

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2018

Public Authority: Nettleden with Potten End Parish Council

Address: Highcroft Cottage
Hempstead Road
Bovingdon
HP3 0HE

Decision (including any steps ordered)

1. The complainant requested from Nettleden with Potten End Parish Council (the Council) information in relation to a proposed telecommunication mast on Spencer Holland Sports Field.
2. The Commissioner's decision is that the Council was entitled to rely on the exemption at section 42(1) (legal professional privilege) of the FOIA to withhold the information. Therefore the Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

3. On 11 November 2017 the complainant wrote to the Council and requested information in the following terms:

"...also, under the Freedom of Information will you please provide:

- a copy of the legal advice which the parish council is said to have received in respect of compliance with the covenants in the conveyance of the sports field to the parish council."

4. On 16 November 2017 the Council responded. The Council stated that a copy of the old lease would be provided to the complainant and with regards to the legal advice obtained in respect of the conveyance, the Council withheld this information. The Council stated that it considered this information private.

5. On 17 November 2017 the complainant wrote to the Council and asked it to confirm whether or not the information is held. The complainant also asked the Council to state which exemption it is relying upon if it is withholding the information.
6. On 20 November 2017 the Council responded and cited section 42 (legal professional privilege) of the FOIA.
7. On the same day the complainant asked the Council for an internal review of his request and disputed its reliance on section 42.

Scope of the case

8. The complainant contacted the Commissioner on 25 November 2017 to complain about the way his request for information had been handled.
9. Further to the ICO's involvement of this case, on 17 January 2018 the Council provided the complainant with its internal review response. The Council maintained its position - reliance on section 42 and explained that the matter is still on-going with further advice being sought.
10. The scope of the case concerned whether the Council correctly withheld some of the information requested (legal advice) under section 42(1) of the FOIA.

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 (LPP) and this claim to privilege could be maintained in legal proceedings.
12. LPP 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 DTI* (EA/2005/0023):

"... 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 communications or exchanges come into being for the purposes of preparing for litigation."

13. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both 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.
14. 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.
15. In this case the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.

Legal advice privilege

16. The Council explained that the withheld information consisted of advice that had been received following the instruction of a barrister to report on the terms of a conveyance on the Potten End Playing Field. It also said that the information requested is a private document which is shared with members of the Council and that the case in question is still on-going.
17. Having viewed the withheld information the Commissioner considers that it is clearly a communication made between a professional legal adviser and client for the purposes of providing legal advice. The report contains confidential legal advice to the Council from its barrister relating to Spencer Holland Sports Field. Therefore, 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) of the FOIA is engaged.

The public interest test

18. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

19. The complainant considers that the Council's role is to act on behalf of parishioners and that it is responsible for the maintenance of the land under the conveyance. He also believes that the Council has a responsibility to ensure that the covenants are kept and that it is appropriate to share the barrister's advice with parishioners. The complainant added that this should not be a private document and only shared with members of the Council.

Public interest arguments in favour of maintaining the exemption

20. 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.
21. The Council maintained the exemption, as it considered that releasing the legal advice into the public domain could prejudice its ability to process the application should a legal challenge arise as a result. The Council confirmed that the legally privileged advice relates to an on-going application. It also confirmed that the privilege attached to the withheld information has not been lost as it is a private document only shared with members of the Council.

Balance of the public interest arguments

22. The Commissioner has considered the arguments put forward by the complainant and the stated position of the Council in addition to the prior findings of the Commissioner and the Information Tribunal relating to legal professional privilege. She has also had regard for the content of the withheld information.
23. 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.

24. 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, it would be necessary for 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.
25. Whilst it is recognised that the complainant has concerns about the maintenance of the land under the covenant and the sharing of the barrister's advice with the parishioners, any wider concerns about the Council's decision relating to the sports field, could potentially be submitted to the Council's complaints process or another public authority with the power to consider them.
26. There is no evidence available to the Commissioner that indicates that the Council has demonstrated any inappropriate or unlawful activity. The Commissioner also accepts that there is a strong public interest in ensuring that the Council is able to seek appropriate legal advice.

Conclusion

27. The Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information, and that the exemption provided by section 42(1) of the FOIA for legal professional privilege has been correctly applied.

Right of appeal

28. 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

29. 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.

30. 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

Ben Tomes
Team Manager
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Wycliffe House
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