

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 May 2017

**Public Authority:** Middlesbrough Borough Council

**Address:** PO Box 500  
Civic Centre  
Middlesbrough  
TS1 9FT

#### Decision (including any steps ordered)

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1. The complainant has requested information from Middlesbrough Borough Council ("the Council") about Passenger Carrying Vehicle ("PCV") enforcement exercises. The Council disclosed some held information, and withheld some under section 42(1) of the Freedom of Information Act ("the FOIA"). The complainant subsequently disputed the application of section 42(1), and whether any further relevant information was held.
2. The Commissioner's decision is that the Council has correctly applied section 42(1) to the withheld information, and that no further relevant information is held. However the Council has breached section 10(1) by providing its response out of time.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 31 May 2016, the complainant wrote to the Council and requested information in the following terms:

*Please provide internal emails/ file notes to /from any members of staff employed in the Taxi Licensing team in relation to PCV enforcement for the time period 2013 – to date.*

5. The Council responded on 3 August 2016. It disclosed some held information, and withheld some under section 42(1).
6. Following an internal review the Council wrote to the complainant on 9 September 2016. It maintained its earlier position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 1 November 2016 to complain about the way their request for information had been handled.
8. During the subsequent investigation by the Information Commissioner's Office ("the ICO") the Council disclosed further relevant information that it had identified.
9. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly applied section 42(1) to the withheld information, and whether any further relevant information is held.

### **Reasons for decision**

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#### **Section 42(1) – Legal professional privilege**

10. Section 42(1) states 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.*

11. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) 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.*

12. There are two types of privilege: 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these 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. Communications made between adviser and client in a relevant legal context will therefore attract privilege.
13. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
14. In this case the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.

#### Legal advice privilege

15. The Commissioner has viewed the withheld information, which comprises emails between an officer of the Council and an 'in-house' lawyer based within the Council's Legal Services.
16. The Commissioner is satisfied that the withheld information represents legal advice provided to a client by their legal advisers. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently the Commissioner accepts that the withheld information attracts legal professional privilege on the grounds of legal advice privilege, and that on this basis section 42(1) is engaged.

#### The public interest test

17. As a qualified exemption, section 42(1) is subject to a public interest test. The communications must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.

#### *Public interest arguments in favour of disclosure*

18. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
19. The Commissioner understands that the complainant seeks the withheld information in relation to concerns they hold about the Council's involvement in PCV enforcement exercises. The complainant disputes the Council's authority to organise these types of exercises in conjunction with other public authorities, and alleges that the incurred costs of the enforcement exercises have been illegally recharged to the taxi trade. The complainant is specifically concerned that their business has been disadvantaged by being targeted as part of these enforcement exercises.
20. It is also understood that the complainant believes the information should be made available to them as part of an associated corporate complaint that they have made to the Council.

*Public interest arguments against disclosure*

21. The Council considers that the withheld information relates to an ongoing dispute that is being pursued by the complainant, and the legal advice retains its sensitivity.
22. The Council considers that it is in the public interest that its decisions about are taken in a legally informed context. In respect of the withheld information, the decision related to licensing matters which are part of the Council's statutory functions.

*Balance of the public interest test*

23. The Commissioner has considered the arguments put forward by the complainant, in addition to the stated position of the Council and the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.
24. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions, particularly where these decisions relate to the statutory functions.
25. However, there is also a strong opposing public interest in maintaining the Council's right to communicate with its legal advisors in confidence. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or

where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.

26. Following inspection of the withheld information and consideration of all the circumstances in this case, the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in this exemption. The request appears to relate heavily to a private interest on the part of the complainant, and it is reasonable for the Commissioner to consider that should the outcome of any licensing enforcement exercise be disputed, this would need to be challenged through the appropriate appeal routes or courts. It is also noted that regardless of any ongoing corporate complaint that may have been submitted by the complainant, the decision in this case is limited to considering whether the withheld information can be disclosed to the public under the terms of the FOIA, and not as part of any privileged disclosure within the Council's corporate complaint's process.
27. The Commissioner has ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption provided by section 42(1) for legal advice privilege has been correctly applied.

### **Section 1(1) – Whether information is held**

28. Section 1(1) states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated to them. This is subject to any exemptions or exclusions that may apply.

#### *The complainant's position*

29. The complainant has made a request to Cleveland Police for information about the enforcement exercises undertaken in conjunction with the Council. Cleveland Police subsequently disclosed information that included correspondence from the Council, which was not disclosed by the Council as part of its own disclosure. The complainant has therefore disputed the completeness of the Council's disclosure.

#### *The Council's position*

30. The Council has informed the Commissioner that electronic searches were undertaken of the subject field and message body of all emails (and attachments) held by Licensing employees; including previous employees where their records are still held. The search criteria used were the keywords "*cannon*", "*vosa*", "*psv*", "*pcv*", "*enforcement*", "*overtime*", "*police*", "*tann*" or "*minibus*". Hardcopy records, such as enforcement files and budget files, were also checked where a logical connection to the request could be established.

31. Due to the necessity of searching by the keyword "*enforcement*", the Council's electronic search identified thousands of documents which were then filtered to identify their relevance. This filtering resulted in 282 documents being identified as relevant to the request and subsequently disclosed. The Council has considered the specific documents released by Cleveland Police, and acknowledges that these were missed when filtering the retrieved documents. The Council was not contacted by Cleveland Police regarding the disclosure made by that authority, so was not made aware of the omission, and able to correct it, until the ICO's investigation.
32. The Council is not aware of the destruction of any relevant information that may have been previously held, but acknowledges that 'general email conversations' between officers may be deleted if there is no apparent business need to retain them. The Council's retention schedule requires that information supporting an administrative function is kept for 3 years, whilst information used for litigation purposes (such as that withheld under section 42(1)) is kept for a minimum of 6 years under the terms of the Limitation Act 1980.

### *Conclusion*

33. The Commissioner must decide on the balance of probabilities whether further recorded information is held by the Council that would fall within the scope of the request.
34. In the circumstances of this case the Council has undertaken searches for relevant information across both electronic and hardcopy records, and a significant volume of documents were subsequently identified as relevant to the request. Further documents were retrieved during the ICO's investigation following their identification by another public authority. The Council has confirmed that no business-necessary information is known to have been previously destroyed, and that a retention scheme is in operation in relation to the type of information sought by the request.
35. Having considered the above factors, there is no evidence available to the Commissioner that suggests that further relevant information must be held. Clear and logical searches for the information have been undertaken, and whilst some documents were omitted in error from the initial disclosure, this has now been rectified. It is also recognised that information such as general correspondence will only be retained if there is a business or statutory need to do so.
36. On this basis the Commissioner finds that the Council has now complied with section 1(1).

**Section 10(1) – Time for compliance**

37. Section 10(1) states that an information request should be responded to within twenty working days of receipt. In this case a response was provided outside of this timescale.
38. On this basis the Commissioner finds that the Council has breached section 10(1).

## Right of appeal

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39. 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)

40. 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.
41. 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**