

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2014

Public Authority: Royal Borough of Kensington and Chelsea
Address: The Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant has requested information relating to the process involved in determining whether previous correspondence should be dealt with as a request under the FOIA or as a pre action correspondence to a claim.
2. The Commissioner's decision is that the Royal Borough of Kensington and Chelsea (RBKC) correctly relied on section 42 not to communicate the requested information to the complainant.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 24 October 2013 the complainant wrote to RBKC and requested information in the following terms:

"I would like to request that RBKC send me the minutes or any other record (emails, notes, reports etc) of the meeting where this matter was discussed and any other correspondence between Council or TMO officers in Housing and Legal or any other Council or TMO Dept. that discussed anything to do with my attempts to be provided with this entirely legitimate information regarding the catastrophic power surge at Grenfell Tower in May 2013"

5. The 'matter' referred to was the process undertaken by RBKC to reach a decision as to whether a previous request for information fell to be dealt with as a request under the FOIA or as a pre action correspondence to a claim.
6. On 29 November 2013 RBKC responded. It provided some information within the scope of the request but this was provided outside of the Freedom of Information Act as it related to personal information about the complainant. RBKC refused to provide the remainder of the information requested, citing the exemption at section 42 – legal professional privilege.
7. The complainant requested an internal review on 29 November 2013. RBKC sent the outcome of its internal review on 19 December 2013 upholding its original position.

Scope of the case

8. The complainant contacted the Commissioner on 22 November 2013 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be whether section 42 has been correctly applied to the request for information.

Reasons for decision

10. Section 1 of FOIA provides two distinct but related rights of access to information which impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.
11. RBKC asserts that the withheld information is exempt from the duty of communication by virtue of section 42 of the Act. It maintains that the withheld information constitutes legal advice which attracts legal advice privilege. It explained that the circumstances in which the information exists was because legal advice was sought and provided which meets the criteria for protection under section 42. The legal advice relates to a previous request for information, specifically addressing how, and by whom, it should be handled.

Section 42 –legal professional privilege

12. 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.
13. There are two categories of legal professional privilege: advice privilege and litigation privilege.
14. In this case the category of privilege RBKC is relying on is advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
15. The Commissioner has viewed the withheld information and it comprises email communications addressing how the Council might handle the request; under which regime, Environmental Information Regulations (EIRs), Freedom of Information Act (FOIA) or whether the request constituted a Pre Action Conduct Protocol. The Commissioner is satisfied that whilst the emails relate to the handling of the request, they do not constitute the complainant's personal data. The communications are between RBKC legal officers acting in a professional capacity and council officers or officers from Kensington and Chelsea Tenant Management Organisation (TMO) who are considered clients in the circumstances.
16. Accordingly, the Commissioner finds that the withheld information constitutes communication between client and adviser and therefore attracts legal privilege (advice privilege).

Public interest test

17. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
18. RBKC acknowledged that disclosing the withheld information would provide an insight into the processing of FOIA requests and staff interaction with legal advisers within that context. More specifically RBKC asserts that disclosure would demonstrate that it has acted in a professional manner.

19. Against disclosure, RBKC states that it has already released emails between officers and the complainant demonstrating transparency but argues that the Council's officers should be able to seek and receive proper legal advice in order to carry out its duties effectively. Disclosure of the information would, in the view of RBKC, inhibit the free and frank exchange of views and provision of legal advice.
20. In balancing the pros and cons of the public interest test RBKC argues that although the complainant has an interest in viewing the emails, there is no significant public interest in disclosure. It further asserts that the information does not relate to the spending of money nor does it relate to a large number of people. RBKC therefore submits that the public interest inherent in the exemption at section 42 outweighs the public interest in disclosure.
21. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, sets out clearly (at paragraph 60) the following public interest factors in favour of maintaining the exemption at section 42:
 - "a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.*
 - b. Were legal advice disclosed routinely, there would be a disincentive to such advice being sought and/or a disincentive to seeking advice based on full and frank instructions.*
 - c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinions might be given in advance which would therefore prevent free and frank correspondence between a public authority and its legal advisors.*
 - d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.*
 - e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed".*

22. Consequently, although the initial weighting of the public interest test inherent in this exemption will always be against disclosure, the Commissioner recognises that there will always be cases where circumstances will favour disclosure. In determining whether, in this case, the public interest favours disclosure, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:
- how recent the advice is; and
 - whether it is still live.
23. In order to determine the weight that should be attributed to the factors in favour of disclosure, the Commissioner will also consider the following criteria:
- the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
24. The Commissioner accepts the established argument, promulgated on a number of occasions by Information Tribunals, that the principle of legal professional privilege diminishes with age. This is based on the concept that if advice is recently obtained it is likely to be used in a variety and number of decision making processes and that these processes may be harmed by disclosure. Conversely, the older the advice the more likely it is to have served its purpose and the less likely it is to be considered during future decision making processes.
25. The advice in question relates to emails sent between 2 October 2013 and 24 October 2013 concerning the processing of a request for information. The Commissioner considers that the advice contained in those emails was live at the date of the request. Consequently the Commissioner considers that the public interest in maintaining the exemption is significant.
26. With regard to the number of people affected by the decision to which the advice relates, the Commissioner is satisfied that it relates to very few people as the advice sought related to a specific case where information was requested. Whilst the decision may be referred to in future cases, it is unlikely to impact on a significant number of people whose request would be identical or similar. It is the Commissioner's position that in order for the public interest test to favour disclosure, the advice would usually need to impact on a significant number of people. In the case of *Mersey Tunnel Users' Association v Information*

Commissioner and Merseytravel (EA/2007/0052) the public interest was weighted in favour of disclosure because decisions taken as a result of the legal advice potentially affected tens of thousands of individuals.

27. With regard to the sums of money involved, the Commissioner accepts the assertion that the information in question does not involve the spending of public money.
28. As for the transparency of RBKC's actions the Commissioner accepts that although disclosure of the information may lead to a better understanding of how information requests fall to be considered and handled, the extent to which this would serve that purpose is limited. This is because the advice relates to the handling of a specific case.
29. Therefore, in light of the inherent public interest in maintaining legal professional privilege, the fact that the advice is recent and involves neither significant amounts of money nor impacts on a significant amount of people, the Commissioner has concluded that the public interest lies in favouring the exemption.

Right of appeal

30. 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

31. 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.
32. 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

Alexander Ganotis
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