

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2014

Public Authority: **Barlborough Parish Council**
Address: **Village Hall**
High Street
Barlborough
Chesterfield
Derbyshire
S43 4ET

Decision (including any steps ordered)

1. The complainant has requested the legal advice obtained by the Parish Council in respect of an employment tribunal case, together with any records showing whether the Parish Council had accepted that advice. The Parish Council refused to provide the information under section 42 which provides an exemption in respect of information which could attract legal professional privilege.
2. The Commissioner's decision is that Barlborough Parish Council is entitled to rely on section 42 to refuse the requested information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 31 December 2013, the complainant wrote to the Parish Council and requested information in the following terms:

"I am aware of a Employment Tribunal in regard to (named individual) and I have received a copy of the Reserved Judgment' and 'Judgment' from the Tribunal Service.

I have some questions so I might understand the costs and the process of this case.

I note that the claim for unfair dismissal was made out, due to bad management by the Parish Council of the procedure surrounding the case.

1. When was proper legal advice obtained on this case and from whom?
2. Was this poor management due to the Parish Council following to the letter the advice received from the solicitor engaged? i.e did the Parish Council follow advice given?
3. Please provide copies of the advice received from the Parish Councils solicitor (or others) and PC minutes either accepting or rejecting this advice.
4. Did the Solicitor at any time advise that the case should be settled on the grounds of reducing cost, if so please provide copies of this advice? For Example settling before the tribunal hearing would have cost less than failing to defend.
5. Did the Parish Council have insurance in regard to employment issues?
6. Was the Insurance company ever informed of the case if so when?
7. Did the Insurance Company offer any advice, if so please provide a copy and PC minutes either accepting or rejecting this advice?
8. Did the Parish Council successfully make a claim on any insurance in this case if so how much was it awarded?
9. I am aware the (named person) was awarded (a sum of money) in addition please itemise the full costs involved in this case, this should include any expenses claimed by any of the Councillors"

5. The Parish Council responded on 31 January 2014. It provided an answer to question 1, challenged whether the second question was a valid request and refused to provide any legal advice requested in questions 3 and 4 on the basis that it was subject to legal professional privilege. The Parish Council explained that the information requested in question 5 was available for inspection in its offices and that it did not hold the information requested at question 6. The information requested in question 7 was withheld because its disclosure would breach the Data Protection Act 1998 as well as prejudicing the Parish Council's commercial interests. Similarly the Parish Council refused the request in question 8 because disclosing some of the information would prejudice its commercial interests and partly because some of the information was not held. Finally the Parish Council refused the information requested in question 9 on the basis that it was available for inspection at its offices.
6. Following an internal review the Parish Council wrote to the complainant on 2 April 2014. It provided a fresh response in respect of question 1. It still considered that question 2 was not a valid request but argued that in any event the legal advice could be withheld under section 42, the exemption relating to legal professional privilege. The Parish Council also withheld the information requested in questions 3 and 4 under section 42. It maintained its original position in respect of question 5, answered questions 6 and 7 and gave a partial answer to question 8. The Parish Council also provided an answer to question 9.

Scope of the case

7. The complainant originally contacted the Commissioner following the Parish Council's initial response to his request. As the Commissioner will normally only accept a request once the public authority's internal review procedure is exhausted, the Commissioner did not investigate his complaint at that time. However following the completion of the internal review the complainant contacted the Commissioner again on the 8 April 2014 stating that he remained dissatisfied with the response he had received.
8. In particular he was concerned that the Parish Council had what he believed to be a history of personnel problems which had resulted in previous compensation claims which represented a significant cost to a small public authority. He therefore argued that there was a strong public interest in disclosing information which revealed whether the Parish Council had dealt with the claim prudently and attempted to settle the case before it was decided by the employment tribunal.

9. Following a discussion between the Commissioner and the complainant on the 11 June 2014 the complainant agreed that the issues he was still wished to pursue were the Parish Council's responses to questions 2, 3 and 4. Question 2 is interpreted as requesting any records which show whether the legal advice obtained was followed by the Parish Council. Questions 3 and 4 are to some extent overlapping. They seek copies of any legal advice received by the Parish Council.
10. The Commissioner considers that the matter to be decided is whether the Parish Council holds records of whether it accepted or rejected the legal advice it received, and if so whether that information can be withheld under section 42. The second issue is whether the legal advice itself can be withheld under section 42.

Reasons for decision

11. Section 42 of FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
12. Legal professional privilege is a principle which developed to ensure that clients can obtain robust and reliable advice from their lawyers. This can only happen if clients are free to discuss legal problems with their representative in the knowledge that those discussions, and the resultant legal advice, will remain confidential between the two parties. Without this assurance of confidence the client would be unwilling to present all the facts of the case and the lawyer could be unwilling to comment candidly on all the issues arising, including any risks or weaknesses in their client's case.
13. Therefore the concept of legal professional privilege developed to protect the communications between a lawyer and their client and ensure that such communications are not released without the client's consent during legal proceedings. The concept of legal professional privilege ensures complete fairness in legal proceedings and is considered a fundamental requirement of the English legal system.
14. There are two forms of privilege, advice privilege and litigation privilege. Both types only apply to confidential communications. Therefore if the client has already disclosed the information to the public, or shared it with a wider audience on an unrestricted basis, the communication would no longer be confidential and could not attract privilege. Furthermore the confidential communication must have been made for the dominant purpose of either seeking or providing legal advice.

15. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice where legal action is either underway or envisaged. There has to be a real prospect of litigation for the protection afforded by litigation privilege to apply. As well as protecting the confidential communications between a client and their legal adviser, litigation privilege also extends to communications with others so long as those communications are necessary for the purpose of obtaining advice. For example, a client may need to consult an expert witness when exploring the merits of their case with a legal adviser.
16. Advice privilege also applies to communications between a client and legal adviser for the purpose of obtaining legal advice. Unlike litigation privilege though, it can be applied to such communications even when legal proceedings are not anticipated. However in these circumstances privilege can only apply to records of communications between a client and their legal adviser; it cannot be applied to advice from third parties.
17. The Commissioner has been provided with copies of the legal advice received together with the minutes from a number of Parish Council meetings. The Commissioner is satisfied that the advice has been provided from an established firm of solicitors acting in its professional capacity by providing advice to its client, the Parish Council. The requested information does therefore relate to communications between a legal professional and their client.
18. Before looking at whether the other elements of legal professional privilege are satisfied it would be helpful to comment on the information which the Parish Council has identified as potentially answering question 2. Setting aside the complainant's comments regarding poor management, the Commissioner interprets question 2 as simply seeking information which records whether the Parish Council accepted or rejected the legal advice it received.
19. It is clear from the information seen by the Commissioner that the Parish Council requested and received legal advice over the course of its preparation for the employment tribunal. The Parish Council has explained that any records of the Parish Council accepting or rejecting that advice would be held in the minutes of the Parish Council's meetings which had been provided.
20. The minutes do note that legal advice had been received, the clear inference being that the advice was discussed and, presumably, decisions taken as to the appropriate action. There is one set of minutes (12 September 2011) which in effect summarises the events and the advice provided up to that point and, from the recommendations minuted, it is clear the proposed actions accord with the legal advice

that had been received. Another set of minutes (9 January 2012) record the Council's agreement to instruct its solicitor to deal with certain issues. When read in conjunction with the legal advice to which those minutes relate, it is apparent that the Parish Council was following the advice it received even if the minutes themselves do not explicitly state this is the case. Finally there is a third set of minutes (23 July 2012) which record a decision to follow any advice offered on a specific issue concerning the proceedings. These three sets of minutes fall within the scope of question 2.

21. However the rest of the minutes that have been provided do not record any discussions that took place. In some cases they simply note that correspondence had been received. The Parish Council has explained that the minutes are not intended to record the discussions verbatim. Although these minutes do demonstrate that the Parish Council were aware of, and responding to, the legal advice it received, because of their brevity they cannot objectively be said to be a record of whether the Parish Council accepted or rejected the advice, even when read in conjunction with the relevant legal advice.
22. The Commissioner also asked the Parish Council for copies of any letters to its solicitor which record instructions relating to the advice offered. The Parish Council has informed the Commissioner that at the time in question they were not fully staffed and therefore instructions were provided to the solicitor verbally. This position is supported by minutes of meetings at which delegated authority was given to particular members of the Parish Council to deal with the solicitor. Therefore apart from the three sets of minutes described in paragraph 20 above, the Commissioner finds that there is no specific record of the Parish Council's acceptance or rejection of the advice.
23. Therefore the issue for the Commissioner to decide is whether the three sets of minutes captured by question 2 and the legal advice itself is capable of attracting legal professional privilege. The Commissioner has already found that the information relates to communications between a legal adviser and its client. Having viewed the solicitor's correspondence the Commissioner is satisfied from their content that they were sent for the dominant purpose of providing legal advice. One of the sets of minutes forms a record of the advice which had been received. The Commissioner is satisfied that such a note constitutes a record of the advice provided and so is capable of attracting legal professional privilege. The other minutes record decisions to seek legal advice or to accept advice and are therefore records of communications for the purpose of seeking legal advice. These are also capable of attracting legal professional privilege.

24. In this case the Parish Council has claimed that the communications attract litigation privilege. The Parish Council has explained that it first sought legal advice after receiving correspondence from a solicitor acting on behalf of one of its employees indicating the intention to take the Parish Council to an employment tribunal. In light of this the Commissioner is satisfied that there was a realistic prospect of litigation at the time it sought legal advice. Therefore, provided these communications were still confidential at the time of the request they would be capable of attracting litigation privilege.
25. In respect of minutes the Parish Council has explained that the first part of each meeting is open to the public. If there are any sensitive matters that have to be discussed such as staffing issues, these are dealt with in the second part of the meeting from which the public are excluded. The Commissioner notes that the copies of the minutes provided are all marked to indicate their confidential nature. The Commissioner is satisfied that at the time of the request these minutes remained confidential.
26. The Parish Council has also explicitly assured the Commissioner that the advice itself has not been shared with any third party on an unrestricted basis. It was confidential at the time of the request and remains so.
27. The Commissioner finds that the information captured by questions 2, 3 and 4 all record communications between a qualified legal adviser and their client made for the dominant purpose of either seeking or providing legal advice at a time when there was a realistic prospect of legal proceedings. The Commissioner is satisfied that at the time of the request this information remained confidential. He is therefore satisfied that the information is capable of attracting litigation privilege and so is exempt under section 42.
28. For completeness it should be noted that the complainant has suggested that the Parish Council may have sought legal advice from other parties, possibly from the district or county council. The Parish Council has advised the Commissioner that the only legal advice it received in respect of the conduct of the employment tribunal was from its own solicitors. The Parish Council has commented that one of the grounds raised by the claimant in the employment tribunal case related to allegations that certain councillors breached the relevant code of conduct. It is understood that the allegations were first raised before there was any prospect of an employment tribunal. At that time the District Council's solicitor, who was also their monitoring officer, corresponded with the claimant. However it is understood that this correspondence was between the solicitor and the claimant personally, rather than between the solicitor and the claimant acting on behalf of

the Parish Council. The Parish Council has advised the Commissioner that it does not hold this information.

29. In any event the Commissioner interprets the complainant's request to focus on the legal advice obtained in managing the employment tribunal case rather than the events that ultimately triggered the claim for unfair dismissal. During a telephone discussion between the complainant and the Commissioner on 11 June 2014 the complainant clarified that he was interested in understanding whether the Parish Council was advised to settle the claim for unfair dismissal before the employment tribunal made its judgement.

Public interest test

30. Section 42 is subject to the public interest as set out in section 2 of FOIA. The public interest test states that even if information is exempt, the public authority can only continue to withhold it if the public interest in maintaining the exemption outweighs the public interest in disclosing it.
31. There will always be a significant public interest in preserving the principle that someone, an individual or an organisation, can obtain legal advice, safe in the knowledge that their communications will remain confidential. The Information Tribunal has consistently found that weight should be attached to this inbuilt public interest in protecting privileged information.
32. This inherent public interest is all the greater where the advice relates to criminal proceedings where an individual's liberty is at stake, or where, for example, the legal advice relates to the protection of vulnerable individuals as in child protection proceedings. The inherent value in protecting the confidentiality of legal advice is less for the advice which relates to matters of public administration. In this case the advice relates to potential and ongoing litigation through the employment tribunal. Therefore although the case for maintaining the exemption may not be as strong as in criminal cases it was nevertheless obtained in the context of adversarial proceedings and relates to the rights of individuals.
33. The public interest in withholding the information is increased by the fact that, at the time of the request, the advice was relatively recent and related to a matter that had not long been concluded. The request was made on the 31 December 2013 and the employment tribunal had only provided its final judgement on the 24 September 2013. However the Parish Council has not suggested that it ever intended to appeal the employment tribunal's decision. So although the advice was relatively recent it did not relate to issues that were live at the time of the

request. This then reduces the public interest in maintaining the exemption.

34. There is nothing to indicate that the Parish Council failed to follow the advice it had received. This is supported by the content of the minutes discussed in paragraph 20 above. Furthermore, although the Commissioner has found that there are no further records minuting decisions on whether to follow the legal advice, the Commissioner finds that it is apparent from the solicitor's letters that, at least some of the advice, was followed. This is gleaned from the fact that the solicitor's correspondence includes sections where he reports back to the Parish Council on actions he has carried out in accordance with the advice provided in previous correspondence. The fact that there is nothing to suggest that the Parish Council failed to follow the advice supports an argument to maintain the exemption.
35. If there was evidence that the Parish Council acted imprudently by not following its legal advice this would certainly be a factor in favour of disclosing the withhold information. The complainant has raised concerns that councillors may have acted against the interests of the people they represent and rejected the advice. However, as set out above, the Commissioner has found nothing to support this contention.
36. The Commissioner has also considered the cost of the litigation and the number of people affected by that diversion of resources. The compensation awarded by the employment tribunal to the claimant was around £35,000. Additional costs would be incurred as a result of engaging a solicitor and being represented by counsel at the employment tribunal itself. The total costs therefore would represent a significant proportion of the Parish Council's annual income of just under £125,000 per annum. The Commissioner accepts the complainant's argument that this increases the public interest in disclosing the information as this would allow transparency of how the Parish Council dealt with this matter.
37. The complainant has argued that the public interest in disclosure is increased still further because the Parish Council has a history of poor employment relations. This suggestion is refuted by the Parish Council. It has however acknowledged that in the past one member of staff left following a settlement. The Commissioner also notes that the employment tribunal comments that there had been a high turnover of clerks over the last ten years. However it does not necessarily follow that this was due to poor management. Therefore the Commissioner accepts that if there was a history of poor management this would increase the value of disclosing information that would shed light on the Parish Council's handling of such matters including whether it sought and received appropriate advice and whether that advice was followed.

This does not necessarily mean that a proven history of poor staff management would be sufficient to sway the public interest in favour of disclosure. In any event the Commissioner is not satisfied that it has been demonstrated that the Parish Council does have a poor record of staff relations and therefore does not give weight to this argument.

38. In any event the judgement of the employment tribunal is already in the public domain. This examines the events leading up to the claim for unfair dismissal and details of the conduct of those involved. This goes a long way to providing transparency in respect of the Parish Council's management of its staff, even if it does not reveal whether it acted prudently by attempting to settle the case before the matter was heard by the employment tribunal.
39. In respect of the number of people affected by the cost of the litigation the population served by the Parish Council is around 3,000. The cost of the proceedings and subsequent award could potentially have a significant impact on the services delivered by the Parish Council to these individuals. However this is still a relatively small number of people and it has not been suggested that the impact on them would be significant.
40. On balance the Commissioner considers that the public interest in protecting the principle that individuals are free to seek legal advice in the knowledge that the advice received will remain confidential is sufficient to outweigh the public interest served by increased transparency of how the Parish Council handled a dispute with a member of its staff. Protecting the concept of legal professional privilege preserves the quality of legal advice and the ability of individuals to access the justice system.
41. The Commissioner finds that the public interest favours maintaining the exemption. The public authority is not required to take any further action in this matter.

Right of appeal

42. 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

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

43. 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.
44. 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
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