

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2015

Public Authority: Beccles Town Council
Address: Town Hall
The Walk
Beccles
NR34 9AJ

Decision (including any steps ordered)

1. The complainant has requested from Beccles Town Council a copy of legal advice concerning charitable land, a map, and a statutory declaration. 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.

Request and response

2. On 16 July 2014, the complainant wrote to the council and requested information in the following terms:

"Someone did kindly pick up a map for me this morning which was supposed to show the area that is now being registered as charitable land. However, the red line showing the area doesn't show up so it is not possible to see what areas are marked. The blue and red bit which is the sports ground shows up but not the other. It is possible to have a copy with the red line showing please as by the black line I see it looks as if the common is excluded and I thought the mayor did say that all lands in the charter do now have to be registered. The quay doesn't seem to appear on the map at all.

Members of the public did not get copies of the other documents mentioned on the agenda, i.e. Barristers opinion, advice, map and statutory declaration from Waveney District Council. Is it possible to have copies of these too please?"

3. The council responded on 25 July 2014 and provided a copy of 'the plan' but did not provide the 'other documents mentioned on the agenda' as it said they are covered by legal professional privilege.
4. On 28 July 2014, the complainant asked the council to check whether the response was correct as she believes she is entitled, under the FOIA, to have copies of the 'other documents'. The council responded the same day stating that the information from the QC is exempt as it is classed as a legal privilege for the council.
5. Following the intervention of the Commissioner, the council provided an internal review response on 17 November 2014. It said that the barrister's opinion in respect of Beccles is exempt under section 42 of the FOIA. It also said that the document could be viewed outside of the FOIA at the council's offices provided a waiver is signed.

Scope of the case

6. The complainant initially wrote to the Commissioner on 7 October 2014 to complain about the way her request for information had been handled. After receiving the internal review response, she confirmed that she was still unhappy with the response. She said she had an unofficial copy of the documents put through her letter box but would like to be officially provided with the information as she believes they should be available to the public.
7. During the Commissioner's investigation, the council confirmed that 'the plan' provided to the complainant on 25 July 2014 is the same document as the map referred to in the request. As this map/plan has been provided to the complainant it is not within the scope of this decision notice.
8. The barrister's opinion requested in this case is the same as that requested in case reference FS50556645. A decision notice on that case was issued by the Commissioner on 12 January 2015¹. The Commissioner's decision was that the council had correctly applied the exemption for legal professional privilege at section 42 of the FOIA. As the request for the barrister's opinion relates to the same matter as a

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043114/fs_50556645.pdf

previous decision notice, the analysis and conclusions reached in that previous notice are applicable in this instance.

9. The Commissioner has considered whether the exemption for legal professional privilege at section 42 of the FOIA has been correctly applied in this case.
10. During the Commissioner's 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.

Reasons for decision

Section 42

The barrister's opinion

11. As stated in paragraph 9, the Commissioner issued a decision notice relating to a request for the same barrister's opinion as the request in this decision notice. That previous decision notice found that the council had correctly applied the exemption at section 42.
12. The Commissioner considers that the analysis and conclusions set out in the previous decision notice are also applicable in this instance. For brevity, the Commissioner will not reproduce the content of that decision notice here but he has adopted the analysis and concluded that the council correctly applied the exemption at section 42 of the FOIA.

The statutory declaration

13. The exemption at section 42 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*² as;

² Appeal no. EA/2005/0023

“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 it is aware that it is possible that it could face litigation, particularly in the short term, regarding the decision it has made to omit the sports complex lands from being held on trust at this stage, but this is only a possibility 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 a solicitor at Waveney District Council, acting as its legal adviser prior to the council seeking the legal opinion of an 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 complainant told the Commissioner that she received a copy of the document through her letter box. The council has not seen a copy of the document that is claimed to be in complainant’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 also informed the Commissioner that she has shown the statutory declaration to some people who were at a council

meeting, sent a copy of to the Charity Commissioner and put it on Facebook.

21. The Commissioner's guidance on 'Information in the public domain'³ 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."

22. The Commissioner notes that the statutory declaration was put on Facebook on 2 December 2014 and there has not been any suggestion that the incident of the copy of the document being posted through the complainant's letter box 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 because the council are of the opinion that some of the land is exempt from being registered with the Charity Commission, but there is nothing in the barrister's opinion to confirm that, it is in the public interest for the requested information to be available.
26. 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 statutory declaration would aid this. It also said that a large number of people will be affected by the contents of the statutory declaration.

³ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

27. The Commissioner considers that disclosing the withheld information would promote accountability and transparency and allow the public to better understand the council's reasons for not including certain areas of land in the trust for the time being.

Public interest arguments in favour of maintaining the exemption

28. The council said that it should be able to conduct a free exchange with its legal advisers and that it is not in the public interest for these exchanges to be restricted through fear of intrusion.
29. It also said that the information contained in the statutory declaration is still live as the council has taken the decision to exclude from the trust lands the sports complex lands that are referred to in the statutory declaration. It said that it needs to have further discussions with the Waveney District Council regarding the contents of the statutory declaration and the fact that the district council think that they could be the rightful owners of the sports complex lands. The district council will need to carry out its own investigations, completely separately from the town councils, in order to reach its own conclusions regarding whether it is the rightful owner of the sports complex lands and ultimately whether these should be recognised as charitable or not.
30. In addition, the council said that the fact that the it has chosen to omit the sports complex lands from the trust lands at this stage, due to the question of ownership, has been a contentious issue amongst a few of the public, and so is it is important that at this stage, given that the council could face legal challenges from these members of the public, that documentation in relation to this matter such as the statutory declaration, is not in the public domain, as it could prejudice the chances of the council winning the case.
31. 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".
32. 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.
33. 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..."

34. 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

35. 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 needs to have further discussions with the Waveney District Council regarding the contents of the statutory declaration and come to a view as to whether the sports complex lands should be recognised as charitable or not, 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.
36. 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 14,000⁴.

37. In relation to the complainant's arguments there is nothing in the barrister's opinion to confirm some of the land is exempt from being registered with the Charity Commission, 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*⁵ which considered 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).

38. 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 other requestors that the sports complex lands have been excluded from the land registered with the Charity Commission due to verbal advice received from the barrister.
39. 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.
40. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional

⁴ <http://www.citypopulation.de/php/uk-england-eastofengland.php?cityid=E34003308>

⁵ Appeal no. EA/2007/0092

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.

Other matters

Internal Review

41. As he has made clear in 'The Guide to Freedom of Information'⁶, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review, or 40 working days in exceptional cases. In this case the Commissioner notes that complainant first expressed dissatisfaction with the response on 28 July 2014 but the council did not provide an internal review response until 17 November 2014, some 3.5 months later. The council should ensure that internal reviews are carried out promptly in future.

⁶ https://ico.org.uk/media/for-organisations/documents/1642/guide_to_freedom_of_information.pdf page 52

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

Andrew White
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