

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2019

Public Authority: Peterborough City Council
Address: Town Hall
Bridge St
Peterborough
PE1 1HF

Decision (including any steps ordered)

1. The complainant has requested from Peterborough City Council (the Council) correspondence between the Council and Fenland District Council (FDC) relating to a conduct complaint against a named councillor and the internal correspondence on the same matter.
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.
3. Therefore, the Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 4 January 2018, the complainant wrote to the Council and requested information in the following terms:

"1. Please may I have a copy of all correspondence, both paper and electronic, both incoming and outgoing, the Peterborough City Council received from the Fenland District Council officer [name redacted] between the dates of 10th November 2017 and 20th December 2017.

- 2. Please can you supply all communication between the Fenland District Council and the Peterborough City Council relating to a conduct complaint against Town, District and County Councillor [name redacted].*
- 3. Could you also please supply all internal communications within the Peterborough City Council, both paper and electronic, relating to the above case."*
5. On 24 January 2018 The Council responded. It cited section 21 (information accessible by other means) as the basis of its refusal stating that for Request 1 and Request 2 the complainant should contact FDC; and it decided to withhold information requested under Request 3, citing section 42 (Legal Professional Privilege) of the FOIA.
 6. The complainant requested an internal review on 18 April 2018 by providing his arguments in support of his information request.
 7. The Council provided the complainant with the outcome of its internal review on 11 May 2018. The Council stated that it considered that the information requested under Request 1 and Request 2 was reasonably accessible, therefore it relied on section 21 of the FOIA. It decided to partially uphold the application of section 42(1) of the FOIA in relation to Request 3.
 8. In reviewing its position, the Council identified that the initially withheld information, amongst other material, included a response to the conduct complaint, which had already been disclosed to the complainant on 8 December 2017. Therefore, the Council accepted that it erred when it withheld this piece of information due to LPP. However, the Council upheld its position in relation to the rest of the information withheld, confirming that it relied on section 42(1) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 30 May 2018 to complain about the way his request for information had been handled.
10. In the course of the Commissioner's investigation, the Council revised its position and decided to waive its reliance on section 21 in relation to Request 1 and Request 2 and apply section 42 to the information request of 4 January 2018 in its entirety, because the Council at that stage considered that all the communications that falls within the scope of the information request were conducted for the purpose of providing legal advice.

11. The Council in the meantime informed the complainant about this change of position. Subsequently, the complainant expressed their wish to continue their complaint with the Commissioner.
12. Therefore, the Commissioner considers the scope of her investigation to be the decision by the Council to withhold the legal advice under section 42(1) of the FOIA.

Reasons for decision

Section 42 - legal professional privilege

13. 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.
14. 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)*¹:

"... 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."
15. 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.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_informat
ion_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_informat
ion_commissioner1.pdf)

16. 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.
17. In this case the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.

Legal advice privilege

18. The Council explained that the requested information consists of correspondence *"between a professional legal adviser (Peterborough City Council Senior Lawyer) and client (Fenland District Council)...for the sole dominant purpose of obtaining legal advice"* in relation to a conduct complaint submitted to FDC by an individual.
19. The Council asserted that *"this information was communicated in a legal adviser's professional capacity and therefore legal advice privilege was engaged and should remain so."*
20. The Council also considered whether, by entering into direct correspondence with the complainant regarding the conduct complaint, it actually waived LPP in relation to the legal advice. The Council maintained that the complainant was not provided with the details of the advice that was provided nor any copies of correspondence for this purpose. Therefore, the Council believed that the LPP still applied.
21. The Commissioner has viewed the withheld information and she notes that it consists of an exchange of a number of pieces of correspondence in the form of emails. This communication took place between 27 November and 11 December 2017 and involved the Corporate Director of FDC, a senior employment lawyer of the Council and the Interim Director of the Council's Law and Governance Department. The exchange of the correspondence in question was for the purpose of providing a response to the individual who submitted the conduct complaint and involved consideration of several legal matters.
22. Having considered the content of the correspondence, the Commissioner accepts that the requested information is subject to legal professional privilege on the grounds of legal advice privilege as it was to and from a professional legal adviser and was for the purpose of seeking and providing legal advice. On this basis, the Commissioner finds that section 42(1) of the FOIA is engaged.

Public interest test

23. The exemption provided in section 42(1) is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
24. Both the Council and the complainant have submitted arguments in relation to legal professional privilege which the Commissioner has considered below.

Public interest arguments in favour of disclosing the requested information

25. 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.
26. The Council asserted that it advocates openness and transparency in relation to its workings and activities. In particular disclosure of the communication which is the subject matter of this information may assist the public in understanding how the Council makes decisions.
27. The complainant stated that *"it is clearly in the public's interest to know they can trust Councillors and officers to behave with honesty and integrity, and be exposed and held to account if they do not"*.

Public interest arguments in favour of maintaining the exemption

28. The Council stated that the ability of the receiver to communicate freely with the legal advice provider for the purpose of obtaining appropriate legal advice is a fundamental requirement of the English legal system.
29. The Council maintains that its officers need space in which they can *"develop their thinking and explore options in communications and discussion with legal advisors."* During that process, it is important to consider all the implications of particular options.
30. In addition, the Council argues that disclosure of legal advice can have a chilling effect on its officers by dissuading them from requesting, obtaining and/or providing such advice in the future if they considered that it would become public.
31. Finally, the Council considers that this exemption requires rigorous application of the public interest test which has been undertaken and the public interest in maintaining the principle of LPP is strong.

Balance of the public interest arguments

32. The Commissioner has considered the arguments put forward by both the Council and the complainant, and her prior findings and those of the Information Tribunal in relation to legal professional privilege.
33. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. Those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, the Commissioner's view is that the public interest in disclosure does not equal or outweigh the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
34. Upon inspection of the withheld information, the Commissioner could find no evidence indicating 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 its consideration of concerns raised or complaints submitted by members of the public.
35. Therefore, the Commissioner has observed that the public interest in maintaining this exception is a particularly strong one in terms of not undermining the principle of legal professional privilege. To equal or outweigh that public interest, the Commissioner would expect there to be stronger opposing factors. In this case, the Commissioner considers that whilst there is a public interest in disclosure, it does not equal or outweigh the strong public interest that is inherent in maintaining the Council's right to obtain legal advice in confidence.
36. 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

37. 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

38. 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.
39. 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
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