

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 April 2015

Public Authority: Cambridge City Council
Address: The Guildhall
Market Square
Cambridge
CB2 3QJ

Decision (including any steps ordered)

1. The complainant has requested information on how a settlement figure of £170 000 was reached which was paid to a developer who won a planning appeal and had costs awarded to it. The council initially applied section 42 of the Act (legal professional privilege). However in response to the Commissioner's investigations the council reconsidered its position and also sought to apply section 43 (prejudice to commercial interests), section 41 (information provided in confidence) and section 40 (personal data) in addition to section 42.
2. The Commissioner's decision is that the council was correct to apply section 42 and 41. As such he has not considered the application of section 43 further or section 40 further.
3. The Commissioner does not require the council to take any steps

Request and response

4. On 3 August 2014 the complainant wrote to the council and requested information in the following terms:

"Please disclose all the information regarding how the figure of £170,000 was decided for the payment of costs in the Wilton Terrace enquiry. Please state how much of this money was paid firstly to [name redacted]/Beacon Planning and secondly how much was paid to Brookgate's barrister (whose name might be [name redacted])."

5. The council responded on 15 August 2014. It stated that no information was held in respect of the second part of the request as this was a matter for the developer once it had received the costs. It also confirmed that although information was held as regards the figure of £170 000 this was agreed following legal advice. It therefore applied section 42 to the information.
6. Following an internal review the council wrote to the complainant on 13 November 2014. It upheld its initial decision.
7. During the course of the Commissioner's investigation the council reconsidered its position and wrote to the Commissioner applying additional exemptions. It applied sections 43, 41 and 40 to some elements of the information. These exemptions were primarily applied to information on details of the costs of the developer associated with third parties who had provided services when preparing and presenting the appeal.

Scope of the case

8. The complainant contacted the Commissioner on 20 November 2014 to complain about the way her request for information had been handled. She considers that the amount paid out by the council should be transparent and open to scrutiny. She therefore considers that the information should have been disclosed to her.
9. The Commissioner considers that the complaint is whether the exemptions have been applied correctly or whether the requested information should have been disclosed to her.

Reasons for decision

Background to the case

10. The council received planning applications to demolish part of a street and develop offices in their place. The issue was fairly contentious with a number of people objecting to the demolition of the buildings which were buildings of local interest.
11. The area had already been designated for development previously, and so the developer submitted plans to develop offices in the area. These plans were subsequently refused planning permission. A number of other planning applications were then made by the developer amending the initial plans, some initiated by the council who asked the developer

to resubmit amended plans. Again however planning permission was rejected on each occasion. The developer appealed the refusal of planning permission to the Planning Inspectorate but the council did not defend its position to refuse the applications. The planning inspector therefore found that all costs associated with the appeal should be paid by the council.

12. The developer's legal representatives (from herein referred to as 'the developer'), then submitted its total costs to the council for appealing the case. The council took legal advice from an expert costs draftsman (a lawyer), before agreeing a settlement with the developer at £170 000. The request is essentially for the breakdown of how the figure of £170 000 was calculated.
13. The withheld information can be sectioned into 3 separate topics.
 - a) Correspondence between the council and a barrister regarding the costs claim. The council has applied section 42 to this information.
 - b) Internal correspondence between officers at the council discussing the need for legal advice, and subsequently discussing details of the legal advice it had received. Again, the council's view is that this is likely to fall within section 42.
 - c) Costs information which was submitted to the council by the developer's representative's, detailing invoices and work carried out by which led it to reach the costs figure it was seeking from council. The council applied section 42, section 43 and section 41 to this information.

Is the information Environmental Information?

14. The Commissioner is satisfied that the council was correct to consider the information under the FOI Act rather than the Environmental Information Regulations 2004. The information relates to purely to the conduct of a legal dispute which led to a costs award being settled out of court. It does not relate to, nor have any direct bearing on the environment or any factors of the environment itself.

Section 42

15. Section 42(1) 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."

16. The council provided the Commissioner with a letter from the developer which outlines that it considers that the information it provided to the council outlining its costs is also subject to legal professional privilege. It said that this reveals the strategy of the advice provided by it. The developer also argued that privilege was not waived nor lost by the submission of the costs claim to the council.
17. The council outlined that the information it holds is subject to litigation privilege. It said that there was a real prospect of litigation over the issue of costs. Had a settlement not been reached between the parties, the decision on the award could be taken to the High Court to make. The council provided evidence that the developer would have done this had a settlement not been reached between the parties.
18. Whilst accepting that that is the case the Commissioner notes that at the time of the request a final settlement had been agreed between the parties and the risk of litigation over costs was no longer present.
19. The Commissioner is satisfied that the information has not been disclosed externally, and legal professional privilege has not therefore been lost by the council at any point. Although part of the advice was provided to the developer as part of the negotiations towards settlement this was done as a 'without prejudice' offer to settle to the developer. In such cases confidentiality is retained and legal professional privilege will not be waived by a disclosure of the information to the opposite party in litigation.
20. The Commissioner is satisfied that the information falling within the scope of the exemption is legal advice received from a professional legal advisor on the basis of potential litigation. The dominant purpose behind the advice was to prepare a response to the costs claim, to try to reach a figure which was agreeable by both parties and to prepare for any litigation which resulted if the attempts at settlement failed.
21. The Commissioner has therefore decided that the council was correct to apply section 42(1) to the information and that the exemption is engaged by the information.
22. Section 2 of the Act requires that a public interest test is carried out where section 42 is engaged. The test whether, in all the circumstances of the case, the public interest in the exemption being maintained outweighs the public interest in the information being disclosed.

The public interest

The public interest in the information being disclosed

23. The central public interest in the information being disclosed surrounds allowing greater scrutiny of the decisions of the council as regards how it handled the costs award and to provide more details on the actual costs claim made by the developer. Details of the council's actions which led to costs being awarded against it are publically available via the Planning Inspector's decision. A disclosure of the requested information would not create greater transparency over this issue.
24. A disclosure of the information would highlight how the figure of £170 000 was reached and allow the public a clearer understanding of why the council's actions and decisions as regards the applications led to this amount of taxpayer's money being paid in settlement of the dispute.
25. The council's actions with the planning applications were criticised by the Planning Inspector, and there is a public interest in allowing the public to have full oversight of the financial costs resulting from these actions.
26. A disclosure would also create greater confidence in the council's financial and legal management of the case once the award of costs had been made to the developer. It would demonstrate how it managed to find a solution with the developer which allowed it to avoid further expensive litigation before the High Court.

The public interest in the exemption being maintained

27. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that a disclosure of information that is subject to legal professional privilege would have an adverse effect on the general principle behind legal professional privilege. It would weaken the general principle, creating uncertainty on the confidentiality of the communications and on the advice received.
28. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, "*a fundamental condition on which the administration of justice as a whole rests*".
29. 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. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

30. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
31. Following on from this, there is also a strong public interest in allowing legal representatives to discuss a case in confidence with their opposition with a view to negotiate a settlement which avoids further litigation and the costs associated with it. This is particularly the case where tax payer's money is involved.
32. 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..."
33. 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.
34. One of the main issues in carrying out the public interest test in cases where section 42 is engaged is whether the issues which the advice addresses is still a 'live issue'. In this case the request was made after a settlement had been reached between the parties. It is therefore on the face of it correct to say that the actual issue over the award was no longer live.
35. The council said however in relation to this that *"in addition to the general public interest in cases such as these, the advice sought is recent. It is not live in relation to Wilton Terrace, as the costs issue has been settled, but it is recent. It is also quite possible that the council will find itself involved in similar issues with developers. There is a strong*

public interest in the council not paying more than it has to when costs are awarded against it, and disclosure of this legal advice has the potential to affect its position in future negotiations”.

36. The Commissioner has considered the information and notes that the advice is specific to the issue of this particular claim. The advisor does however use his experience as an expert costs draftsman to go through aspects of the claim and provide advice on specific details within it where he or she considers that the claim is too high, or that the other party might accept a reduced figure.
37. The tools used by the advisor can potentially be identified and used by other organisations and taken into account in any future claims of a similar nature laid against the council. However in essence the central issues involved will always revolve around analysing the amounts claimed by the other party for particular actions or services and making counter claims to reduce the overall figure.
38. The council also said that there was a strong public interest in allowing the council to negotiate with other parties on a confidential basis in order to allow agreements to be reached outside of the courts. It considered that a disclosure of this information would affect that confidential nature of discussions and lessen the possibility of negotiated agreements being found in any future cases. There is a strong public interest in negotiated settlements occurring.
39. ‘Without prejudice’ offers will not affect the confidentiality of the information concerned and so legal professional privilege will be retained for that information in spite of the fact it has been provided to the opposite party. This is based on the public policy of assisting and encouraging parties to settle disputes without resorting to litigation.

Conclusions

40. The Commissioner has considered the above. There is a very strong public interest in maintaining the status of legal professional privilege, even where the issue is no longer live. Where issues such as ‘without prejudice’ negotiations are involved there is also a strong public interest in allowing the parties to negotiate without concerns that those negotiations might subsequently be disclosed. In this way an open and frank negotiation can occur and the opportunity to resolve the issues outside of the courts is not hampered by concerns of a subsequent disclosure of the information.
41. The Commissioner is therefore satisfied that in this case the council has applied section 42 correctly and that the public interest in maintaining the exemption outweighs that in the disclosure of the information.

Section 41

42. The council has applied section 41 to information submitted by the developer's lawyers as regards the council's costs in appealing the planning decisions. The information, for the most part, is invoices outlining the developer's legal costs. The information was submitted to the council to outline the basis for the total claim for costs being made against it. The council argues that in this context it is clear that the intention behind providing the information to the council was for the purposes of making its claim, and that it was clear to the council that the information was to be held in confidence and not disclosed for any other purpose.

43. Section 41(1) provides that –

"Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

44. In order for the exemption to be engaged the Commissioner considers that in this case the appropriate test is that it must be shown that the information:

- was provided to the authority by another person, and
- that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:
 - The information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
 - the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;
 - disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;

- the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.
45. The Commissioner accepts that the above does not constitute the only test of confidence however he considers it appropriate to use this test in this case.

Was the information provided by another person?

46. The council received the information from the developer. It submitted invoices and costings for work it had carried out preparing the appeal against the council's planning refusal decision. The costings provide a detailed overview of the costs of third parties who provided services to the developer and submitted invoices for that work. The developer also submitted estimates in relation to its own costs in preparing the appeal. The information was therefore provided to the council by another person.

Quality of confidence

47. The Commissioner is satisfied that the information is not trivial, as it relates to invoices and sensitive information on pricing and costs of the legal appeal and of third parties who provided services in support of this. Overall it provides a picture of the steps taken by the developer's lawyers in preparing and presenting the appeal to the planning inspector.
48. The Commissioner is also satisfied that the information is not otherwise in the public domain. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Obligation of confidence

49. Both the council and the developer's lawyers argue that there is an obligation of confidence on the information. The information was submitted for the purposes of outlining the costs of the developer in handling the appeal process and negotiations. The council argues that it was very clear, due to the context in which the information was provided, that it was intended for the purposes of dealing with the claim and nothing more. It argues that even employees of the developer would understand that the information was confidential and that it should not be disclosed without authority. The council therefore argues that if it were to disclose the information then the developer could take action against it for breaching the duty of confidence.
50. The council pointed out that the information is invoices provided to the developer by third parties, who would have had no direct contractual

relationship with the council itself, only with the developer as part of its appeal against the council's planning decision. Their contractual relationship would therefore have been with the developer, which is not a public authority, and the developer itself has no FOI obligations which would have alerted the third parties to any potential for a disclosure of the invoices to the whole world via FOI.

51. The developer's legal representatives wrote to the council when informed of the FOI request. In their response they outlined their belief that the majority of information held by the council is confidential. It argued that any disclosure of the information would be an actionable breach of a duty of confidence and that this would prejudice its commercial interests. Other third parties were also asked and passed on comments stating, in short, that the information was provided in confidence, and only for the purpose of outlining the cost of the services which were provided to the developer.
52. The council argue that disclosing invoices issued to the developer (not the council), or by using the information for any other purpose than to settle the claim it considered that this would constitute an actionable breach of confidence.
53. The Commissioner accepts that the information would have been considered to have been received in confidence. The council would therefore consider that there was an obligation to retain the information in confidence and only use that information for the purposes of paying the figure quoted or seeking to negotiate a settlement.
54. The Commissioner therefore considers that the information has the necessary obligation of confidence which was not lost by the disclosure of the information to the council for the limited purpose of seeking payment for the costs it had been awarded.

Would disclosure be detrimental to any party?

55. The developer's representatives have outlined that a disclosure of the information would be detrimental to it, and that it may also be detrimental to those companies which have provided services to it in the course of the appeal.
56. The individual items of information are invoices from third parties hired by the developer to carry out work, or invoices which the developer's lawyers were charging for representing the developer. Whilst not in itself confidential information generally, the items, when taken as a whole, provide an overview of the actions taken by the lawyers in order to best present their case before the planning inspector. In this context a disclosure of the information would be prejudicial to the interests of the

lawyers as it goes some way to demonstrating their strategy in preparing their case.

57. The council also highlighted that the third parties had contracted with a private development company, not a public authority, and that the situation was therefore different to where contracts with public sector clients were agreed. It added that there would be no expectations that the invoices, demonstrating pricing etc would be disclosed as there might be where a direct contractual relationship was entered into with a public authority.
58. The Commissioner has considered the above and accepts that the disclosure of the information would be detrimental to the developers as it would indicate the way that they approached the case. He also accepts that a disclosure of the invoices would be detrimental to some third parties as it would provide commercial information on the services they provided, (including their pricing).

Would a disclosure of the information be actionable?

59. The public interest can provide a defence to any action for a breach of confidence. The public interest test in this situation is reversed from the normal balance of the test under FOI. For the information to be disclosed the public interest in disclosing the information must outweigh the public interest in confidences being maintained. This reflects the strong public interest in maintaining confidences.
60. The majority of the arguments in favour and against disclosure are the same as those provided above. Whilst less inherent weight is placed upon maintaining confidences than in protecting information which is subject to legal professional privilege there is still nevertheless a strong assumption that confidences will be maintained.
61. The Commissioner notes that the information falling within the scope of section 41 is the information provided to the council by the developer. A disclosure of this information would not particularly shed light on the actions of the council or how it handled the claim negotiations. It would simply provide details of the claim that had been made against the council by the developer.
62. The council argued that, in the case of third parties, the information was only provided to the council as a result of the appeal. It considers that this provides a stronger context for the information held by the council to be considered confidential. It is only held for the limited purposes of examining the cost claims of the developer to reach an agreed settlement over the costs. The Commissioner accepts that this is the case.

63. The Commissioner also recognises the strong public interest in open negotiations of this type occurring. By providing the invoices directly in this way the costs of the developer can be analysed and challenged or agreed where necessary based upon clear evidence of the costs which the developer had incurred during the appeal. Ultimately this is likely to lead to a greater chance of a negotiated settlement between the parties and avoid further expensive litigation.
64. The Commissioner recognises a strong public interest in negotiated settlements occurring. He also recognises that a subsequent disclosure of the information may dissuade third parties from divulging direct evidence such as copies of invoices from being provided to authorities in the future should this information be disclosed. This is a qualified argument however as costs claims will always need to be made with appropriate evidence provided. It would be difficult for a party claiming costs not to provide evidence of the breakdown of the costs it has claimed, whether this is with a public authority, (with the associated risk of disclosure), or not.
65. Following the above the Commissioner does not consider that the public interest in the information being disclosed outweighs that in maintaining confidences in this instance. The overall cost of the settlement, and the reasons why the information has needed to be paid are already within the public domain. There public interest in showing a breakdown of the individual elements of the claim do not need to be demonstrated in order for the council to be scrutinised for the actions it took which caused the loss to the public purse. The actions taken to reach the costs overall were the developers in preparing its appeal, not the councils. A disclosure of the information would not provide greater transparency on the actions of the council other than to demonstrate the claim of the developer as compared to the ultimate price settled at. The information providing the details of the actions taken by the council and its legal adviser to negotiate with the developers falls within the scope of section 42 as outlined above, and so this would not be disclosed. A disclosure of this information would not create substantially greater transparency on the council's actions in this respect.
66. The Commissioner therefore considers that the council was correct to apply section 41 to the information.

Section 43

67. The council also sought to apply section 43 to the information which it received from the council. As the Commissioner has found that section 41 applies he has not considered this further within this decision notice.

Section 40

68. The council also applied section 40 to very limited sections of data, primarily of third party individuals whose personal data was included on invoices which had been provided to the developer.
69. As the Commissioner has decided that both section 42 and section 41 were applied correctly he has not found it necessary to make a decision on the application of section 40.

Right of appeal

70. 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

71. 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.
72. 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