

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2017

Public Authority: Newport City Council
Address: Civic Centre
Godfrey Road
Newport
NP20 4UR

Decision (including any steps ordered)

1. The complainant has requested information in respect of legal advice that Newport City Council had provided to one of the primary school's within its boundaries. The Council refused to provide the information by citing section 42 of the FOIA. The Commissioner's decision is that Newport County Council was not entitled to rely on section 42 of the FOIA to withhold the requested information. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complaint which does not rely on section 42 of the FOIA.
2. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 13 December 2016, the complainant wrote to Newport City Council ('the Council') and requested the following information:

"I would like to know the origin of the following advice provided by Newport City Council recently, in relation to the Charles Williams Church in Wales Primary School.

4. The advice was in respect of a school within the Council's boundaries contacting it for advice regarding a related FOIA request from the complainant Which has been reproduced below:

"I would like to know the origin of the following advice provided by Newport City Council recently, in relation to the Charles Williams Church in Wales Primary School.

"I have received legal advice following our conversation on the request made by Mr David Powell. The advice received is what we had discussed. If we hold the information, the Act requires us to supply copies of it to the requester or to explain why it is exempt from disclosure.

*The FOI request, is about complaints that were dealt with under the School's Disciplinary Procedure. **This means that this is a confidential staffing matter and all information is exempt under FOI to the extent that it contains personal data relating to individuals.***

The most the School could disclose would be copies of the requesters own complaint's and copies of other complaints, with all names and other personal details redacted. But all records, documents and information arising from those complaints would be confidential staffing matters."

5. The Council responded to the complainant's request regarding the background of the advice on 10 January 2017. It confirmed that it held information falling within the scope of the complainant's request but refused to provide the information by virtue of section 42 of the FOIA.
6. The complaint contacted the Council on 17 January 2017 stating that the response indicated that the Council generally withholds information about legal advice obtained by the Council. He expressed concern with such an approach as it appeared to him that any request for information can be refused if the Council claims to possess legal advice recommending refusal. He also expressed concern that the veracity of the advice itself cannot be tested if access to it is denied. The complainant further stated that the focus of his request was not the advice itself but the background to the advice, and requested the following information:

"Will you provide the evidence that the advice was legal advice?"

Can you confirm that I've previously stated the advice correctly and in its entirety?

Who passed on the advice to the school?

At what date was the advice passed on to the school?

What was the documentary basis for the advice? (Or if you would like to reconsider then who produced the advice?)"

7. Following an internal review the Council wrote to the complainant on 27 April 2017 providing an explanation to many of his concerns and confirming that it would continue to rely on section 42 of the FOIA.
8. The complainant contacted the Council on the same day stating that he found its response overly focussed on upholding the confidentiality of the source of the legal advice. He informed the Council that he was not really asking for the identity of anyone providing the advice, just for an insight into its origin in legal literature or for references to other material used to support it.

Scope of the case

9. The complainant contacted the Commissioner on 27 April 2017 to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of her investigation is to consider whether the Council was correct to rely on section 42 in respect of the complainant's request regarding the background to the advice as opposed to the advice itself.

Reasons for decision

Section 42 – Legal professional privilege

11. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege.
12. Legal professional privilege (LPP) is not defined under the FOIA or in any other legislation but is a common law concept shaped by the courts over time.
13. LPP is intended to protect the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the former Information Tribunal described LPP 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 related communications and exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."

14. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA (EA/2007/0136; 8 August 2008)*.
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 these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
16. The Council confirmed to the Commissioner that it is relying on advice privilege and that the purpose of the advice was to provide advice to the school in relation to an FOIA request it had received from the complainant. It further confirmed the names of the creators of the advice and that they hold practising certificates from the Law Society, and that it considered that the information is still classed as confidential.
17. The Council also informed the Commissioner that its grounds for applying section 42 to the request was because the complainant directly asked for the origin of the legal advice, adding that schools are free to seek advice to enable them to make the best informed decision. It further informed the Commissioner that legal advice often contains arguments both for and against the matter which advice is being sought in order to enable the person seeking the advice to make an informed decision.
18. The Commissioner has had sight of this information and has provided further detail in a confidential annex accompanying this notice. However, she would point out that it does not constitute legal advice as outlined paragraphs 11 to 15 above. As such, the information cannot attract Legal Professional Privilege. The Commissioner has therefore

determined that the Council incorrectly relied on section 42 in respect of the complainant's request for information.

Other matters

Internal review

19. The Commissioner acknowledges that it is not a formal requirement for a public authority to conduct an internal review under the FOIA. However, the Section 45 Code of Practice recommends that public authorities do undertake an internal review and that it should be done promptly. The Commissioner has also produced guidance in relation to this matter which recommends that it takes no longer than 20 working days in most cases, and in exceptional circumstances, no longer than 40 working days.
20. The Commissioner notes that the complainant requested an internal review on 17 January 2017. However, the Council did not send the complainant details of its internal review until 27 April 2017.
21. The Commissioner expects the Council to deal with requests for an internal review within the recommended timescales in future.

Right of appeal

22. 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

23. 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.
24. 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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF