

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

Public Authority: CityWest Homes Limited
Address: 21 Grosvenor Place
London
SW1X 7EA

Decision (including any steps ordered)

1. The complainant has requested information relating to proposed works to be carried out on hot water and heating systems on a residential estate. CityWest Homes Limited ("CWH") provided some of the requested information and withheld some information under the exemption for legal professional privilege (section 42(1) of the FOIA).
2. The Commissioner's decision is that CityWest Homes Limited:
 - Complied with section 1(1) of the FOIA in relation to part 9 of the request but failed to respond within 20 working days and breached section 10(1) of the FOIA.
 - Correctly applied section 42(1) to the withheld information and that the public interest favours maintaining the exemption;
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 19 July 2013, the complainant wrote to CityWest Homes Limited ("CWH") and requested information in the following terms:
 - 1. Who is responsible for maintenance of all tanks, pipes, radiators etc for supply of heating and hot water within flats.*
 - 2. Are proposed alterations a legal requirements?*
 - 3. Is the installation of HIUs a legal requirement?*
 - 4. Which EU Directive are you implementing?*
 - 5. What is capital cost and running costs of installing HIUs plus what grants are available?*
 - 6. Please provide a copy of your legal department's advice on these proposals as stated in minutes of meeting on 16 May 2013.*
 - 7. Please provide copy of Counsel's opinion, as promised at above meeting, as to ownership of equipment in flat and proposed works and also alterations that will be required to leases to charge for heating and hot water by way of meters rather than as percentage of costs.*
 - 8. Cost of first heating consultant and if this is to be charged to service charge?*
 - 9. How many defective radiators, tanks and cylinders have been replaced in last 3 years.*
 - 10. Reason for abandoning meetings with residents steering group?"*
5. CWH responded on 16 August 2013. It provided information in response to most parts of the request. In relation to part 9, it stated that this information would take time to collate and that it would provide it "in due course". This information was subsequently provided on 2 September 2013. In relation to parts 6 and 7 of the request CWH confirmed that the information was being withheld under the exemption for legal professional privilege (section 41(2) of the FOIA).
6. Following an internal review CWH wrote to the complainant on 3 October 2013. It stated that it was maintaining its position.

Scope of the case

7. On 3 September 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether CWH had provided the correct information specified in part 9 of the request and whether it had correctly applied

section 42(1) to withhold the information requested in parts 6 and 7 of the request.

Reasons for decision

Section 1 - duty to provide requested information

9. 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.
10. In their complaint to the Commissioner, the complainant has alleged that CWH failed to provide the correct information in response to part 9 of their request. This asked for:

"9. How many defective radiators, tanks and cylinders have been replaced in last 3 years."
11. The complainant has stated that, whilst CWH provided the requested statistics it did not specify the location of the replaced items. The complainant has also queried the veracity of the provided information.
12. In relation to the complainant's assertion that CWH did not provide the locations of the replaced components/appliances, the Commissioner has not considered this element of the complaint further as the request clearly asks only for numbers and makes no reference to locations. CWH was, therefore, under no obligation to provide this information.
13. The Commissioner has considered whether the numbers of replaced appliances provided in response to the request accurately reflects the relevant information held by CWH at the time of the request. He has not considered whether the information held by CWH is itself accurate.
14. On 2 September 2013 CWH wrote to the complainant and issued the following response to part 9 of the request:

"In the last three years since August 2010, 4 tanks, 1 cylinder and 6 radiators have been replaced."
15. Following enquiries from the Commissioner CWH has explicitly confirmed that the statistics provided in response to the request accurately reflects the recorded information that was held at the time of the request. In the absence of any arguments or evidence from the complainant or other which dispute this, the Commissioner has no reason to doubt the veracity of CWH's confirmation.

16. The Commissioner finds that in responding to part 9 of the request CWH complied with section 1(1) of the FOIA; however, in responding to this element of the request outside the 20 working day time limit the Commissioner finds that CWH breached section 10 of the FOIA.

Section 42(1) – Legal Professional Privilege

17. CWH has applied section 42(1) to the following parts of the request:

6. Please provide a copy of your legal department's advice on these proposals as stated in minutes of meeting on 16 May 2013.

7. Please provide copy of Counsel's opinion, as promised at above meeting, as to ownership of equipment in flat and proposed works and also alterations that will be required to leases to charge for heating and hot water by way of meters rather than as percentage of costs.

18. 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.
19. 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 underway or anticipated).
20. In this case, CWH has identified 2 pieces of information which it considers attracts LPP by virtue of it being privileged legal advice. By way of background, CWH confirmed that it sought legal advice in relation to the proposed works to be undertaken on the estate identified in the request but that it had also previously sought advice in relation to similar works proposed on another housing estate.
21. Having inspected the withheld information to which the council has applied the exemption, the Commissioner is satisfied that this consists of communications made by 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.

Does the advice still attract LPP?

22. When considering whether legal advice has been disclosed such 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. CWH has explicitly confirmed to the Commissioner that the withheld advice had not, at the time of the request, been made available to the public or to a third party.
23. CWH has further confirmed that, despite the passage of time since the complainant's request was made, it remains satisfied that the withheld information remains live and continues to attract LPP. It explained that, whilst it was not relying upon the litigation privilege limb of the exemption, Leasehold service charges, which are linked to the proposed works to be undertaken, are routinely subject to challenge. Disclosure of the withheld information would undermine CWH's defence if residents were to bring a legal challenge.

Based on his review of the withheld information and CWH's submissions, the Commissioner is satisfied that the withheld information is subject to legal professional privilege. This is because the information is not publically known and there is no suggestion that privilege has been lost.

The public interest test

24. 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

25. CWH has argued that there is a public interest in transparency in its decision-making processes.
26. The complainant has argued that they and the other parties (numbering over 100) whose properties will be subjected to the proposed works may be liable for substantial service charges. There is, therefore, a public interest in knowing whether CWH has obtained and acted upon sound legal advice in this matter.

Public interest arguments in favour of maintaining the exemption

27. CWH has argued that there is an inbuilt weight of public interest in maintaining legal privilege.
28. The Commissioner acknowledges that there is an inherent public interest in the maintenance of legal professional privilege in ensuring the rule of

law. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.

29. It is well established that where section 42(1) FOIA is engaged, it carries strong in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in *Cabinet Office v Information Commissioner and Gavin Aitchison (GIA 4281 2012)* where, at paragraph 58, Upper Tribunal Judge Williams said:

"it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".

30. CWH has argued that there is a public interest in safeguarding openness in communicating with lawyers in order to ensure access to full and frank legal advice. The advice in this instance highlights areas of potential risk which, if it were unable to obtain legal opinion in a confidential environment, could expose CWH to legal challenge.
31. CWH has further argued that the advice in question is still "live" and is helping it to develop a strategy and approach to communal and hot water schemes across the housing stock.

Balance of the public interest arguments

32. The Commissioner understands the complainant's concerns about the charges which they and other residents may incur as a result of CWH's proposed work. He does not doubt that they and their fellow residents have a strong personal interest in accessing the withheld information.
33. However, the public interest in the context of the FOIA refers to the broader public good. As the Commissioner has noted above, the Upper Tribunal and numerous First-tier Tribunal (Information Rights) decisions have highlighted the very strong inbuilt public interest in protecting the confidentiality of legal advice.
34. Whilst the Commissioner accepts that the complainant as a very strong and valid interest in accessing the information, no public interest has been identified which even begins to reach the threshold for disclosure set by authorities such as the Upper Tribunal. Whilst the complainant and other parties might be financially compromised by the proposed works the Commissioner has to consider the wider public interest in public authorities being able to conduct their functions in a way which secures best value for the public purse.

35. The Commissioner considers that it is not the purpose of the FOIA to provide private interests with a route to circumvent normal legal channels. Other remedies are available to the complainant should they wish to challenge CWH's actions in relation to the proposed works.
36. In weighing the complainant's interests against those of CWH and its ability to seek confidential legal advice for facilitating its wider public responsibilities, the Commissioner does not consider that the interests of the complainant or the public interest in disclosure tip the balance in this case.

Right of appeal

37. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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 – Complaints Resolution
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SK9 5AF