

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 August 2014

**Public Authority:** Newcastle City Council  
**Address:** Civic Centre  
Newcastle-upon-Tyne  
NE99 2BN

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the costs incurred dealing with a dispute between Newcastle City Council and care home providers.
2. The Commissioner's decision is that Newcastle City Council (NCC) has correctly applied the exemptions cited at sections 21 and 42, and has also complied with its duties under section 1 of the FOIA.
3. However, the Commissioner finds that NCC is in breach of section 10 of the FOIA in failing to respond to the request within 20 working days of the request.
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### **Request and response**

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5. On 12 February 2013, the complainant wrote to NCC and requested information in the following terms:
  - i. *"How much has been spent to date by the Local Authority in pursuit of this case? Where actual costs are not known indicate and include the best estimate. Include officers and councillors time and any other costs including external costs such as legal advice (and where appropriate the*

*legal costs of the other side as awarded).*

- ii. *What is the latest estimate of the total future costs to be incurred by Local Authority?*
  - iii. *What separate estimate does the Council have for the costs incurred by the Care Home providers that the Council may be obliged to pay should they lose the case?*
  - iv. *In previous articles and reports on television the Council claim the Care Home providers are charging excessive profit margins. The latest article refers to the Council refusing "to guarantee a certain amount of profit to private operators" a previous quote was ""In setting a fair price, we believe we are required to consider the actual costs of care – not the actual costs plus an unrealistic level of profit."(journal 24/10/12)*
    - a) *Is the level of profit referred to a gross profit margin or a net profit margin?*
    - b) *What evidence do the Council have regarding the profit margins or levels of profit of the Care Home providers?*
    - c) *What level of net profit or return on capital do the Council accept is reasonable given the capital invested by these organisations?*
  - v. *What is the level of profit of the companies that the Council is seeking legal advice from?*
6. NCC responded on 22 April 2013. It provided the information requested, at part i.
  7. It went on to explain that no final costs had been awarded or agreed in but it had made an interim payment of £25,000 in this respect in line with an agreed Order of the Court.
  8. In addition, NCC stated that officers other than internal lawyers do not formally time record and so no other personnel costs based on time spent on the case were available. Similarly, no records were kept in respect of time spent by Councillors on council business.
  9. NCC stated that it did not hold information relating to parts ii and iii. With regard to part iv, NCC stated that part iv a) did not appear to be a request for information held or recorded by it.
  10. Regarding part iv b) NCC asked that for the request to be clarified or framed as a request for specific information as in its current format it was too wide and it was difficult to assess what information was being sought.

11. However, in order to attempt to respond and assist NCC confirmed that it seeks and continues to seek to inform itself of any such information that may be relevant to its decision making processes.
12. Regarding part iv c) NCC stated that this was a request for an opinion and therefore no such information was held. Finally, NCC stated that it did not hold information relating to part v of the request.
13. On 30 May 2013, the complainant wrote to NCC again stating:

*Unfortunately I do not believe it answers all of my questions, so before I formally ask for an internal review I wish to seek clarification on some of your answers.*

*a. In answering questions 1-3 I find it difficult to understand that given the decision in the case was against Newcastle Council there is no correspondence to indicate costs.*

*Please supply me with copies of the communications, correspondence, notes of telephone calls and notes of meetings in relation to the award of costs against the city and a copy of the taxation notice if relevant.*

*b. In relation to question 4 it was the City Council who claimed that the care home providers were making an "unrealistic level of profit".*

*i. Please provide copies of the documentary evidence used to support the statement made by the Council that the care home providers were making an "unrealistic level of profit". If no such evidence was submitted then please confirm this.*

*ii. Who authorised the release of this statement to the press and the use of this term?*

*iii. Please provide copies of any communications, correspondence, records of discussions and telephone calls between senior officers, Councillors and the council administration regarding the press releases."*

14. On 20 June 2013 NCC responded and stated:

*"With regard to your request for clarification of our original response re costs we confirm that whilst we fully anticipate a final order for costs to be made, at this point no such discussion or order has been made other than the interim amount stated in our initial response. Therefore at this time we simply do not hold the information requested. Please can you confirm whether, following this clarification you still require a review of the response to your previous request?"*

*With regard to the remainder of the matters raised in your correspondence, as set out below, we consider these to be requests for new information and as such they will be considered in line with the Council's set procedures and a response given within 20 days. Notwithstanding this we are in a position to respond to parts (i) and (ii) immediately. Your individual questions (in bold) are set out below together with the responses.*

***i. Please provide copies of the documentary evidence used to support the [press] statement made by the Council that the care home providers were making an "unrealistic level of profit". If no such evidence was submitted then please confirm this.***

*As a matter of clarity only we would point out that no statement was made in the exact terms set out above and that where the directly quoted text was included it was not prefaced in the manner suggested. In order to assist and in order to address your query as best we can it is confirmed that where any of the relevant press statement(s) you reference were issued that these were not accompanied by any supporting documentation.*

***ii. Who authorised the release of this statement to the press and the use of this term?***

*Under S.21 of the FOIA the Council can refuse a request for information if, as in this case, the information you have requested is already readily available elsewhere. The relevant quote(s) were suitably attributed and therefore the originator of each specific quote highlighted can be identified accordingly.*

***iii. Please provide copies of any communications, correspondence, records of discussions and telephone calls between senior officers, Councillors and the council administration regarding the press releases.***

*Please note we are treating this question as a new Freedom of Information Act request.*

*The information held with regard to this section of your request is in the form of email advice sought by client officers with regard to the press releases from legal advisors. We confirm that as this communication was created expressly for the purposes of obtaining legal advice and was related to ongoing legal action the exemption from disclosure under section 42 of the Freedom of Information Act applies. The Council has*

*considered the public interest in disclosure of these emails and considers that the protection of the principle that officers should be able to be open with their legal adviser when obtaining legal advice, without fear of disclosure outweighs the Public interest in disclosure. The press releases themselves are in the public domain as you are aware."*

15. On 31 July 2013 the complainant requested an internal review of his request dated 12 February 2013 and stated:

*1. Have no estimates been made or correspondence received by the Council as to the likely costs/compensation requested by the Care Homes group? Please supply any information you (the Council) or their representatives hold.*

*2. I asked for the person who authorised such statements as some are only attributed to a spokesperson in some cases and in others Rachel Baillie. From what I recall when a statement was given on BBC TV local news this was also attributed to "a spokesperson".*

*a. Are all of the quotes in the articles accurate in terms of the press release?*

*b. Were all of the quotes mentioned made by Rachel Baillie?*

*c. If I cannot readily trace the name of person quoted in the television interview and in the articles in the newspaper (and I have made strenuous efforts) will you please justify your statement that this information is this deemed to be "readily available"?*

*d. Given the close links the Council has with the local press did it advise the press that the term "unrealistic" was inaccurate? If so when?*

*e. If inaccurate statements have been made by officers, or attributed to them, please state how is it not in the public interest (iii letter 20/6/13) to discover if they were advised not to use inaccurate/unsubstantiated terminology?"*

16. In correspondence with the Commissioner NCC confirmed that it did not conduct an internal review of the request dated 12 February 2013 as the complainant had requested additional information. It had therefore classed this as a new FOI request which was completed. NCC stated it had asked the complainant if he still required a review of his previous response. He did not respond and therefore NCC considered the matter to be closed.

## **Scope of the case**

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17. The complainant contacted the Commissioner on 11 November 2013 to complain about the way his request for information had been handled.
18. The Commissioner considers the scope of this case to be to determine whether:
  - the information requested at parts ii and iii of the request dated 12 February 2013 is held by NCC;
  - NCC has correctly applied section 42 to the withheld information requested in part iii of the request dated 30 May 2013;
  - NCC has correctly applied section 21 to the information requested in part ii of the request dated 30 May 2013.
19. In addition, the Commissioner will consider whether NCC has complied with its duties under section 10 of the FOIA.

## **Reasons for decision**

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### **Section 1 – information not held**

20. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
21. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
22. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
23. Accordingly, the Council was asked to provide the Commissioner with an explanation of the searches that were carried out in response to the complainant's request, as well as any other reasons it had for concluding that it did not hold the requested information.

24. The Commissioner asked the Council a series of questions relating to searches carried out to locate information within the scope of the request, its records management policy and how the information would be likely to be held.
25. The Council responded stating:
- Information held in relation to this enquiry would be electronic.
  - The Council does not currently have a system which allows the recording of officer's, other than legal officers, involvement on certain tasks. It is therefore not possible to determine the amount of time spent compiling the press release.
  - Searches were conducted of email systems as there were no reports or other documents associated with this statement. The searches run through the archive system for live data, were specifically limited to the date ranges 1 January 2013 to 11 February 2013. NCC explained that it is not possible to retain an email separately on a machine without a copy existing within the archive. The search was specifically limited to the officers known to be involved as anything else would slow down the entire email system. Therefore searches were limited to the Head of Commissioning, press officer involved and the legal advisor.
  - The council operates an email system that automatically retains anything over 24 hours however employees can delete information that is not required or delete within a day of receipt and is therefore not retained.
  - There is no business or legislative need to retain emails relating to press statements or the authorisation thereof. All non-essential emails should be deleted and the press office is not required to hold material separate to the directorates involved. This prevents duplication of records and helps ensure that effective archiving and searching can occur where necessary.
  - However if it pertains to legal matters specifically information is retained as part of the legal files.
26. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept NCC's position that it does not hold the requested information. The Commissioner is satisfied that, on the balance of probabilities, that the information requested in parts ii, iii and part iv of the 12 February 2013 request, is not held.



## **Section 21 – information accessible to applicant by other means**

27. Section 21 of the FOIA provides that information is exempt if it is reasonably accessible to the applicant by means other than through section 1 of the FOIA. This is a class based exemption and it is not qualified by the public interest. This means that if the information is reasonably accessible to the applicant, it is exempt from section 1 of the FOIA.

28. NCC stated that the original request dated 12 February 2013 opened with:

*The most recent article in the Journal yet again highlights very significant sums of money being spent on a legal case, in the **ongoing** dispute regarding the fees that the Local Authority will pay Care Home providers.*

29. It further stated that the complainant included this URL which is still live <http://www.journallive.co.uk/north-east-news/todays-news/2013/02/11/newcastle-council-will-spend-more-on-law-case-61634-32784472/>

In his later correspondence he asked:

*ii. Who authorised the release of this statement to the press and the use of this term?*

30. It was at this stage and to this part of the enquiry that Section 21 was applied as the relevant quote(s) were suitably attributed and therefore the originator of each specific quote highlighted can be identified accordingly. In this instance the officer quoted, Rachel Baillie, is the authoriser.

31. As the complainant himself provided this URL and alludes to the fact that he has read the article and press release which holds the information he requested NCC consider that the requestor has access to the information and further that he had access to the information at the time of the request.

32. NCC explained that section 21 was applied as the press statement is the only result of the discussions which took place. The statement was a distillation of the opinions of multiple officers and a general understanding of the social care industry and not linked to a specific report. As the complainant refers to the press statement and also provided the URL for the online version of the article in question NCC is satisfied that the requestor is able to access it.



33. NCC stated that having noted that the complainant refers to the officers involved in making the statement to the press it is not possible to determine who is responsible for the statement. The statement was a collaborative effort involving a number of officers and external legal resources and is therefore not attributable to a single individual. However such statements do require signoff and in this case this would have come from the Assistant Director of Commissioning Rachel Bailie.
34. Finally, NCC stated that it does not currently have a system which allows the recording of an officer's involvement on certain tasks. It is therefore not possible to determine the amount of time spent compiling this press release.
35. Where a public authority is relying on section 21 the Commissioner considers that it is necessary to direct the complainant to where the information can be accessed with some precision. It would not be sufficient to simply refer to a website if it was not obvious upon visiting that website where the information was located.
36. The Commissioner notes that NCC's response stated:

*Under S.21 of the FOIA the Council can refuse a request for information if, as in this case, the information you have requested is already readily available elsewhere. The relevant quote(s) were suitably attributed and therefore the originator of each specific quote highlighted can be identified accordingly.*
37. The Commissioner acknowledges that although the complainant was able to access the article he was requesting further details about how that statement came about and who authorised it. NCC's initial response did not provide the explanation it provided to the Commissioner. It is therefore not obvious that the details requested were already contained in the article.
38. Nevertheless, the Commissioner accepts that NCC correctly cited section 21 of the FOIA, but should have provided the additional explanation.

#### **Section 42 – legal professional privilege**

39. 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.
40. There are two categories of legal professional privilege: advice privilege and litigation privilege.

41. NCC stated that the specific correspondence withheld under this section as outlined in paragraph 14 (iii) dealt with the communication from internal and external legal services providing specific advice as to the wording and content of the press release. It was created both to provide advice and also within ongoing litigation. On this basis it considered that both Litigation and Legal Advice privilege attached to it however with the predominant consideration being litigation privilege.
42. It further explained that the advice was provided directly by internal legal advisers and also Counsel acting for NCC in the ongoing litigation which concluded following submissions to the Court of Appeal.
43. NCC stated that the purpose of the advice and correspondence was to ensure that nothing in this statement prejudiced or compromised NCC's position in both this litigation and any further potential proceedings which may have followed.
44. NCC further stated that in addition to the ongoing litigation there was also considered to be a very realistic prospect of both subsequent and parallel litigation. This was shown to be a very realistic consideration as such litigation did indeed arise when an individual provider subsequently issued proceedings. This matter also proceeded to trial.
45. The advice provided related to matters of both high sensitivity and with a significant risk to NCC's financial position. Its aim was to protect NCC's position and ultimately public funds, in a challenge to its wider fee setting in residential care homes. The public interest in having the NCC's legal advisers free to disseminate such advice within the bounds of privilege, whilst litigation was ongoing and knowing further litigation may follow, thereby outweighed the public interest in allowing such legal advice to be disclosed.
46. The correspondence related to legal advice provided by legal advisers to client officers to assist in ongoing litigation and with a view to potential proceedings to follow. The advice was specifically to assist in these proceedings. Maintaining privilege in circumstances intending to remove or minimise high risk to public funds clearly outweighs the public interest in disclosure given the harm which is likely should such privilege be lost.
47. Section 42 was applied as the press statement referred to related to ongoing litigation, which is still live. The statement was created in conjunction with NCC's external legal team as well as internal legal staff.

48. After reviewing the legal advice the Commissioner is satisfied that the dominant purpose of the advice was clearly the provision of legal advice and the exemption contained at section 42(1) is engaged.

### **Public interest test**

49. The public interest test is set out at section 2 of FOIA. The test requires the balancing of all the public interest factors in favour of maintaining the exemption against all the public interest factors in favour of disclosing the information.
50. The information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
51. As stated in the Commissioner's guidance, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind the legal professional privilege i.e. safeguarding the confidentiality of communications between a lawyer and their client.

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

52. NCC considered the public interest in maintaining the exemption outweighed the public interest in disclosing the requested information.
53. NCC explained to the complainant that the requested information:

*"does not demonstrate a compelling and/or specific justification that gives rise to a public interest for disclosure that equals or outweighs the public interest in maintain the section 42 exemption. Therefore, in all circumstances of this matter, I consider the public interest in maintaining the exemption outweighs the public interest in disclosing the Council's solicitors legal advice to you".*

54. NCC concluded that the fundamental principle underpinning legal professional privilege was demonstrated in this case.

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

55. NCC did not provide any evidence of what factors it had considered in favour of disclosing the information.
56. In correspondence with the Commissioner the complainant stated that he wanted to know which officers were aware of the proposed briefings, if any Councillors were involved and if there was any advice regarding the words to be used in press statements especially the "unrealistic" level of profit.

### **Balance of the public interest test**

57. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) was clear:

*'The fact there is already inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41)*

58. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.

59. However, the Commissioner considers that there is a very strong public interest in NCC being able to obtain or give full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without the 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 to which legal advice is sought/given which would not be in the public interest. He further determines that at the time of the request, NCC was still relying on the advice and there is therefore no indication that its sensitivity was lost.

60. In this case, the Commissioner considers that the relative merit in the public being made aware of Councillors or officers who may have been involved in the briefing is outweighed by the negative effect that its disclosure could have on the requesting and provision of legal advice in the future. Therefore section 42(1) can be relied on to withhold the information, which the Commissioner is satisfied attracts legal professional privilege. The Commissioner determines that NCC has correctly applied section 42(1).

## **Section 10**

61. Section 10 of the FOIA states that subject to subsections (2) and (3), a public authority must comply with section (1) promptly and in any event not later than the twentieth working day following the date of receipt.

62. Section (1) states that any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

63. The complainant submitted an information request to NCC on 12 February 2013. As NCC failed to issue a full and detailed response until 22 April 2013, some 40 plus days it is not in accordance with the FOIA timescale of 20 working days of the request. The Commissioner has therefore found NCC in breach of section 10 of the Act.

## Right of appeal

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64. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.
66. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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