

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2018

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AEX

Decision (including any steps ordered)

1. The complainant has requested information created following his request for an internal review (for a previous information request that he has made). Rotherham Metropolitan Borough Council ("the Council") disclosed some information, and withheld the remainder under section 42(1). The complainant subsequently contested the application of section 42(1).
2. The Commissioner's decision is that the Council correctly applied section 42(1).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 2 February 2017, the complainant wrote to the Council and requested information in the following terms:

Please can I have all of email exchanges and any other written information arising from my Request for an Internal Review on 29 June 2016 and the reinstatement of this request on 26 October 2016.

It is particularly important to have any email exchanges that involved Sumera Shabir, Eira Owen, Christine Hotson and Ian Thomas. It is not necessary to include any emails sent to me.

5. The Council responded on 1 March 2017. It disclosed some information, and withheld the remainder under section 42(1).
6. On 5 April 2017, the complainant asked the Council to undertake an internal review.
7. Following an internal review the Council wrote to the complainant on 3 May 2017. It maintained that its earlier response was correct.

Scope of the case

8. The complainant contacted the Commissioner on 16 August 2017 to complain about the way his request for information had been handled, and specifically that section 42(1) had been incorrectly applied.
9. The Commissioner considers the scope of the case to be the determination of whether the Council has correctly withheld information under section 42(1).

Reasons for decision

Section 42(1) – Legal professional privilege

10. Section 42(1) of the FOIA 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 First-tier Tribunal ("the 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 email communications. Due to the complexity of the information (which comprises 'chains' of emails) the Council has divided it into three groups. These three groups are: the client seeking legal advice from the solicitor; the solicitor seeking further information from the client; and the advice provided by the solicitor to the client. The Council has also provided the Commissioner with a list of the named Council officers and their roles. The Commissioner notes that the Council has provided copies of the 'complete' chains, and that many of these chains originate with emails that the complainant has sent to the Council, or the Council to the complainant.

16. The Commissioner understands that these emails relate to an information request that the complainant had previously submitted to the Council, and contact between the parties following this. The Council has explained the context of the request by clarifying that, upon the original request for an internal review, the Council attempted to address the complainant's specific concerns and information needs by providing an alternative 'Business as Usual' approach (outside the FOIA regime), which was agreed by the complainant. However this did not lead to a resolution of the complainant's concerns, and the complainant subsequently asked for the internal review request to be reinstated.
17. Having reviewed the information that the complainant does not already have or otherwise seek (i.e. those emails between the complainant and the Council), the Commissioner is satisfied that it represents legal advice as defined in paragraphs 12-13. 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 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

18. As a qualified exemption, section 42(1) is subject to a public interest test. The information 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

19. 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.
20. The complainant has informed the Commissioner that he believes the Council's application of section 42(1) is invalid, and that its application is part of a wider attempt to deny him information.
21. The complainant has further informed the Commissioner of the context to the request. The complainant is the co-author of a book titled 'Voices of Despair, Voices of Hope' ("the book"), the subject of which is child sexual exploitation. The complainant has indicated that the Council has previously advised it would order 1500 copies of this book; however the Council has since declined to do this. The Commissioner understands that the complainant has made the request (as well as previous requests) in order to understand why the Council has made this decision.

Public interest arguments against disclosure

22. The Council argues that it is important that Council officers have a 'safe space' in which to discuss issues with the Council's Legal Services when their advice is required, and that compromising this safe space may affect the quality of legal advice exchanged in the future.
23. The Council has informed the Commissioner that the legal advice was sought at a time when the complainant had submitted a significant number of requests for information and enquiries about the substantive matter (the Council's decision to not purchase the book), which the Council was attempting to manage in an appropriate manner.
24. The Council further argues that there is an inherently strong public interest in maintaining the concept of legal professional privilege, and in preserving the confidentiality of client-lawyer communications.

Balance of the public interest test

25. 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 Tribunal in relation to legal professional privilege.
26. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions and decisions.
27. 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.
28. In the circumstances of this case the Commissioner understands that the legal advice has been sought by the Council whilst either complying with its statutory duties under the FOIA, or else addressing the complainant's dissatisfaction with the Council's decision to not purchase copies of the book (which is understood to have been written and published in a private capacity by the complainant as co-author).
29. Whilst it is recognised that the complainant holds concerns about these two aspects, it is reasonable for the Commissioner to consider that any concerns held by the complainant that relate to an information request

under the FOIA can be referred to the Commissioner (under the right to do so provided by section 50), and that any wider concerns about the Council's decision to not purchase the book could potentially be submitted to the Council's complaints process (or another public authority with the power to consider them).

30. There is no clear evidence available to the Commissioner that indicates that the Council has demonstrated any inappropriate or unlawful activity, and it is evident that there are clear processes available by which the complainant can have any related concerns addressed. The Commissioner also recognises that there is a strong public interest in ensuring that the Council is able to seek appropriate legal advice in relation to both its obligations under the FOIA, and its consideration of concerns raised by individuals.
31. 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.

Right of appeal

32. 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

33. 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.
34. 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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