

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2015

Public Authority: Beccles Town Council

Address: Town Hall
The Walk
Beccles
NR34 9AJ

Decision (including any steps ordered)

1. The complainant has requested a copy of legal advice concerning the Beccles Fen. The Commissioner's decision is that Beccles Town Council has correctly applied the exemption for legal professional privilege at section 42 of the FOIA. He does not require the public authority to take any steps to ensure compliance with the legislation.

Background

2. The complainant explained that the legal opinion in question considers whether the 'Fen Land & Common' controlled by Beccles Town Council ('the council') is owned by the council or whether it is owned by the 'Inhabitants of Beccles' with the council acting as sole trustee. He said that, after the involvement of the Charity Commission, and upon receiving and considering the legal opinion, the council immediately reversed their 15 year claim to ownership of the 'Fen Land & Common' agreeing that it was indeed owned by the 'Inhabitants of Beccles' with the council acting as sole trustee.

Request and response

3. On 17 July 2014, the complainant wrote to the council and requested information in the following terms:

"At the Beccles Town Council meeting on Tuesday 15 July 2014 Item 8 (proposal 1 through 4) upon the agenda dated 8 July 2014, concerning the Beccles Fen was accepted by the council.

It therefore appears that the legal advice sought from the QC, by the council, confirms that the opinion already presented to council by the Charity Commissioner is upheld. In view of this I request a copy of the legal opinion."

4. The deputy town clerk initially responded stating that the information is exempt as it is classed as a legal privilege for the council.
5. The complainant then wrote to the council on 2 August 2014 with detailed reasons why he believes the information should be released.
6. On 13 August 2014, the council responded. It stated that the complainant had already been informed that the information is exempt under section 42 of the FOIA and provided its reasons why it believes the public interest favours maintaining the exemption.
7. On 18 August 2014, the complainant wrote to the council requesting that it revisit its position. The council responded on 3 September 2014 maintaining its original position.

Scope of the case

8. The complainant wrote to the Commissioner on 23 September 2014 to complain about the way his request for information had been handled.
9. During the Commissioner's investigation, the council informed the complainant that it had considered his request further and offered him the opportunity to view the requested document outside of the FOIA, subject to the signing of a waiver. The complainant declined the offer because he believes that the public interest can only be served by placing the legal opinion in the public domain.
10. The Commissioner has considered whether the exemption for legal professional privilege at section 42 of the FOIA has been correctly applied in this case.
11. During the Commissioners investigation, the council also said that the exemption for information intended for publication at section 22 of the FOIA applies. As the Commissioner has decided that the exemption at section 42 applies, he does not deem it necessary to also consider the exemption at section 22 of the FOIA.

12. The complainant has said that the council cannot rely on both sections 21 and 42 of the FOIA. The Commissioner has not been made aware that the council is citing section 21 of the FOIA and, as such, that particular exemption and the complainant's arguments relating to it has not been considered in this decision.

Reasons for decision

Section 42

13. This exemption provides that information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
14. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*¹ as;

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
15. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
16. In its response to the Commissioner's enquiries, the council said that withheld information is subject to legal advice privilege. It explained that

¹ Appeal no. EA/2005/0023

it is aware that it is possible that it could face litigation, particularly in the short term, regarding the decision it has made based on the legal advice given, but this is only a possibility and not a real likelihood, and so litigation privilege does not seem to be appropriate under these circumstances.

17. The council has confirmed that the withheld information constitutes a communication from the council's external barrister acting in their professional capacity for the sole purpose of obtaining legal advice.
18. The Commissioner has reviewed the withheld information. Based on that review and the council's submission the Commissioner and is satisfied that the withheld information is subject to legal professional privilege.
19. Information will only be privileged so long as it is held confidentially. In this case, the council told the Commissioner that another member of the public informed the council that she received a copy of the document as it 'turned up on her doormat'. The council has not seen a copy of the document that is claimed to be in this member of the public's possession and cannot verify whether it is the whole, or indeed the same, document as requested in the case. It said that the requested document has never been officially released by the council and therefore it does not believe that privilege has been lost in these circumstances.
20. The complainant has commented that a number of paragraphs were read out at a public council meeting and that this therefore constitutes a partial release and that the council has relinquished its right to claim section 42 regardless of the intent behind reading the paragraphs out publically. When the Commissioner enquired about this, the council informed him that the mayor did quote a couple of brief paragraphs which were pertinent to council's discussions, but it does not believe that this brief reference to a limited audience at a council meeting revealed the substance of the 31 page document and does not lead to a loss of privilege.
21. The Commissioner's guidance on 'Information in the public domain'² explains that:

"Information is only in the public domain if it is realistically accessible to a member of the general public at the time of the request. It must be available in practice, not just in theory."

² <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

22. Confidence isn't necessarily lost as a result of a fraction of the material being read out as legal professional privilege is designed to provide a safe area of engagement between a party and their legal advisor. In this case the council has explained that parts of the advice were read out as they were pertinent to discussions. In addition, there has not been any suggestion that the incident of the copy of the document turning up on a member of the public's doormat occurred before or at the time of the request.
23. Given the circumstances, including that the requested document has never been officially released by the council, the Commissioner does not consider that privilege has been lost in this case.

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. The complainant has said that as the legal opinion was sufficiently robust to create a reversal of council opinion, the facts contained within the opinion are important and relevant to the 'Inhabitants of Beccles' as to why there has been a significant and sudden change in council position. He believes that the legal opinion will probably contain a logical review of the whole topic, an assessment of applicable law and case law and a final legal judgement based on law and presented evidence that is not available from other sources. He said that the legal opinion is an important study into the legal basis upon which present and future decisions will be taken and as these decisions will be taken on behalf of the 'Inhabitants of Beccles' there is an overriding need for transparency so that those inhabitants are fully aware of the legal basis upon which such decisions are taken. He said that this is particularly the case as the council has made so many public statements against charitable status over the years, arguing long and hard, often quoting local legal advice, that the Fen Lands were both registered to and owned by Beccles Town Council. He said that release of the legal opinion will help to avoid a repeat of the '1974' type land disposal to other public authorities from arising again.
26. He also said that it is important that the legal basis can be studied by other public bodies affected by the Fen Land issue, in particular Waveney District Council who has the same topic to resolve as Beccles

Town Council. He said that specifically, the question of public interest remains especially important because of the following outstanding issues:

- “1. Beccles Town Council has voted to exclude the Sports Centre lands, in conflict to the Charity Commission ruling that ‘all Fen Lands are to be placed in trust’, even though it is common knowledge that the Sports Centre lands are part of the Fen Lands under consideration.
The public needs to understand whether this decision is legally legitimate.
 2. There seems to be an issue with Waveney District Council concerning the sports centre building upon Fen Land that is yet to be resolved.
This issue could affect the buildings freehold/leasehold status.
The public needs to understand the problems if suspicions of wrongdoing are to be avoided.
 3. In 1974 under the auspices of the Local Government Act 1972 part of the Fen Lands were handed over by Beccles Borough Council to Waveney District Council as though assets of Beccles Borough Council. It is now clear that this was an error & should not have happened as the Fen Lands were outwith the Acts provisions.
Waveney District Council need to visit this problem & publically availability of the legal opinion will help them to reach a decision economically.”
 27. The complainant also said that due to the 15 years of dispute, attitudes between citizens and council have developed and it is now important for the rebuilding of trust that openness and transparency should prevail.
 28. The council said that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process, and publishing the legal opinion would aid this. It also said that a large number of people, those being the population of Beccles, will be affected by the advice in the legal opinion and that there is potential that non-disclosure of the legal opinion could lead to suspicions that the council has not acted legally.
 29. The Commissioner considers that disclosing the withheld information would promote accountability and transparency and allow the public to better understand the council’s justification for changing its position regarding ownership of the land in question.
- Public interest arguments in favour of maintaining the exemption**
30. The council said that it should be able to conduct a free exchange with its legal advisers and ask questions regarding its legal rights and

obligations. It said that it is not in the public interest for these exchanges to be restricted through fear of intrusion.

31. It also said that the advice received is recent and still live as the council is currently implementing the advice given by the barrister regarding the Beccles Fen lands. It said that further to this, the Charity Commission has stated that they will be approaching Waveney District Council regarding some further lands that it has been told by members of the public are part of Beccles Fen and that should therefore also be held in a trust. Waveney District Council will therefore need to carry out their own investigations, completely separately from the town councils, in order to reach its own conclusions regarding whether the land should be recognised as charitable or not and this is therefore another reason why the council believes that it is important that the document is not in the public domain, as it may prejudice another organisation's investigations of the issues involved.
32. In addition, the council also said that one of the main reasons it obtained the legal opinion was to protect it against any legal challenges against its decision. It explained that this has been a contentious issue amongst some members of the public, and it felt that it was important that any decision it made had legal backing that could be used in a court of law if legal proceedings were progressed.
33. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the *Bellamy* case, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
34. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
35. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to

their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

36. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

37. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, including the fact that the issue is still live as council is currently implementing the legal advice in question, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
38. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. He notes that the population of Beccles is approximately 14,000³.
39. In relation to the complainant's arguments at paragraph 17 and 18, the Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO*⁴ which considered

³ <http://www.citypopulation.de/php/uk-england-eastofengland.php?cityid=E34003308>

⁴ Appeal no. EA/2007/0092

the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..." (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

40. Having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately. He notes that the council has explained to the complainant that the Beccles Sports Complex has been excluded from the Fen Lands due to verbal advice received from the barrister.
41. The Commissioner acknowledges that even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'. However, he does not consider this to be an overriding factor in this case.
42. The complainant has said that he appreciates that the information is recent but the council has already voted to act upon the information. The Commissioner considers that this does not alter the fact the issue is still live as the council has explained that it is still implementing the legal advice and that the issue involving Waverley District Council is ongoing.
43. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.

Right of appeal

44. 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

45. 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.
46. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF