirmation that no information was held. The scope of the search comprised the following departments: Licensing, SAG, Legal, Executive Directors, Greenscene and Events.

If the information was held would it be held as manual or electronic records?

18. The council explained that it has implemented SharePoint as its main repository for information produced, collated and processed within the authority. Along with legacy network shares and Outlook, the council confirmed that it was confident that any information relevant to the request would be held electronically.

If searches included electronic data, what search terms were used?

19. The council confirmed that searches would have involved electronic data and included searches for: "NIMBY", "Blackheath", etc. Searches were conducted on SharePoint, Outlook, Network Drives and local key systems.

² This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072.

Was any relevant, recorded information ever deleted or destroyed?

20. The council confirmed that this was a possibility. They explained that a former member of staff might have had emails relating to the matter although, equally, they may have addressed the issues verbally.

If recorded information was held but is no longer held, when did the council cease to retain this information?

21. The council explained that (following paragraph 23) there is no evidence that relevant information was ever held and, therefore, there is no record of the date of deletion.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

22. The council explained that, if the information was deemed to be a record, it would have been held in line with the guidance it follows from the Information and Records Management Society and the Local Government Classification Scheme. Any ephemeral information which is not classed as a record can be deleted by a department or individual at any time. The council confirmed that it has adopted a retention schedule and it is working towards its full implementation.

If there is a business purpose for which the requested information should be held? If so, what is that purpose?

23. The council confirmed that there is no business purpose for retaining the information.

Are there any statutory requirements upon the council to retain the requested information?

24. The council confirmed that there are no statutory requirements for it to retain the relevant information.

Conclusion

25. Having considered the council's explanations, the Commissioner accepts that, should any relevant information have been held by the council, it is likely that this would constitute 'ephemeral' information, as defined by the council's records management working practices. As such, it is not information which would have been identified for retention as part of the corporate record.

26. In considering the likelihood of further relevant information being held, the Commissioner has balanced the council's records management explanations with the fact that some relevant information was found to be held during the Commissioner's investigation.
27. The locating of information or additional information during the course of the Commissioner's investigation is not uncommon and does not necessarily lead to the conclusions that initial searches were unreasonable or that further information is likely to be held.
28. The Commissioner accepts that the seeking of legal advice, particularly in this specific context, is a significant step for a public authority to take. Whilst public authorities would, for audit or for the purposes of documenting decision making, be expected to keep adequate records, it is for authorities to decide what records are necessary for these or other purposes³.
29. As it is likely that the small quantity of relevant information held by the council is the result of a localised decision or oversight rather than a strategy endorsed by records management practice, the Commissioner has concluded that, on the balance of probabilities, no further relevant information is held by the council. However, in providing the information outside the statutory time limit, the Commissioner finds that the council has breached section 10(1) of the FOIA.

Section 42(1) – Legal Professional Privilege

"....copies of the instructions and opinions of both counsel..."

30. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
31. The principle of legal professional privilege (LPP) is based on the need to protect a client's confidence that any communication with their legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is

³ The code of practice issued under section 46 of the FOIA, provides public authorities with guidance on good practice in records management:
<http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

underway or anticipated). In this case, in relation to the request for copies of the instructions and opinions of counsel, the council sought to rely on advice privilege.

32. Having inspected the withheld information to which the council has applied the exemption, the Commissioner is satisfied that this consists of communications made by or to qualified solicitors for the dominant purpose of obtaining or giving legal advice. The information, therefore, falls within the scope of the exemption. However, prior to determining whether the exemption is engaged, the Commissioner has considered whether the advice still attracted privilege at the time the request was received.
33. The complainant directed the Commissioner's attention to an email between a member of the council's legal department and a Councillor. This email summarises the content of the 2 legal opinions and the complainant has argued that this sharing of the content of the advice has resulted in the information losing the quality of confidence. The complainant considers that this disclosure has resulted in the information no longer being legally privileged.
34. When considering whether a previous disclosure of legal advice means that the advice can no longer attract LPP the Commissioner considers that the sole consideration under section 42(1) is whether the information is still confidential from the world at large.
35. When considering the impact of any previous disclosure the Commissioner considers that the only relevant disclosures would be those into the public domain or disclosures that have been made without any restrictions being placed on the information's further use so that it is capable of entering the public domain. When such disclosures are made the original holder/owner of the legal advice can no longer expect it to remain confidential.
36. A restricted disclosure would consist in the disclosure of information to a limited audience where restrictions are placed on the further use of the information. Such disclosures will not impact on whether the information remains confidential from the world at large and therefore will not affect whether the information can continue to attract LPP.
37. In this instance, the council has confirmed that the legal advice was obtained for the council and the information has not been shared with anyone outside the council. The councillor to whom the summaries (and copies of the advice in question) were provided is a member of the council and not a third party and the information was provided in confidence and on the basis that it would not be disclosed more widely.

38. In reaching a determination, the Commissioner has referred to his awareness guidance which states that, in such scenarios:

"LPP can be waived inadvertently, and even accidental disclosure will usually result in a loss of LPP. No intention to waive LPP is required."

"A mere reference to, or a brief summary of, a document will not amount to waiver. However, if the substantial contents of a document have been disclosed and are being relied on, then there will have been waiver of the privilege within the document."⁴

39. The Commissioner accepts that, in this instance, the disclosure of the advice and the related summary was restricted and did not, in itself, result in privilege being lost. In addition, although the complainant has had sight of the summary, the Commissioner does not consider that the summary discloses the substantial content of the legal advice. As there is no evidence to indicate that the information has been shared to such an extent that it would no longer be considered to be confidential, the Commissioner has, therefore, concluded that the exemption in section 42(1) was correctly engaged.
40. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

Public interest arguments in favour of disclosing the requested information

41. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
42. The complainant has argued that it was generally known before the determination of the NIMBY licensing appeal that the council had initially been advised that ministerial consent was required and it was only subsequently learnt that it had received fresh advice to the contrary. The perception that the council had strayed from normal practice in obtaining a second opinion and the importance of ensuring that the

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/LEGAL_PROFESSIONAL_PRIVILEGE.ashx

correct advice is applied to an issue of local importance were also raised by the complainant as public interest factors - specific instances of the general principles of accountability and transparency, in support of disclosure.

43. In this case, the Commissioner appreciates that disclosure of the legal advice would help the public to understand more about the way in which the council took the decisions that it did in this particular case.

Public interest arguments in favour of maintaining the exemption

44. 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".

45. It is very important that public authorities should be able to consult with 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 council has confirmed that it considers disclosure would inhibit its ability to freely seek legal advice/second opinions and to have free and frank exchanges of views with its legal advisors. The Commissioner's guidance 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 argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".⁵

46. 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. The council has argued that there is a strong possibility of legal challenge to its decision not to obtain ministerial consent in relation to the use of Blackheath. The advice is, therefore,

⁵ Ibid.

still "live" and disclosure would prejudice the council's position in any future action. The council has also argued that the correct route to test its accountability for its decision making is, in this instance, via the courts.

47. 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.
48. 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

49. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in the council's decision making processes, particularly in relation to an issue which affects local residents. The perception that the council departed from normal practice in seeking a second legal opinion might prompt public concerns about the adequacy of the decision making process. The public interest in ensuring the proper practice was observed would be, arguably, served by disclosure of the legal instructions and advice.
50. The Commissioner does however also consider 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. This in turn may have a negative impact upon the quality of decisions made by the council, which would not be in the public interest.
51. The Commissioner also considers that there is a strong public interest in not disclosing legal advice which might prompt or assist litigation. The council has confirmed that the issues to which the advice relates are still "live". The fact that the related decision to grant NIMBY a licence to hold a music event was subject to an appeal by the Blackheath Society provides evidence of the precedent for and the degree of opposition to the council's decision⁶. The OnBlackheath music festival is still yet to

⁶ See, for example: <http://www.lewisham-today.co.uk/news.cfm?id=28450>

take place so there is a remaining possibility of further objections being raised.

52. Having inspected the information, the Commissioner can see no obvious sign of unlawful activity, evidence that the council has misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. Whilst he accepts there is a public interest in authorities being held accountable for decisions which impact on a number of people and involve public expenditure he considers that, in this instance, these do not outweigh the public interest in maintaining LPP and other remedies are available for testing the council's actions in this case.
53. The Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure and upholds the council's use of section 42(1) of the FOIA to refuse the information.

Other matters

54. Although they do not form part of this decision notice, the Commissioner wishes to note the following matters of concern.

Internal Review

55. The code of practice issued under section 45 of the FOIA (the "code") recommends that public authorities should provide a procedure – referred to as an "internal review", for dealing with complaints about the handling of requests. Paragraph 40 of the code advises that, in conducting an internal review, public authorities should:

"... undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint"⁷.

56. The Commissioner notes that, in relation to its decision to refuse the request, the council's internal review response simply provided a copy of
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⁷ The code is available online here:

<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/foi/reference/impreg/codepafunc.htm>

the public interest arguments which were considered at the time the request was initially received.

57. The Commissioner considers that the internal review did not demonstrate that the council had undertaken a full re-evaluation of the case. He directs the council to the code and expects that its future handling of requests and internal reviews will conform to the recommendations of the code.

Right of appeal

58. 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

59. 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.
60. 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

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