

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 November 2016

**Public Authority:** Liverpool City Council  
**Address:** Municipal Buildings  
Dale Street  
Liverpool  
L2 2DH

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to Liverpool City Council's decision to pay the legal costs incurred by the Mayor in a dispute with his previous employer. The council disclosed some information and withheld other information under the exemption for Legal Professional Privilege – Section 42 of the FOIA.
2. The Commissioner's decision is that Liverpool City Council has breached section 17 and correctly applied section 42 to withhold legal advice falling within the scope of the request.
3. The Commissioner does not require the public authority to take any steps.

## Background

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4. The following background information has been taken from the council's Delegated Decision which is in the public domain.
5. On 7 February 2012, Liverpool City Council (the "council") agreed to change its governance arrangements to an Elected Mayor and Cabinet model. In May 2012 Liverpool elected its first directly Elected Mayor, Joe Anderson.
6. The Mayor instructed solicitors in a private capacity to bring proceedings against his previous employer, Chesterfield School, on the grounds of unfair dismissal. The grounds for dismissal were on the basis of the Mayor being elected to office.
7. In November 2012 the council decided that an indemnity be applied in respect of legal fees incurred by the Mayor in this matter.
8. The Delegated Decision goes on to define the terms of the indemnity in this particular context:

*"The Council's constitution provides for Members and officers to be granted an indemnity in certain circumstances. The circumstances are in relation to any action of, or failure to act by, the member or officer in question, which –*

*(a) is authorised by the Council; or*

*(b) forms part of, or arises from any powers conferred, or duties placed, upon that employee or Member, as a consequence of any function being exercised by that employee or Member (whether or not when exercising that function he or she does so in his or her capacity as an employee or Member of the Council)."*

9. The requester sought information relating to the council's decision to apply the indemnity to the Mayor's legal costs.

## Request and response

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10. On 27 September 2015, the complainant wrote to the council and requested information in the following terms:

*"The Council has said "the decision to pay the legal fees was taken by the council chief executive after discussions with the council solicitor and monitoring officer and was not made by Mayor Anderson. In addition, it was a course of action that had the agreement of the District Auditor."*

*Please disclose dates and records of all decisions, discussions, telephone calls or meetings, copies of all emails and other written communications between and/or including any or all of the following people in connection with the approval of the payment by the Council of the Mayor's legal costs in connection with his ET and EAT claim against Chesterfield school: the Mayor, council officers and the District Auditor.*

*The period of interest extends from May 2010 to the present."*

11. On 15 October 2015 the council advised the complainant that it was extending the time for complying with the request to consider the public interest test in relation to the application of a qualified exemption.
12. The council responded on 8 January 2016. It stated that it was withholding the information under the exemption for legal professional privilege, section 42 of the FOIA.
13. Following an internal review the council wrote to the complainant on 17 March 2016. It stated that it was maintaining its position.

## Scope of the case

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14. On 17 March 2016, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
15. During the course of the investigation the council disclosed to the complainant a table documenting the dates of decisions taken in relation to the decision to cover the legal costs identified in the request.
16. The Commissioner confirmed with the complainant that she would consider whether the council had correctly withheld information under section 42 of the FOIA and whether it had otherwise disclosed all the relevant information held.

## Reasons for decision

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### Section 1 – information held

17. Under section 1(1) of the FOIA public any person making a request for information to a public authority is entitled-

*“(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.”*

18. The extent of information held by the council became a matter of some confusion during the Commissioner’s investigation. The Commissioner comments further on this in the other matters section of this decision notice.
19. The council confirmed that the only relevant information held in relation to the request is a Delegated Powers/Decision which was made on 29 November 2012 (which has been disclosed) and external legal advice. The complainant disputes the council’s position.
20. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
21. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
22. In order to assist with this determination the Commissioner approached the council with a number of questions routinely asked in such scenarios. The questions and summaries of the council’s responses are set out below.
- What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?*
23. The council explained that the decision-making in relation to this matter was the responsibility of the City Solicitor and the Chief Executive. Searches were, therefore, conducted on records retained by these parties.
24. The council confirmed that searches of electronic and physical records were made.

*If searches included electronic data, which search terms were used?*

25. The council confirmed that searches were made of personal folders and team drives used by the Chief Executive and the City Solicitor using the following search terms:

- Indemnity
- Tribunal
- Employment Tribunal
- Application of Indemnity
- Monitoring of indemnity

26. The council stated that no records relevant to the scope of the request were retrieved.

*Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?*

27. The council confirmed that no relevant information had been deleted or destroyed.

*What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?*

28. The council explained that, when a delegated decision is made under the provisions of the Scheme of Delegation as set out in the City Council's Constitution, a signed report setting out the decision is required to be produced and retained. In this instance a signed report was created, retained and disclosed.

*Is there a business purpose for which the requested information should be held? If so what is this purpose?*

29. The council confirmed that its Constitution regulates the manner in which it conducts business which includes requirements for the recording of decisions which are taken and the format in which this must be recorded and signed by the appropriate officer. The council stated that, for the purposes of correct business process, the delegated decision report on this matter was produced and retained in full compliance with Constitutional requirements.

*Is it standard practice for legal costs incurred by council employees (or specifically the Mayor) in disputes which do not relate to their current post to be paid by the council? If it is, please identify the relevant policy/guidance/contractual arrangements.*

30. In responding to this query the council stated that the Commissioner's question implied that the dispute in question did not relate to the Mayor's current post. It advised the Commissioner that such a suggestion was fundamentally incorrect. The council explained that the basis upon which the Mayor was dismissed from his private employment at Chesterfield High School was as a direct result of his being elected to the Office of Mayor of Liverpool.
31. The council has further explained in its responses to the complainant and in submissions to the Commissioner that the decision to apply the indemnity to cover the legal costs incurred by the Mayor was made by the Chief Executive in consultation with the City Solicitor on 29 November 2012 and both officers were involved in the subsequent monitoring of it continued application.
32. The council confirmed that the City Solicitor was continuously informed by external solicitors of the progress of legal proceedings in order that they could be satisfied that the continued application of the indemnity remained appropriate. The council explained that the matter was also subject to verbal discussions with the council's external auditors, Grant Thornton, on a number of occasions.
33. The council confirmed that the monitoring identified in the request was conducted on a verbal basis and that, beyond the delegated decision and external legal advice, no written records were retained.

### *Conclusions*

34. The Commissioner notes that the council's decision to apply the indemnity in this case resulted in significant public expenditure (some £89,000). In view of this and, given the seniority of the parties involved, the Commissioner observes that it would be reasonable for the requester to consider that written records were kept of the monitoring process.
35. The code of practice issued under section 46 of the FOIA (the "section 46 code") sets out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.

36. Section 8 of the section 46 code recommends that authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes<sup>1</sup>.
37. The Commissioner acknowledges that, ultimately, it is for public authorities to decide what records must be kept in order to satisfy business needs and for legal and accountability purposes. Having considered the council's submissions and the available evidence, the Commissioner has concluded that, on the balance of probabilities, the council has correctly confirmed the extent of relevant information that it holds.

### **Section 17 – refusal notice**

38. Under section 17(1) of the FOIA, where an authority is relying on an exemption to refuse to provide information specified in a request it must give the applicant a notice which:
  - “(a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.”
39. Where an authority is considering the application of a qualified exemption, which requires a determination as to where the balance of the public interest lies, it must, under section 17(3), and *“...within such time as is reasonable in the circumstances, state the reasons for claiming...”*
  - (b) *that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*
40. In this case the request was submitted on 27 September 2015 and on 15 October 2015 the council advised the complainant that it was extending the time for complying with the request to consider the public interest test in relation to the application of a qualified exemption.

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

41. On 8 January 2016 the council issued a notice which confirmed that information was being withheld under section 42 of the FOIA. However, this refusal notice contained no reference to the reasons for its conclusion that the public interest favoured maintaining the exemption.
42. The Commissioner has, therefore, concluded that the council breached section 17(3) of the FOIA.

### **Section 42 – Legal Professional Privilege**

43. Section 42 provides an exemption for information that is subject to legal professional privilege (LPP). The concept of LPP protects the confidentiality of communications between a lawyer and client.
44. There are two types of LPP – advice privilege and litigation privilege.
45. The withheld information consists of external legal advice sought by the council in relation to its decision to apply the indemnity to cover the costs of the Mayor's legal fees.
46. The council has confirmed that it considers the information is subject to litigation privilege.
47. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
48. Having viewed the withheld information the Commissioner is satisfied that it constitutes a communication between a client (the council) and a legal adviser (external solicitor). In relying on the litigation privilege limb of the exemption the council has not provided any submissions in this regard, however, in view of the context within which the advice was sought the Commissioner is, in this case, satisfied that this element of the exemption is engaged.
49. Once it has been established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures. In this case the complainant has argued that, as the substance of the advice, namely that the council paid the Mayor's legal fees and this was endorsed by legal advice, the privilege attached the information has



been lost. However, the Commissioner does not consider that this in itself demonstrates that the advice has been subject to either restricted or unrestricted disclosures. The council maintains that the advice itself has not been disclosed so she has concluded that it remains subject to LPP.

50. As she has decided that the exemption is engaged the Commissioner has gone on to consider the public interest test.

*Public interest in disclosure*

51. The council did not provide any public interest arguments in its response to the complainant, at the internal review stage or in its submissions to the Commissioner. The Commissioner has, therefore considered arguments provided by the complainant and provided her own analysis of what she considers to be the relevant arguments.
52. Firstly, the Commissioner considers that there is a general public interest in public authorities being transparent about their decision-making as this promotes public understanding, reassurance that appropriate judgements are being and provides a mechanism for accountability.
53. In this case, the council's decision to apply an indemnity and cover the Mayor's legal costs has been the subject of media coverage and public concern<sup>2</sup>. It is not the Commissioner's role to comment on the decisions taken by the council in this regard nor to comment on the veracity of media reports, however, she considers that the level of public expenditure involved, concerns expressed in the local community and the apparently novel nature of the matter provide enhanced grounds for public scrutiny.

*Public Interest In Maintaining The Exemption*

54. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced

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<sup>2</sup> See, for example: <http://www.liverpoolecho.co.uk/news/liverpool-news/calls-liverpool-mayor-joe-anderson-10005630>; <http://www.bbc.co.uk/news/uk-england-merseyside-32349986>

decisions for fear that this legal advice may be disclosed into the public domain.

55. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. This general view has also been supported by the Information Tribunal.

*Balance Of The Public Interest*

56. In considering where the balance of the public interest lies, the Commissioner has given due weight to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP; safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
57. The Commissioner considers that the sensitivity of LPP can decline when matters are no longer live. However, the council has not clarified whether the withheld litigation advice was "live", that is, relating to an ongoing matter at the time of the request. As the council had already taken widely reported decision to apply the indemnity at the time of the request and matters relating to this were not in train, it is not immediately obvious that the advice is live, although the Commissioner accepts that it is recent. In the absence of specific arguments from the council, though, the Commissioner considers that little weight is attached to the information by dint of it being relatively recent.
58. The public concerns about this matter focus on the council's involvement in what, on the face of it, appeared to be a private dispute between the Mayor and his former employer. That the council was using a significant amount of public money to cover the Mayor's legal costs has provided some cause for concern and grounds for scrutiny of the council's rationale for its actions and its decision making in this regard.
59. The concerns about the council's involvement in this matter were echoed by the Judge in the Mayor's employment tribunal appeal who commented:

*"On 3 July 2012 the solicitor to Liverpool City Council wrote to Mr Penney raising various questions, including whether the 208 hour payment limit in section 10 of the LGHA applied any longer. (It is*

*unclear to me why the legal department of Liverpool should have been acting on behalf of the Claimant in his private capacity.)".<sup>3</sup>*

60. The Commissioner is not suggesting that the council has behaved inappropriately in this matter or otherwise taken the wrong decision - such judgements are not within her remit. However, the public interest in this case is impacted by the public perception of possible wrongdoing and the public expenditure involved are of sufficient weight to affect public confidence in the council performing its public functions.
61. The council has explained that the decision to apply the indemnity to the legal fees incurred by the Mayor was taken because the case had direct implications for its governance arrangements. In essence, the council has explained that the Mayor's dismissal from his former employment was a direct result of taking up the post of Elected Mayor. Rather than being a personal matter, therefore, the council considers that the issue directly relates to its administration of the Mayoral model of governance, something that will be relevant going forward.
62. Whilst authorities will often face criticism in the media for decisions which might be unpopular but which do not involve malpractice, the scenario presented is, as acknowledged by the council, such that new territory is being explored with accompanying uncertainty about what the correct approach might be. It is within this context that, on the one hand, the withheld legal advice appears and on the other, the public perception that the indemnity might not have been applied appropriately.
63. The Commissioner is fully aware of the emphasis that the Tribunal has placed on clients being able to seek legal advice in a confidential context. However, it is also the case that the exemption is qualified not absolute, and it must be shown that there is a clear, compelling and specific justification that at least equals the public interest in disclosing the information in dispute.
64. In reaching a decision in this case, the Commissioner has reflected on the amount of public money involved, the concerns raised by the complainant and the wider community (reflected in the media) and the absence of any arguments from the council as to why the public interest favours withholding the information in this specific case.

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<sup>3</sup> Appeal No. UKEAT/0206/14/MC, judgement published online here: [http://www.bailii.org/uk/cases/UKEAT/2015/0206\\_14\\_1404.html](http://www.bailii.org/uk/cases/UKEAT/2015/0206_14_1404.html)

65. In relation to the definition of the information as being subject to litigation privilege, the council has not provided any details of the form such litigation might take.
66. In accepting that the exemption is engaged, the Commissioner has extrapolated from the context within which the advice was sought, namely, regarding the Mayor's Employment Tribunal Appeal and the council's concerns about the potential broader repercussions for its adoption of the Elected Mayor model of governance. However, without specific details of the putative litigation the Commissioner is unable to determine whether any additional weight is attached by virtue of the public interest in withholding the information to protect the integrity of the course that such litigation might take.
67. The Commissioner is mindful that the council has had numerous opportunities to provide arguments in support of its application of the exemption – at the time of the initial response, the internal review and on several occasions during her own investigation. Whilst she acknowledges that there is a well-established general public interest in legal and litigation advice remaining confidential, the public interest scales in any individual case should always be populated with arguments that are specific to the information and circumstances under consideration.
68. In this case, the public expenditure involved, a matter of heightened public concern at a time when there are restrictions on local authority finances, and the public concern about the council's decision provide strong public interest arguments for disclosure. Nonetheless, ultimately, the Commissioner must focus her considerations on the substantive content of the information being withheld and the likely affect disclosure might have. To that end, the council sought advice on its legal position regarding the specific matter of indemnity. Undue invasion into the necessary space required for those legal deliberations to be considered must be provided for and the counter public interest arguments so far looked at focus more on the context rather than the substance.
69. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need

to be adduced to override that inbuilt public interest"<sup>4</sup>. In this case, with no evidence of wrong doing or actions counter to advice provided, the Commissioner has concluded that, in light of the factors above, the public interest in disclosing the information in this case does not outweigh the public interest in maintaining the exemption.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

## Other matters

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70. Although they do not form part of this decision notice the Commissioner wishes to note the following matters of concern.

### *Section 45 Code of Practice*

71. The code of practice issued under section 45 of the FOIA (the "code") contains recommendations for public authorities as to the practice which it would be desirable for them to follow in connection with the discharge of their functions under the FOIA.

72. Paragraph 15 of the introduction to the code states:

*"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and the Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on good practice issued by the Commissioner. Authorities should ensure that proper training is provided in this regard. Larger authorities should ensure that they have a central core of staff with particular expertise in Freedom of Information who can provide expert advice to other members of staff as needed."*<sup>5</sup>

73. Although the introduction does not form part of the code itself the Commissioner, in accordance with her role under section 47 of the FOIA to promote the following of good practice would echo these recommendations.

74. In this case, the council's initial response and internal review stated that information was being withheld under section 42. However, during the

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

75. Commissioner's investigation the council initially revised its position to state that this information was not held; then revised its position again to confirm that legal advice was held.
76. The Commissioner considers that the lack of clarity from the council around the question of whether relevant recorded information was held resulted in unnecessary delays to her investigation. She also wishes to set on record that her enquiries of the council and attempts to establish the relevant facts were met with some resistance.
77. She also notes that, in response to some of the Commissioner's standard enquiries regarding compliance with section 1, the council stated:

*"Notwithstanding that the City Council considers these to be questions rather than requests for information – and therefore beyond the remit of the legislation – as evidence of the spirit of cooperation which Liverpool City Council brings to its responses to FOI requests, we will address these questions."*

78. In view of the above, the Commissioner has additional concerns that the council might not understand the distinction between requests for information under section 1 of the FOIA (which are confined to recorded information held at the time of a request) and enquiries made under section 50 of the FOIA, which are not so confined and which can require authorities to generate new information to assist the Commissioner in reaching a decision.

#### *Recommendations*

79. Having considered these matters the Commissioner has concerns that the council has not fully demonstrated an understanding of the requirements that the FOIA provides for public authorities. This may be a symptom of not having provided staff involved with the handling of requests with adequate training. In future, the Commissioner expects that the council will process requests in accordance with the codes of practice and her published guidance and that it will display due engagement with her investigations.

## Right of appeal

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80. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

81. 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.

82. 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**