

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 February 2013

Public Authority: Cambridgeshire County Council

Address: Shire Hall
Cambridge
CB3 0AP

Decision (including any steps ordered)

1. The complainant requested details of the advice provided by Cambridgeshire County Council's Trading Standards department to a particular company in relation a dispute between the complainant and the company in question. Cambridgeshire County Council argued that the requested information was exempt from disclosure on the basis of section 42 of FOIA, the legal professional privilege exemption. The Commissioner has concluded that the requested information does not attract legal professional privilege and therefore it is not exempt from disclosure on the basis of section 42 of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a copy of the information he requested. The Commissioner has provided the Council with a confidential annex which clearly identifies the information that needs to be disclosed.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 18 April 2012 the complainant wrote to the Cambridgeshire County Council (the Council) and requested information in the following terms:

'I understand from a letter from [company name] that you will be supporting that firm in the forthcoming proceedings which I intend to bring against them in the small claims court...

... In the meantime, under the Freedom of Information Act 2000, I am making a formal request for a copy of the written advice you have given to [company name] as to their legal position and/or the notes (taken contemporaneously) of your telephone conversations with that company.'

5. The Council responded on 9 May 2012 and explained that although it held a copy of the advice in question, and notes related to the advice, it believed that this information was exempt from disclosure on the basis of section 42 of FOIA.
6. The complainant contacted the Council on 22 May 2012 and asked for an internal review of this decision to be carried out.
7. The Council informed the complainant of the outcome of the internal review on 18 June 2012; the review upheld the application of section 42.

Scope of the case

8. The complainant contacted the Commissioner on 18 July 2012 in order to complain about the Council's handling of his request. The complainant argued that although he accepted that the Trading Standards officer in question was legally qualified, he did not believe that section 42 should apply in this situation and even if it did then the public interest favoured disclosing the requested information. The complainant made a number of points to support his position which the Commissioner has not set out here but he has referred to them in his analysis below.
9. In its submissions to the Commissioner the Council provided a 7 page document which it explained contained details of the contact between Trading Standards and the company in question. However, the Commissioner has established that there is in fact a limited amount of information contained within this document which falls within the scope of the request. Firstly, this is because some of the information detailing the contact between the Council and company is repeated in a number

of places. Secondly, the Commissioner has established that details of some of the advice contained in the document in question was provided to the company *after* the refusal notice was issued on 9 May 2012. In responding to a request a public authority only has to consider information that it held when the request was submitted, or at the latest, information it holds at the time it actually responds to the request (assuming this response is provided within the 20 working of the request). Therefore, information contained within the 7 page document which details advice provided to company after 9 May 2012 falls outside the scope of this request and thus outside the scope of the Commissioner's investigation.

10. During the course of his investigation the Commissioner identified a letter with the 7 page document provided to him which the Council had sent to the company in question along with an accompanying leaflet. The Council disclosed this to the complainant during the course of the Commissioner's investigation as it acknowledged that the leaflet was widely available on the internet and thus not exempt from disclosure, albeit in the Council's opinion the letter was arguably not in the scope of the request. In any event, as the letter and its enclosure have now been disclosed to the complainant it does not form part of the Commissioner's decision which is set out below.

Reasons for decision

Section 42 – legal professional privilege

11. Section 42(1) of 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.
12. There are two categories of legal professional privilege: advice privilege and litigation privilege.
13. In this case the category of privilege the Council is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity, i.e. by a legal professional retained to provide legal services to their client. Consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the

principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer which can usually be found by inspecting the documents themselves.

The complainant's position

14. The complainant argued that legal professional privilege did not apply to the information he had requested for three broad reasons. Firstly, he argued that company in question could not be said to be the 'client' of the Council's Trading Standards department. This was because there was no contract between the two parties and nor was there any fee arrangement. Secondly, the complainant argued that there was an absence of the useful features one would expect to find in a client / lawyer relationship. For example, the complainant highlighted the fact that the internal review response noted that 'they [Trading Standards] are reliant upon what they are told and the caller often does not disclose who the other party are'. In the complainant's opinion such an approach was clearly unprofessional as it meant that the lawyer in question was not in a position to question the evidence presented to him by their client and furthermore it meant that the lawyer in question could not identify any potential conflicts of interest when providing their advice. Thirdly, the complainant noted that the company in question had appeared to have freely quoted from the advice provided to it by the Council in two letters sent to him by the company. The Commissioner was provided with copies of these letters.

The Council's position

15. The Council confirmed that the employee at the Council who provided the advice was a fully qualified Fellow of the Chartered Institute of Legal Executives. The Council argued that as a fully qualified legal executive acting and providing advice in a professional capacity, any advice that he provides to a client is capable of having legal professional privilege applied.
16. The Council highlighted the fact that the Oxford Dictionary definition of client is a 'person or organisation using the services of a lawyer or other professional person or company'. It further explained that the Council's Trading Standards department offers an advisory service to both consumers and business in the area. The Council argued that given that the individual in question is a fully qualified lawyer who was acting in his professional capacity at the time, the company's request to him for advice makes them the client for the purposes of the legal advisor / client relationship as required for the application of legal professional privilege. Consequently the Council argued that any communication between the individual in question at the Council and the company in

question that had been created with the purpose of providing advice, or where the company has sought advice, should attract legal professional privilege.

17. The Commissioner asked the Council to clarify its position in relation to the complainant's concerns about conflicts of interest, i.e. in scenarios where both the trader and consumer involved in a dispute want advice from Trading Standards. The Council explained that although it had no written policy in place it was likely that each party would be dealt with by separate officers who advise the trader and consumer separately. In some cases, permission is sought to talk to either the trader or consumer respectively, this would not happen without consent. In such circumstances, it is possible for the same officer to deal with both parties. Consequently, the Council explained to the Commissioner that if the Trading Standards advice service provides one party to a dispute with legal advice, this will not automatically exclude the other party from making use of the service. The Council also explained that advice given to both traders and consumers is based solely on the information provided to the officer at the time and is as applied to the law and that Trading Standards are reliant on the facts being presented accurately.

The Commissioner's position

18. The Commissioner understands that the Council's Trading Standards department provides advice and assistance to consumers and businesses on a variety of issues, including legal aspects of trading standards legislation. Furthermore, the Commissioner understands that the Council does employ some individuals in its Trading Standards department with legal qualifications so that they can provide advice on more complex cases and the employee who provided the advice in this case was such an individual. However, in the Commissioner's view this simply means that the individual in question was employed by the Council as an adviser with expert legal knowledge to assist in providing advice and assistance to third parties on the Council's interpretation of trading standards legislation. In the Commissioner's view this does not mean that the individual in question was employed as a professional legal adviser, funded by the Council, to provide legal advice to third party clients such as the company in question. In the Commissioner's opinion a client / lawyer relationship in the context of legal professional privilege means that the client has to have actually retained the lawyer in question - in a professional capacity - with the intention of seeking legal advice.
19. In the circumstances of this case, the Commissioner accepts that the Council's employee was clearly providing advice in his professional capacity as a member of the Trading Standards advice team. However, the Commissioner does not believe that it can be said that the company

in question had retained the services of the employee at the Council in a professional capacity so that he could provide them with legal advice. Rather, the company in question appears to simply have made use of the Council's Trading Standards advice service and were provided with advice, albeit by someone with a legal qualification. In the Commissioner's opinion this does not make the company the 'client' of the Council employee in the context of legal professional privilege; it simply means that the company was provided with advice by an individual with legal knowledge. In other words, to use wording of the dictionary definition cited by Council, the company was not in fact 'using the services of a lawyer'; rather they were simply using the services of the Council's advice service which happened to be provided by someone with a legal qualification.

20. Consequently, the Commissioner does not believe that the communications between the company and Council employee at the Trading Standards department can attract legal professional privilege. Therefore the requested information cannot be exempt from disclosure on the basis of section 42(1) of FOIA and thus needs to be disclosed to the complainant.

Right of appeal

21. 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

22. 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.
23. 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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