

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2018

Public Authority: London Borough of Wandsworth
Address: The Town Hall
Wandsworth High Street
London
SW18 2PU

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Wandsworth ("the Council") relating to advice obtained by the Council on charging leaseholders for the cost of attaching sprinklers in blocks of ten or more storeys.
2. The Commissioner's decision is that the Council has correctly withheld the information under section 42(1) of the FOIA as it is subject to legal professional privilege.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 25 September 2017, the complainant wrote to the Council and requested information about its decision to charge leaseholders for the cost of installing sprinklers in blocks of ten or more storeys. Part of the request, which was in 23 parts, was as follows:

"Wandsworth Legal has opined that leaseholders are liable for the cost of water sprinklers being installed within blocks."

19. Please provide the documents which was [sic] provided to legal which requested the advice.

20. Please provide a copy of Legal's confirmation that leaseholders are liable, along with the supporting explanation."

5. The Council responded on 27 October 2017. It provided a response to some parts of the request and stated that some other information which had been requested was not held. With regard to questions 19 and 20, above, it stated that some information was held, but that it was withholding it under section 42 of the FOIA – Legal professional privilege ("LPP").
6. The complainant requested a review of the Council's response to parts 19 and 20 of his request on 17 November 2017. Following its internal review, the Council wrote to him on 21 December 2017. It upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 11 January 2018 to complain about the way in which parts 19 and 20 of his request for information had been handled.
8. The Commissioner clarified with the Council what information was held falling within the scope of these requests.
9. With regard to request 19, the Council explained that it issued a set of Instructions to Counsel ("the instructions"). The instructions are undated, but were evidently issued during the second half of June 2017, following the tragic fire at Grenfell Tower in the London Borough of Kensington and Chelsea.
10. In addition, the Council had attached two documents to the instructions for Counsel's consideration: a standard form (blank template) 'two-tier' lease, and an agenda item relating to a meeting of the Housing and Regeneration Overview and Scrutiny Committee on 20 June 2017.
11. During the course of the investigation, the Commissioner clarified with the Council that it was happy to disclose these two attachments to the complainant, which has now been done.
12. With regard to part 20 of the request, the Council withheld legal advice issued by a barrister in response to the instructions.

13. The analysis which follows considers whether the Council correctly withheld the instructions and the advice under section 42 of the FOIA.

Reasons for decision

Section 42 – Legal professional privilege

14. Section 42(1) of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
15. LPP was defined by the First-tier Tribunal (Information Rights) in *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023)¹ (“Bellamy”) as:

“...a set of rules or principles which are designed to protect the confidentiality 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 [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.”
16. There are two types of LPP: litigation privilege and 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. Advice privilege applies where no litigation is in progress or contemplated. In order to attract privilege, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
17. In this case, the Council has confirmed that it considers both parts of the withheld information to be subject to legal advice privilege.
18. As explained in the Commissioner’s guidance on section 42 of the FOIA², the Commissioner’s view is that legal advice privilege covers confidential

¹

http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

communications between the client and lawyer made for the dominant purpose of seeking or giving legal advice.

19. The Commissioner has viewed the withheld information and is satisfied that the instructions and the advice constitute communication between a lawyer and their client, and that they clearly relate to legal matters. It is therefore 'legal advice' for the purposes of the FOIA, and LPP attaches to it.
20. The Commissioner has considered whether the LPP attached to these documents has been waived. It is clear from the Council's communications with the ICO that neither document has been disclosed publicly, and the Commissioner is satisfied that the associated confidence has not been lost.
21. Consequently, the Commissioner considers that the exemption at section 42(1) of the FOIA is engaged, and she will go on to consider the public interest test.

Public interest test

22. Section 42(1) is a qualified exemption, and, as such, is 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.

The complainant's view

23. The complainant put forward arguments in favour of disclosing the information. He explained that the Council "*is imposing*" on leaseholders the cost of installing sprinklers in tall buildings.
24. The complainant explained that the Council justified this in Council paper 17-269³ which states that the Council is entitled, under the provisions of its standard lease, to "*do such things as are necessary to ensure the efficient maintenance administration or security of the Block... [This] includes safety, which properly and reasonably includes facilities and equipment to fight fire and prevent the spread of fire.*"

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<https://democracy.wandsworth.gov.uk/documents/s52192/Update%20on%20fire%20safety%20arrangements%20in%20Wandsworth%20Councils%20housing%20stock.pdf>

25. However, the complainant argued that a Fire Risk Assessment commissioned by the Council in relation to a particular property states that sprinklers are "*not required*" and he therefore considers that the Council should not be able to argue that their installation would fall within what is "*necessary*".
26. The complainant considers that there is a wider public interest in viewing the legal advice provided to the Council regarding leaseholders' liability for the costs of the installation.

The Council's view

27. The Council has explained that, at the date of the request, this was very much a 'live' issue and, while it was relying on legal advice privilege rather than litigation privilege, it was concerned that litigation may ensue since, as was reported in newspapers at the time, a large number of Wandsworth leaseholders were unhappy at the Council's decision to charge them for the installation of sprinklers and were planning to oppose the charges.

The balance of the public interest

28. The Commissioner has stated in her guidance on the application of section 42, referenced previously, that "*a client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings*".
29. This reflects the importance of the principle of LPP. As the First-tier Tribunal found in *Bellamy*, "*...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest*".
30. Although there is always, therefore, an initial weighting towards maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
31. There is always a public interest in a public authority conducting its business in an open and transparent manner.
32. In addition, the Commissioner considers that additional factors may lend weight in any particular case in favour of disclosure. While not an exhaustive list, examples of such factors may include:

- a large amount of money being involved;
 - a significant group of people being affected by the advice or resulting decision;
 - where there has been a lack of transparency in the public authority's actions;
 - if the public authority has misrepresented the legal advice it was given;
 - if the public authority has disclosed selectively only part of advice that it was given.
33. In this case, it has been reported that the works may cost, in total, several million pounds, which is certainly a large amount of money. The Commissioner is also aware that the issue affects a large number of households in Wandsworth and may arguably influence other London Boroughs' future course of action. This in itself lends some weight in favour of the information being disclosed.
34. However, on the basis of all the evidence available to her in this case, the Commissioner does not consider that the Council's conduct to have been secretive or misleading, and does not consider that the Council has misrepresented nor selectively referred to the advice.
35. The Commissioner is aware that this issue remains 'live' in the borough and that a number of residents' associations have considered taking legal action against the Council in the event that it attempts to recover the cost of sprinkler installation from the leaseholders themselves.
36. The Commissioner considers that the disclosure of the instructions and advice would effectively disclose the Council's hand in advance if it were required to defend itself in a legal case, which would undermine the principle of LPP.
37. In all the circumstances of the case, the Commissioner does not consider that the factors in favour of disclosure either equal or outweigh the strong public interest inherent in this exemption.
38. The Commissioner has therefore determined at paragraph 2, above, that the balance of the public interest lies in maintaining the exemption. She is satisfied that the exemption provided by section 42(1) of the FOIA for legal advice privilege has been correctly applied, and does not require the Council to disclose the withheld information.

Right of appeal

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

Website: 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
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