

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 November 2021

**Public Authority:** Durham County Council  
**Address:** County Hall  
Durham  
DH1 5UL

#### Decision (including any steps ordered)

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1. The complainant requested information from Durham County Council ("the Council") comprising the legal advice given to a councillor on whether they should declare a disclosable pecuniary interest (DPI) at a meeting of Great Aycliffe Town Council. The Council withheld the information under section 42(1) of the FOIA: legal professional privilege.
2. The Commissioner's decision is that the exemption at section 42(1) of the FOIA is engaged, and that balance of the public interests favours the information being withheld under the exemption.
3. The Commissioner does not require the Council to take any steps.

#### Request and response

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4. On 17 September 2020, the complainant wrote to the Council to request information. He explained that it related to a meeting of Great Aycliffe Town Council on 2 September 2020, during which certain councillors had left the meeting after declaring a pecuniary interest, apparently on the basis of legal advice to one councillor. He requested:

*"Could I have a copy of the County Solicitor's letter to County Councillor [redacted] under FOI if required."*

5. On 30 September 2020, the Council responded and stated that it was withholding the information under section 42 of the FOIA: legal professional privilege.
6. The complainant requested an internal review on 3 October 2020. Following an internal review, the Council wrote to the complainant on 5 November 2020. It upheld its position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 1 November 2020, to complain about the way his request for information had been handled.
8. This notice covers whether the withheld information is exempt from being disclosed under section 42(1) of the FOIA: legal professional privilege.

### **Reasons for decision**

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#### **Section 42 – legal professional privilege**

9. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP), and the claim to privilege could be maintained in legal proceedings.
10. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI* (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 communications or exchanges come into being for the purposes of preparing for litigation."*
11. There are two categories of LPP – litigation privilege and legal advice privilege. In this case, the Council considered that the information was subject to legal advice privilege. Legal advice privilege may apply where legal advice is needed, whether or not any litigation is in prospect.
12. For the exemption to be engaged, the communications must be confidential in nature, made between a client and a professional legal

adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining, and/or providing, legal advice.

13. In this case, a councillor sought advice from a legal manager (also the Deputy Monitoring Officer) at the Council. It appears to the Commissioner that advice was initially sought (and provided) over the telephone but that the advice was "formalised" in an email. The withheld information comprises the legal manager's email response.
14. The Commissioner is satisfied that the withheld information comprises confidential advice between a lawyer and his client, and exists for the dominant purpose of providing legal advice, and therefore, that it attracts LPP.
15. She has next considered whether the privilege has been lost. Privilege may be lost in cases where the contents of legal advice have been disclosed to other parties or made public.
16. In this case, the complainant noted to the Commissioner that the councillor who received the advice stated publicly (Newton News, 18 September 2020<sup>1</sup>): *"I consulted the DCC legal officers, who informed me in writing that, yes, I should declare an interest."* The complainant therefore considered that the LPP may have been lost.
17. The Commissioner notes that the publication date for the newsletter was the day after the request was made. However, it was published within the 20 working day period during which the Council was required, under the FOIA, to respond to the complainant, and prior to its response being issued, and so is relevant to determining whether the Council's position regarding the request – that the advice remained privileged – was correct.
18. The Council argued to the Commissioner that *"Privilege will generally be waived when a client shares the content of advice, but not when a client shares the effect of the advice... [the] public comment is sharing the effect of the advice, but not any of the contents of it."*
19. The Commissioner disagrees that the councillor's public statement only related to the effect of the advice. In the Commissioner's view, it purported to set out the advice that the councillor was given.

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<sup>1</sup> <https://www.newtonnews.co.uk/download/83788/>

20. However, having viewed the withheld information, she is satisfied that the published statement is not sufficiently detailed that the LPP attached to the withheld information has been lost.
21. She is satisfied that the exemption at section 42(1) of the FOIA is engaged in respect of the withheld information. Because it is a qualified exemption, she has gone on to consider the balance of the public interests.

### **The balance of the public interests**

22. Information which attracts LPP must still be disclosed under the FOIA unless the balance of the public interests favours maintaining the exemption.
23. LPP is a fundamental concept of the English legal system. A client must be free to seek (and legal advisors free to provide) good quality, frank legal advice to inform their decisions, without being concerned that the advice might in future be made public. Therefore, whilst section 42(1) is not an absolute exemption, and factors in favour of disclosure must be considered when the information is requested under the FOIA, there is an inherent public interest in maintaining that privilege.
24. It follows that, whilst the public interest factors in favour of disclosure do not need to be exceptional, because of the inherent importance of LPP such factors must be considerable, if they are to outweigh the strong interest in protecting the principle of LPP.
25. The facts in this case are that certain town councillors exempted themselves from a meeting at which the issue of "double taxation" was being discussed.
26. In a report<sup>2</sup> produced by the National Association of Local Councils (NALC) in 2011, double taxation is explained as being "*where residents in certain local council areas are paying twice over for particular public services. It can happen because many local services are 'concurrent functions' – that is, they can be managed and delivered either by local parish and town councils or by principal local authorities (district, borough, unitary or county councils)*".

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<sup>2</sup> <https://www.nalc.gov.uk/library/our-work/create-a-council-resources/1363-managing-double-taxation/file>

27. It is also relevant to this case that the councillor receiving the advice was what is known as "dual-hatted". That is, he served on both the local town council and the county council.
28. In this case, it became a matter of public disagreement between town councillors as to whether the councillor receiving the legal advice had a financial interest in the town council debate about double taxation, such as would amount to a DPI.
29. The councillor stated, in the ensuing public debate, that he considered he was affected financially by the double taxation issue because he was paid an allowance by the (county) Council. As previously set out in this notice, after seeking advice, he said he had been *"informed in writing that [he] should declare an interest"*.
30. The complainant disagreed that being paid an allowance by a principal local authority (in this case, the Council) amounted to a DPI, and considered that it was unnecessary, and therefore damaging to the democratic process, for five town councillors to refuse to take part in the debate.
31. He stated that he had previously obtained advice that dual-hatted councillors could participate in such debates, and that there was no DPI in this case. He argued that the allowance paid to councillors by the Council was set by an independent panel.
32. He also explained that he was aware that it was possible to apply for a dispensation in cases where there may be a DPI, in any event, in order to attend debates.
33. In the complainant's view, either the councillor must have misrepresented the advice he was given, or the advice must have been erroneous. In either case, he considered there to be a considerable public interest in shedding light on this, sufficient to overturn the principle of LPP.
34. The Commissioner has considered the circumstances of the case and the withheld information.
35. The Commissioner notes that the issue about which the legal advice was provided, is one which is likely to arise frequently for councillors who serve in a dual-hatted capacity. A councillor on a town or parish council, who also serves on the principal local authority, is likely to have to consider whether any allowance they receive from the principal authority amounts to a DPI.

36. In addition, such as in this case, dual-hatted councillors are likely to encounter the issue of double taxation, and to have to consider whether to attend discussions and debates about it and, potentially, to vote.
37. She notes that this matter, therefore, centres on transparency over the controversial issue of councillors having financial interests in matters upon which they may be called to vote. Under the Localism Act 2011, it is an offence for a councillor to participate in a debate, or vote, on a matter in which they have a DPI.
38. In her view, therefore, there is undoubtedly public interest in the subject matter of the legal advice. It is a matter of widespread public interest that councillors should be transparent about their financial interests. This public interest would potentially extend to learning about councillors' own considerations, and advice they receive, about whether specific matters may amount to a DPI.
39. She is also aware that there is an allegation that the advice may have been misrepresented, in this case.
40. The Commissioner notes the comments of Wyn Williams J in *DBERR v O'Brien v IC [2009] EWHC 164 QB*<sup>3</sup>:

*"It is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question."*

41. The Commissioner also notes that, in *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office [2017] UKUT 495 (AAC)*<sup>4</sup> (paragraph 68), the Upper Tribunal noted: *"The powerful public interest against disclosure ... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of*

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<sup>3</sup> <https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

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[https://assets.publishing.service.gov.uk/media/5e206454ed915d7c7c3978d1/2018\\_AACR\\_19ws.pdf](https://assets.publishing.service.gov.uk/media/5e206454ed915d7c7c3978d1/2018_AACR_19ws.pdf)

*disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute".*

42. However, the Council has argued that the complainant has not provided any clear and compelling justification for the disclosure of the information, such as would outweigh the significant weight in favour of maintaining the legal privilege. Indeed, it seems to consider that the complainant may have only a private interest. It has set this against what it describes as an "*overwhelming*" interest in maintaining confidentiality.
43. The Commissioner has considered the withheld information.
44. Notwithstanding there may be a significant public interest in the *subject matter* of information that is covered by LPP, the Commissioner's approach is that the key factor is to determine whether the *contents* of the withheld information are of a weighty enough public interest, to overturn the significant public interest in maintaining LPP.
45. In her view, whilst there is an interest in the subject matter in this case, she considers that the contents of the legal advice in this case are benign and uncontroversial, and would not add to the public's understanding of the matter of councillors' considerations of their pecuniary interests, disclosable or otherwise.
46. The Commissioner is satisfied that, having weighed up all relevant factors in this case, and despite the subject matter of the advice being of interest, the public interest in the disclosure of the withheld information is not sufficient to overturn the very strong public interest in section 42(1) being maintained.
47. In all the circumstances of this case, and having given full consideration to the contents of the withheld information, the Commissioner's view is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
48. She does not, therefore, require the Council to take any steps.

## Right of appeal

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49. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**