

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2012

Public Authority: London Borough of Redbridge
Address: Town Hall
128-142 High Road
Ilford
Essex
IG1 1DD

Decision (including any steps ordered)

1. The complainant requested information relating to the way in which the London Borough of Redbridge ("the council") handled a previous information request. The council initially said that the request was vexatious under section 14(1) of the Freedom of Information Act 2000 ("the FOIA"). However, the council subsequently complied with the request following a separate decision notice issued by the Commissioner. The council withheld some information on the basis that it was exempt under section 42(1) of the FOIA, the exemption relating to legal professional privilege. The complainant asked the Commissioner to make a decision on whether the council breached the FOIA by its initial reliance on section 14(1), whether it had incorrectly relied on section 42(1) and whether the council had identified all the relevant information that it held. The Commissioner's decision is that the council correctly applied section 42(1) to some of the information. However, some information was also incorrectly withheld using this exemption and the Commissioner has ordered the disclosure of that information in this notice. The Commissioner also found that the council did hold more information beyond that it had initially identified and this information was informally disclosed during the investigation. The Commissioner decided that other than this information, on the balance of probabilities, there was no other information that had not already been provided to the complainant. The Commissioner found breaches of section 1(1) and 10(1) of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose to the complainant the information that the Commissioner has identified was not exempt under section 42(1) of the FOIA. For clarity, that information is as follows:

All correspondence that was not specifically sent to (this includes being copied into a specific email) or by, one of the qualified solicitors named by the council in its letter to the Commissioner dated 13 April 2012.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 12 July 2010, the complainant requested information from the council in the following terms, quoting the reference number for a previous information request:

"I should like to request all information contained in the Council's records in relation to the above reference number. This should be information held in paper records and by electronic methods – internal and external information".

5. The council refused the request on the basis that it considered that it was vexatious. The Commissioner issued a decision notice on 17 November 2011 (reference FS50350859) finding that the request was not vexatious. He ordered the council to respond.
6. The council responded on 29 December 2011. It said that it had enclosed the information requested however it highlighted that it had redacted some information because it considered that it was exempt under section 40(2) and section 42(1) of the FOIA.
7. The complainant requested an internal review on 5 January 2012.
8. The council replied on 13 January 2012. The council said that it did not wish to undertake a further internal review.

Scope of the case

9. The complainant specifically asked the Commissioner to make a formal finding in relation to sections of the FOIA that the council had breached

- by its initial decision to rely on section 14(1). Although this issue was considered in a separate decision notice issued by the Commissioner, no formal findings in relation to specific breaches of the FOIA were made.
10. The complainant also asked the Commissioner to consider whether the council had correctly withheld the information using the exemption under section 42(1). For clarity, the complainant did not wish to pursue the information being withheld using section 40(2). That information was presented to the Commissioner nonetheless in the withheld bundle provided by the council. For the avoidance of any doubt, the information withheld using section 40(2) has been scoped out the Commissioner's investigation and nothing in this notice relates to that information.
 11. The complainant also alleged that she had not received all of the information held by the council that could have been disclosed aside from that withheld under section 42(1). When the Commissioner questioned the council about this, it identified information that it should have disclosed when it complied with the Commissioner's initial decision notice and it provided that information to the complainant. The complainant continued to allege that further information was held although this allegation primarily related to correspondence she had already obtained through making a separate information request to the Information Commissioner's Office. As this correspondence was already in the complainant's possession, the Commissioner has scoped that issue out of his investigation. However, as the complainant continued to express her lack of trust that the council had identified all the information relevant to her request, the Commissioner has made a formal finding on the balance of probabilities in this notice.

Reasons for decision

Section 1(1) – General right of access

12. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. 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".¹

14. Following the complainant's allegation that some information had not been provided (apart from that to which the exemption under section 42(1) had been applied), the council accepted that this was the case and it disclosed that information to the complainant. As indicated in the scoping section of this notice, the council also identified that it held correspondence that had already been provided to the complainant as a result of a separate request for information to the ICO. The Commissioner considered whether there was any more information that ought to have been identified.
15. The council confirmed to the Commissioner that it had, in response to the new complaint, conducted further thorough searches of the relevant information that was held. As evidence of the thoroughness of this search, the council was able to provide the additional information that it located to the complainant. It said that it had spent a significant amount of time considering the request and had consulted all the officers involved and searches had been conducted of emails and relevant folders. It confirmed that to its knowledge, no relevant information had been deleted, destroyed or mislaid.
16. Having considered the above, the Commissioner considered that on the balance of probabilities, no further relevant information was held.

Section 42(1) – Legal Professional Privilege

17. 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.
18. 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 (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, the council sought to rely on both, although it said that all of the withheld information was covered

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

by legal advice privilege and only some of it was covered by litigation privilege as well.

19. The Commissioner inspected the withheld information provided to him by the council. It consisted of one bundle to which the council had applied the exemption to all of the information and a separate bundle where the council had withheld only parts of the information. The Commissioner agrees with the council that the majority of the withheld correspondence is covered by legal advice privilege. The council confirmed to the Commissioner the names of the qualified solicitors involved and the Commissioner was satisfied that as part of these communications, the solicitors were engaged in a process of giving legal advice in a relevant legal context (that being in this case how to deal with the complainant's request for information).
20. The Commissioner did not find that it was necessary to consider litigation privilege as well as he was satisfied that the information to which both branches of privilege had been applied was covered by legal advice privilege.
21. However, the Commissioner considered that there were a number of items that were not privileged. The bundle provided contained communications that were not sent to (including being copied into specific emails) or by the named qualified solicitors. Despite that point being raised directly with the council, the council made no attempt to address it when it responded to the Commissioner. The council also attempted to argue that a named staff member should be regarded in the same way as a qualified legal advisor, despite apparently having no appropriate legal qualifications, because he was working under the supervision of a lawyer. The council did not provide sufficient justification for taking that position so it has not therefore been accepted by the Commissioner.
22. In relation to the information that was privileged, the Commissioner was also satisfied that there was no evidence to indicate that the information had been shared to such an extent that it would no longer be considered to be confidential.

Public interest arguments in favour of disclosing the requested information

23. 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.

24. 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

25. 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".

26. 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 argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

27. 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.

28. 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..."

29. 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

30. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. 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 authority's right to consult with its lawyers in confidence.
31. The Commissioner would observe 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 obvious signs that these factors were present in this case.
32. The Commissioner was also particularly struck by the lack of wider public interest in disclosure in this case. The information relates to the handing of a request for information that was the subject of an appeal to the Commissioner. There are mechanisms in place for the scrutiny of the way in which a request was handled (a complaint to the Commissioner and perhaps to the First-Tier Tribunal (Information Rights)). The complainant has exercised her right to pursue those avenues. The Commissioner also notes that the complainant has already been provided with a significant amount of information concerning the handling of the request by the authority and the Commissioner. At this stage, there is a limited amount of public interest in further disclosure.

Procedural issues

33. Section 1(1) and 10(1) provide that when a request for information is received, if the information cannot be withheld legitimately, it must be provided within 20 working days. The council did not do so in relation to all of the information falling within the scope of the request and it therefore breached these provisions.

Right of appeal

34. 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

35. 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.
36. 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