

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2021

Public Authority: Oxford City Council
Address: St Aldate's Chambers
109 St Aldate's
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested information regarding off-street parking enforcement powers for Oxford City Council.
2. The Commissioner's decision is that Oxford City Council has correctly applied the exemption at section 42(1) to withhold information. She has also decided that on a balance of probabilities no further information is held by the council.
3. Commissioner requires no steps to be taken

Request and response

4. On 21 January, the complainant requested information from Oxford City Council ('the council') in the following terms:

"I refer the council to FOI response 8889, where the council confirmed that it prosecuted 1 individual in October 2019. The council has also confirmed it issues around 10,000 excess charge notices a year, even though by virtue of regulation 7(1) above, non-payment of an excess charge notice is not an offence which may be pursued in a Civil Enforcement Area.

Of course, the council may hold information that confirms regulation 7(1) does not apply or is for some reason not relevant to its car park enforcement activities. In light of this I now request the following information:

- 1) What legal basis does the council have to issue ECNs, contrary to the provisions of regulation 7(1)?*
 - 2) What legal basis does the council have to pursue criminal prosecutions for parking contraventions, contrary to the provisions of regulation 7(1)?"*
5. On 18 February 2020 the council responded. It provided the following information in regard to each part of the request:

- 1) "The Council relies on The City of Oxford (Off-Street Parking Places) Order 2011 (as amended) and Part IV sections 32 – 35 of the Road Traffic Regulation Act 1984, with the consent of the Oxfordshire County Council in accordance with section 39(3) to issue excess charge notices. The Council is of the view that The City Council's off street car parks were excluded from The Road Traffic (Permitted Parking Areas and Special Parking Areas) (City of Oxford and Parish of North Hinksey) Order 1996, therefore regulation 7(1) has no effect in relation to them.*

Please see attached The City of Oxford (Off Street Parking Places) Order 2011.

- 2) In the event of any non-compliance and contravention of The City of Oxford (Off-Street Parking Places) Order 2011, the Council has authority under Section 35A (1) of the Road Traffic Regulation Act 1984 to pursue criminal prosecutions."*

6. The complainant requested an internal review on 18 February 2020, stating that the council should disclose any information it holds which forms the basis of its response to request item (1) specifically in relation to the exclusion of off street car parks from the 1996 Traffic Regulation Order ('TRO'). The complainant asked where, within the 1996 Order, information concerning the exclusion relied on by the council can be found and whether the council holds any further information recording its reliance on this exclusion.
7. Following an internal review, the council wrote to the complainant on 17 March 2020. It upheld its original response, however the council also provided further information which it stated was an explanation of the council's position regarding its enforcement powers for parking contraventions:

"The Council considered the correct use of enforcement powers for its off-street car parks in 2015. It was concluded that the City Council's off-street car parks were excluded from the County Council's 1996 submission to the then Department of Transport (DoT) which led to the 1996 Order and therefore they remain subject to 'criminal' enforcement by way of section 35 A(1) Road Traffic Regulation Act 1984 (RTRA 1984).

Legal advice was obtained which informed and supported this conclusion. This advice is subject to legal professional privilege and exempt from disclosure under section 42(1) of the Freedom of Information Act 2000. I am not willing to waive that privilege at this time and I consider the general public interest in maintaining communication between client and legal advisor overrides any public interest in disclosing the advice in this case.

I can say that looking at Part II of Schedule 3 to the 1996 Order. This part is entitled "Modifications to the Road Traffic Act 1991 ("the RTA"). The relevant part of the 1996 Order reads as follows:

"(1) Schedule 3 (to the RTA) shall be amended as follows.

(2) In paragraph 1(4) paragraph (ab) shall be omitted"

Paragraph 1(4)(ab) of Schedule 3 to the RTA provides as follows:

"While an order under sub-paragraph (1) above is in force (an order introducing DPE - "Decriminalised Parking Enforcement"), the following provisions shall cease to apply in relation to the permitted parking area designated by the order-

(ab) section 35A(1) of the ("Road Traffic Regulation") Act of 1984 (offences), so far as it relates to the contravention of, or non-

compliance with any provision of any order made under section 35 of that Act (use of parking spaces) applying in relation to stationary vehicle"

The City Council does rely on section 35A(1) of the RTRA 1984 in order to enforce compliance with the conditions upon which its off-street car parks are used. The effect of Part II of Schedule 3 to the 1996 Order is to leave intact criminal enforcement under section 35A(1). The clear intention was to exclude off-street car parks from Decriminalised Parking Enforcement. This fact is recognised in a letter of 16th October 1996 from the then Minister for Railways Roads and Local Transport to the County Council indicating his regret that the City Council was not prepared to allow its off-street car parks to be included in the 1996 Order. A copy of this letter is held by the Council and is attached.

Further support for this position is provided in The Road Traffic (Permitted Parking Area and Special Parking Area) (County of Dorset) (District of West Dorset) Order 2002 (now repealed) which contained a proviso identical to Schedule 3 to the 1996 Order and its explanatory note provided:

"It also modifies Schedule 3 to the Road Traffic Act 1991 in relation to the designated area to provide that parking offences in offstreet car parks will not be decriminalised under this order"

This explanatory note, provided in an Order made by the DoT some six years later than the 1996 Order, does appear to clarify the effect of excluding the operation of the RTA and preserving section 35A(1) of the RTRA 1984. A copy of the Dorset Order is no longer held by the Council"

8. In response to questions from the complainant the council carried out a second internal review on 29 October 2020 in which it answered two questions:
 - a. Does the council hold any further disclosable information in relation to the conclusion it reached on the question of parking enforcement in its off street car parks as set out in the review?
 - b. Was the council entitled to withhold the legal advice on the basis of section 42(1)?
9. In relation to (a.) the council advised that the information communicated had been based on the recollection of officers who were involved with or aware of the matter when the council considered the question of parking enforcement, rather than being recorded information held by the council. It advised that the parking enforcement question had been considered in relation to a formal complaint (the 'Formal

Complaint') made by an individual. The council holds some recorded correspondence in terms of its response to the Formal Complaint which is considered exempt from disclosure under sections 40(2) (personal information) and 41 (information provided in confidence). However, it advised that the substance of the Formal Complaint correspondence that relates to the complainants FOI request, has been provided in its responses to the request and the internal reviews.

10. In relation to (b.), the council upheld its position to withhold the legal advice on the basis of section 42(1).

Scope of the case

11. The complainant contacted the Commissioner on 4 June 2020 to complain about the way their request for information had been handled. Specifically regarding whether the council is correct when it says it does not hold any further information in scope of the request and whether it is entitled to rely on section 42(1) to withhold information.
12. Commissioner considers the scope of this case is to establish whether the council has disclosed all of the information held in scope of the request, including whether the recorded correspondence which informed its position on parking enforcement is in scope of the request. She will also consider whether it has correctly engaged the exception at section 42(1).

Reasons for decision

Section 1 general right of access

13. Section 1 of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him."*

14. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of

First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
16. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the council and other information or explanation offered by the council which is relevant to her determination.

The council's position

17. In its second internal review response, the council clarified that the information provided is based upon the recollections of officers of the council rather than being recorded information held by the council.
18. In order to answer the request, the council had also referred to correspondence and legal advice in relation to the Formal Complaint, made by another individual, for which the parking enforcement policy had been considered previously. It is the council's position that the correspondence regarding the Formal Complaint is not within the scope of the request, and that the legal advice is withheld on the basis of section 42(1).
19. The council confirmed this position with the Commissioner, stating "*The substance of the request was answered. The specific documents the complainant seeks are outside the scope of the request or subject to legal professional privilege.*"
20. Furthermore, it stated that the legal advice was not the origin of the council's position on parking enforcement nor did it lead to the council changing its position on that matter. It was obtained to assist in reinforcing an existing position and in order to inform its response to the Formal Complaint.
21. The Commissioner asked what searches had been undertaken to locate information in scope of the request. The council advised that it had carried out searches of historic case records, since 2005, and obtained the oral recollections of responsible officers. It stated that no further information was found.
22. The council advised that any information that may have been in scope would be held on its single casework record system. Electronic searches had therefore been undertaken on that system.

23. The records on the system are maintained in accordance with the council's file retention and destruction policy. The council confirmed that no relevant records had been destroyed or deleted.
24. The council advise that there is no statutory reason for it to hold further information in scope of the request.

Conclusion

25. The Commissioner observes that the request is written in the form of two questions. Whilst she appreciates that it is written in this way to elucidate as much information as possible, it is also the case that the FOIA does not require public authorities to answer generic questions or create new information as a result of a request. However, if the council holds information in recorded form that would answer the questions then this should be provided.
26. The first issue that the Commissioner must therefore consider is whether the correspondence in relation to the Formal Complaint falls within the scope of the request.
27. The Commissioner has considered the wording of the request: *"Of course, the council may hold information that confirms regulation 7(1) does not apply or is for some reason not relevant to its car park enforcement activities. In light of this I now request the following information: What legal basis does the council have to issue ECNs, contrary to the provisions of regulation 7(1)? What legal basis does the council have to pursue criminal prosecutions for parking contraventions, contrary to the provisions of regulation 7(1)?"*
28. The Commissioner has reviewed the correspondence in relation to the Formal Complaint which consists of the council's response to a separate individual. The Formal Complaint relates to the council's position on parking enforcement and the correspondence specifically answers the points raised in the Formal Complaint. In answering the points raised the correspondence refers to the legal advice that the council sought on the matter.
29. Having reviewed the correspondence, the Commissioner does not consider that it constitutes recorded information which describes *"the legal basis"* of the council. Rather, she finds that the correspondence refers to the legal basis as justification of its response to the specific formal complaint, it is not, in itself, a description of the legal basis.
30. The Commissioner considers, however, that the legal advice sought by the council in answering the Formal Complaint, does constitute information that would answer the request. This is because, in the absence of other recorded information, it is likely that the council would

refer back to this advice should the question of its position on parking enforcement be raised again. The Commission has therefore proceeded to consider the section 42(1) exemption in regard to this legal advice.

31. In terms of whether any other information is held that would answer the request questions, the Commissioner is satisfied that the council has undertaken suitable searches. The council has also confirmed that no information has been destroyed or deleted, and that there is no statutory purpose for holding further information.
32. Having considered the council's responses, and in the absence of any evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the council does not hold any further information within the scope of the request.
33. The Commissioner therefore considers that the council complied with its obligations under section 1(1) of the FOIA.

Section 42(1) – legal professional privilege

34. 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.
35. 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)* ("Bellamy") 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 communications or exchanges come into being for the purposes of preparing for litigation."

36. There are two categories of 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 where 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.

37. Communications made between adviser and client in a relevant legal context will therefore attract privilege.
38. The Commissioner's view is that for legal professional privilege to apply, the 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. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
39. In regard to this case, the council confirmed that it considered the requested information to be subject to legal advice privilege. It stated that the information is the legal advice of counsel which was sought by and provided to an "in house" instructing solicitor acting for the council.
40. The council confirmed that the withheld information is not in the public domain. It advised that should a dispute arise, resulting in litigation, over the legal basis for parking enforcement, then the council would be prejudiced in defending any claim if its legal advice were already in the public domain.
41. The Commissioner has viewed the withheld information and is satisfied that it comprises legal advice that was sought by the council from a professional legal adviser. The information was communicated in the legal adviser's professional capacity and remains confidential therefore the privilege attached to the withheld information has not been lost.
42. The Commissioner is satisfied that the exemption at section 42(1) of the FOIA is engaged. Since it is a qualified exemption, she has considered the balance of the public interest.

Arguments in favour of disclosing the requested information

43. The complainant has provided arguments to support their view that the councils approach to parking enforcement may be unlawful.
44. The complainant states that disclosure would be in the public interest in order to establish whether their "*plausible suspicions*" were correct, or alternatively to allay suspicions and restore faith in the council.
45. The complainant states that the legal advice should be disclosed in full to enable the public to understand either how the authority is able to pursue criminal cases or else to expose the unlawfulness of this practice and hence put a stop to it.

46. The council advised it had considered the factors in favour of disclosure of the legal advice including the need for transparency and openness in public affairs and the matters set out by the complainant.

Arguments in favour of maintaining the exemption

47. In the case of *Bellamy v The Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the requested information, and it said that:

"... there is 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".

48. In order to balance the opposing public interest factors, the Commissioner must give weight to the in-built public interest in maintaining this exemption. In the Commissioner's opinion, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege, that is, safeguarding openness in all communications between a client and their lawyer to ensure access to full and frank legal advice. The Commissioner holds the view that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.
49. The Commissioner considers that weight must always be given to maintaining the principle of legal privilege and the maintenance of this exception. Nevertheless, she also recognises there might be circumstances where the public interest will favour disclosing the information. Such circumstances would need to be evident in the details of a particular case. They include instances where:
- large amounts of money are involved;
 - whether or not a significant group of people are affected by the advice or resulting decision;
 - lack of transparency in the public authority's actions;
 - misrepresentation of advice that was given;
 - selective disclosure of only part of advice that was given.
50. The council states that the information already supplied to the complainant, and therefore now in the public domain, explains the substance of the privileged legal advice and gives a sufficiently detailed

explanation of the council's position to make clear to the public that parking enforcement is being carried out with lawful authority and allay any public suspicion of wrongdoing. The council argues that full disclosure of the advice would serve no additional public interest.

51. The council advises that its position on parking enforcement existed prior to obtaining the legal advice and was not therefore based entirely on it. The council explains that the advice was obtained solely to assist in reinforcing an existing position and to inform a response to a complaint.
52. The council argued that disclosure of the legal advice would not be necessary if there were to be any potential legal challenge. It stated that if the complainant believes that the council has acted unlawfully there is nothing in disclosure of the entire advice that is required should they be considering or taking legal action.

Balance of the public interest

53. In this case, the Commissioner has considered those arguments favouring disclosure of the withheld information against the Information Tribunal's previous decisions in respect of maintaining legal professional privilege. She has also given regard to the content of the withheld information.
54. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decisions. She gives some weight to those arguments.
55. The Commissioner understands the crux of the complainant's case is that disclosure is required in order to establish whether the council's approach to parking enforcement is unlawful. However, it is the Commissioner's position that determinacy of the credibility of such accusations is beyond the remit of the FOIA.
56. The Commissioner considered the explanations given by the council, which it has stated were partially based on the legal advice and also on the advice of council employees. The Commissioner has no reason to doubt the council's transparency on the issue and maintains that the FOIA is not an appropriate legal mechanism by which to debate whether the council has been lawful in its approach.
57. The Commissioner has considered the public interest arguments in favour of disclosure of the information withheld under section 42. She concludes that in general terms weight can be attached to transparency and accountability, and to public interest in knowing the quality of legal advice received and whether a council chose to follow or go against it.

However in this case, the weight of these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption, such as the vital importance of the council being able to obtain free, frank and high quality legal advice without the fear of premature disclosure. The evidence presented is not sufficient to outweigh or override the inbuilt public interest in information remaining protected by LPP.

58. In view of the above, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42 of the FOIA outweighs the public interest in disclosing the information.

Right of appeal

59. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.

61. 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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