Freedom of Information Act 2000 (FOIA)
Decision notice

Date: 27 July 2022

Public Authority: London Borough of Hillingdon
Address: 3E/04, Civic Centre
High Street
Uxbridge
UB8 1UW

Decision (including any steps ordered)

1. The complainant has requested information relating to a change of wording in Road Traffic Orders.

2. The Commissioner's decision is that London Borough of Hillingdon (LBH) has correctly applied section 42 FOIA (Legal Professional Privilege) to the withheld information.

3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 2 October 2018, the complainant's father wrote to LBH and requested information in the following terms:

> "For the period between January 1998* to March 2017 Hillingdon Council used the standard term of "intends to make" in relation to Road Traffic Orders in over 620 legally required notices. These notices were all published in the 1501 section of the London Gazette and should reflect the on-street notices put up in that period as well as reflecting the orders citing the relative act and sections that are eventually made relating to those notices.
>
> From April 2017 more than 40 notices by the London Borough of Hillingdon have been published in the same 1501 section omitting the phrase "intends to make" and instead substituted it with the term "proposes to make". As this is clearly a required legal term, the change indicates a change of internal policy affecting these notices as no legislation changes have been made requiring the use of this term regarding proposal notices since 1996.
>
> Therefore I would ask for the following information under the freedom of information act.
>
> Which member or members of the executive and or political leadership made the decision to change the standard term from "Intends to make" to "Proposes to make"
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> As this is a significant change it would require a meeting that should include the input of at least the relative cabinet member, deputy CEO whose named on those notices and Head of Legal/Borough Solicitor who is ultimately responsible for legal compliance. Did any such meeting take place and who attended. Please supply the minutes.
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> If no policy meeting took place, there would have been internal consultation regarding this significant policy change, please supply the relative internal communications and or minutes of the associated meetings relating to this policy change."

5. This request was followed up on 3 and 5 October 2018 and these can be found in full in an annex at the end of this decision notice.

6. A decision notice was issued on 18 November 2019 under case references FS50803416 and FS50803417 which was subsequently appealed (EA/2019/0411) with the Information Tribunal substituting the Commissioner's decision notices on 22 December 2021. It ordered that a fresh response be issued without reliance on section 14.

7. LBH provided a response on 25 February 2022 in which it confirmed a 'briefing note' was held but refused to provide it citing section 42 FOIA as its basis for doing so.

8. The decision notice in this case therefore relates to the new response and the application of section 42.

Scope of the case

9. At some point in the proceedings the complainant took responsibility for the appeal to the Information Tribunal and subsequent dealings with LBH and the Commissioner from his father. The complainant has subsequently made a request to LBH relating to similar information which will be dealt with in a separate decision notice in due course.

10. Due to the overlapping timescales of requests and appeals, along with delays in progressing complaints and Tribunal cases due to the pandemic, some of the correspondence to the Commissioner related to both cases. Consequently, the Commissioner has identified the salient points to be included in this decision notice.

11. The complainant first contacted the Commissioner on 18 January 2022 to advise that another complaint was pending with regard to an information request for similar information, to which LBH had also applied section 14, as referred to in paragraph 9.

12. Having received the fresh response from LBH the Commissioner contacted the complainant on 19 May 2022 to provide his preliminary view was that LBH was correct in its application of section 42(1) and invited them to withdraw. The complainant advised that they required a formal decision notice to be issued.

13. The Commissioner therefore considers the scope of this case to be to determine if LBH is entitled to rely on section 42(1) to withhold the requested information, that is, the briefing note.

Reasons for decision

The Council's position

14. LBH explained that on 8 February 2017 the complainant sent a 28-page document to LBH entitled: 'Cease and Desist Notice with Formal and Detailed Complaint'. In this document the complainant claimed that LBH had failed to follow the statutory procedures and that the introduction of the parking scheme would be unlawful.

15. Following receipt of the Cease and Desist Notice (C&D Notice) LBH officers sought advice from the Borough Solicitor. On 16 February 2017, the Borough Solicitor replied to the complainant stating that LBH had followed the correct statutory procedures and that the purported notice of cease and desist has no lawful basis.

16. The letter confirmed that the parking scheme would become operational on 27 February 2019 and recommended the complainant took legal advice. The Borough Solicitor gave formal advice to the Corporate Director of Residents Services on 28 March 2017 by way of a Briefing Note. It is this Briefing Note that is being withheld.

17. LBH consider it is clear that the complainant was threatening legal action against it and also that the Corporate Director was seeking legal advice on the C&D Notice. It therefore follows that the Briefing Note attracts both legal advice privilege and litigation privilege.

The complainant's view

18. In their complaint to the Commissioner the complainant argued that, "in order for privileged legal "advice" to exist requires a chain of communications and a formal request being rendered for advice in a briefing to the Borough Solicitor by one or more of indeed the cabinet on the matter." [sic]

"In the absence of any other grounds for refusal of the other information, the public interest test applies to the "advice" alone, advice which is in fact internal advice and not supplied by 3rd party legal counsel which section 42 hangs as the Borough solicitor being part of the Authority limits the scope application of section 42 as his role is defined under the LGHA. The LGHA does not give provision for legal privilege to be employed in relation to Authority business outside finite scope of sensitive matters involving natural persons or 3rd parties.

The Borough Solicitor's role therefore falls outside of the precedents set which are reliant independent legal advice and privilege involving 3rd parties and or litigation. In relation to how a constitution works the Borough Solicitor's advice is designed to be delivered for the best interests of all residents of the borough in their role as the monitoring officer, that is residents and or businesses who may be affected by that advice. So in relation to Legal Privilege the position of the Borough Solicitor sets a high bar and limited scope where non-disclosure is permissible under legal privilege. Furthermore, there is no legal action or litigation in progress relating to the information sort *[sic]* which again renders the core arguments for withholding the information moot.

Section 42 is not an absolute and defines accountability and furthering public debate and as this request does not in fact involve any criminal case or litigation.

Bellamy is outdated case law in respect of what constitutes legal privilege, otherwise any authority can simply get around disclosure by simply asking their internal legal department to send out a memo and emails in order to withhold information. That is not the intent of section 42." [1]

19. The complainant further argued:

- That the briefing note does not contain information which constitutes contemplation or process of litigation
- That the briefing note is a standalone document which has no other documents related to it which shows any person within the council be that appointed or elected officers seeking advice from the Borough Solicitor.

"So taking these 2 aspects together as being absent there is no public Interest test to conduct because it does not constitute sort *[sic]* advice by a client be it in contemplation of litigation or not.

Furthermore, the foundation of Bellamy is the exchanges of commutations *[sic]* and documents in contemplation of litigation and the seeking of legal advice, not a unilaterally volunteered briefing note which could be argued as a lawyer covering their backside rather than protecting the client. The foundation of Bellamy is reliant on an exchange of communications which frank advice and exchanges were "live" and ongoing these were not and are no longer "live" exchanges because it is claimed there is only one document, that itself does not constitute an exchange and in fact gives foundation to the cliché "If I want your advice I'll ask for it" and that fact that no Borough Solicitor should offer advice unless there is a call in or it is requested. There has to be a legitimate documented causality and requirement under their remit which requires advice to sort [sic] and given.

Moreover if it was exchange in order to "seek advice" it would have to cover the following which may not have been disclosed

- Undocumented conversations and communications which would be in breach of standards in public life
- Other methods of communications such as text messages and or WhatsApp communications, again failure to disclose would be in breach of standards in public life."

[1] N:B This is why the Commissioner requests sight of the withheld information

Section 42 – Legal professional privilege (LPP)

20. Section 42(1) states that: "Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

21. In Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006) the FTT described LPP 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 [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation." (paragraph 9)

22. LPP protects an individual's ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.

23. Section 42 is a class based exemption. The requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise from disclosing the information. However, this exemption is subject to the public interest test.

24. 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 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.

25. LBH confirmed that it considers the withheld information is subject to both legal advice and litigation privilege.

26. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be

covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

27. The Commissioner accepts that litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.

28. Legal advice privilege is generally considered where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:

- the communications must be made between a professional legal adviser and client;
- the communications must be made for the sole or dominant purpose of obtaining legal advice; and
- the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.

29. A communication under section 42 means a document that conveys information. It could take any form, including a letter, report, email, memo, photograph, note of a conversation, or an audio or visual recording. A document does not actually need to be sent for it to count as a communication for this purpose; a document that has been prepared to convey information, but is still on its creator's file, is still a communication. Communications might include draft documents prepared with the intention of putting them before a legal adviser, even if they are not subsequently sent to the adviser, and therefore the briefing note itself would be considered a 'communication'.

30. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.

31. The Commissioner has reviewed the information falling within the scope of the request and is satisfied that it comprises a communication between legal adviser and client for the dominant purpose of obtaining legal advice in response to a C&D Notice from the complainant.

32. The client in this case is the Corporate Director of Residents Services, and the legal adviser is the Borough Solicitor. The privilege attached to the withheld information has not been lost as it has not been made

available to the public or to a third party without restriction. Despite the complainant's assertions internal legal advice is legal advice and capable of attracting LPP.

33. The Commissioner is satisfied that the withheld information is subject to legal professional privilege and that section 42(1) is engaged.

The Commissioner's view

34. Although section 42 comes with a significant 'in-built' public interest in non-disclosure, it still remains a qualified exemption and it is for the public authority to demonstrate that the public interest balance lies in favour of withholding the information. This means that – building on the 'in-built' public interest in non-disclosure – the authority will need to identify any additional public interest factors in favour of withholding the information, all the relevant public interest factors favouring disclosure and then weigh them appropriately in order to establish whether or not the information can be disclosed.

35. Each case has to be considered on its own merits where a request for disclosure is made, and the public interest for and against disclosure also considered in each case. The fact that there may be particular factors in a case which leads to disclosure under FOIA does not undermine the principle of LPP in other cases where different factors may be important.

36. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

37. At the time the advice was sought by the director, LBH was in receipt of a C&D notice which implied the complainant was considering litigation. Therefore LBH was entitled to seek legal advice with regard to its position.

38. The Commissioner is mindful of the Information Tribunal's explanation on the balance of factors to consider when assessing the public interest in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)*:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".

39. He is also mindful of *DBERR v O'Brien v IC [2009] EWHC 164 QB, [41 & 53]*:

'41. … 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.

53. … The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight.'

40. LBH has acknowledged the general public interest in transparency and accountability. It further stated that no other member of the public has questioned the wording of its traffic orders. LBH explained that the independent parking adjudicators who decide appeals against parking control notices have also never once questioned the wording of its traffic orders.

41. LBH considered that this is particularly important because a parking adjudicator is duty bound to require LBH to prove the validity of its orders and, whenever there is any doubt about due process having been followed, a parking adjudicator will always give the benefit of the doubt to an appellant. Again, a parking adjudicator is a specialist independent tribunal whose decisions are given due weight by the courts.

42. Furthermore, LBH argued that, given that the parking scheme in question came into force approximately 5 years ago and has never been challenged in court and that independent parking adjudicators have never expressed concern about the use of any verb in LBH's statutory notices, LBH was unable to establish any consideration that would suggest that it is appropriate for legal professional privilege to be overridden in this case.

43. It finally noted that, at the time of the request, the complainant could have challenged the parking order in the High Court pursuant to paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984 as the statutory time limit had not expired.

44. The inherent public interest in maintaining the exemption provided at section 42 lies in protecting the confidentiality of communications between client and lawyer. The Commissioner has considered whether disclosure of this information would undermine this confidentiality, leading to future legal advice being guarded or generic.

45. In a recent Upper Tier Tribunal decision promulgated on 22 January 2022 *(Robin Callender Smith - v – (1) The Information Commissioner (2) The Crown Prosecution Service[2])* at paragraph 25 stated:

"It is due to the fact that legal professional privilege is a fundamental condition on which the administration of justice as a whole rests, that it is afforded an "inherent weight" when it arises in Environmental Information Rights ('EIR') (the DCLG case was a EIR case) and FOIA cases while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.".

46. Notwithstanding this, the Commissioner also recognises, in Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office [2017] UKUT 495 (AAC)), the Upper Tribunal noted the following in emphasising that the exemption is not a blanket exemption:

"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 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."

47. Paragraphs 59 and 60 of Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 00308[3] make clear that the public interest arguments in favour of maintaining the exemption must relate specifically to the exemption and will therefore be narrow in scope. The tribunal confirms that the public interest arguments in favour of disclosure can be wide ranging and do not need to specifically relate to the exemption which has been engaged.

48. The Commissioner has considered the specific public interest arguments put forward by the complainant as well as the general arguments that favour disclosure. The Commissioner has also considered the stated

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2 https://assets.publishing.service.gov.uk/media/6228a0f78fa8f526d2688db5/GIA_0051_2021-00.pdf

3 https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf

position of LBH as well as having regard to the content of the withheld information.

49. In reaching his decision, the Commissioner has taken into account the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.

50. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision-making process. He gives weight to those arguments.

51. However, he must also consider that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets. These long-established rules exist to ensure people are confident they can be completely frank and candid with their legal adviser when obtaining legal advice, without fear of disclosure.

52. The matter of any changes relating to parking regulations is always likely to stir local interest. However, the Commissioner notes that in the appeal referred to in paragraph 6 above, the Information Tribunal stated at paragraphs 49 and 52:

> 49. We noted that Regulation 7 does use the term "notice of proposals" rather than "notice of intent". Nevertheless, we doubted that the use of "intends" or "proposes" was legally significant or grounds to challenge the validity of an Order made by the Council. We doubted the Appellant's interpretation of "intends" as implying a lack of consultation and noted that the Council had invited and received objections to its "notice of intent" in relation to the Scheme. As a result, we found it highly unlikely that there could be any corruption or maladministration by Council officials in connection with the change of wording.
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> 52. Furthermore, the majority did not accept that the request had no serious purpose. The Request was for minutes and communications relating to a decision to change the wording of the Council's 1501 notices. We found that this information was unlikely to be of value to the public or even a section of the public. However, applying the words of Arden LJ in Dransfield, we found that there was a reasonable foundation for thinking that it would be of value to the Appellant. The Appellant is interested in the wording of the notices and it would be of value to him to see minutes and communications, if any exist, about the change. It was not unreasonable for him to conclude that the change, made two months after he had drawn the inconsistency in the Council's approach to its attention, was the result of his complaint. While the change is not legally significant and unlikely to demonstrate maladministration, it would objectively be of value for the Appellant to see information about the decisions leading to that change."

53. While the Commissioner appreciates the complainant's arguments in favour of disclosure, he is not satisfied that they override the strong public interest in safeguarding LPP.

54. The Commissioner further notes that the complainant had another route available to challenge the change of wording in the notices if they considered it to be of major significance.

55. Therefore, the Commissioner has concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner is therefore satisfied that the exemption provided by section 42(1) of FOIA for advice privilege has been correctly applied.

Right of appeal

56. 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

57. 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.

58. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

59. Request 3 October 2018

"I should ask one more question to be added to this request which is most important.

Why was the term "Intends to make" in the 1501 notices changed to "Proposes to make".

The following does need to be taken into account. The Borough Solicitors and Deputy CEO's written affirmation that the term was legally acceptable and compliant PRIOR TO that significant change and backed up by the Council Leader [named individual 1] in writing with the statement 'For the avoidance of doubt I have absolute faith in the professional ability of the Deputy Chief Executive and the Borough Solicitor'"

60. Request 5 October 2018

"What is the procedure for official combined complaint against the Deputy CEO, Borough Solicitor and Council Leader under the following circumstances.

For negligence and failure of duty and or failing to declare a conflict of interest in the handling a complaint to which they were the ultimate responsible subjects compounded by joint supported misleading actions with misleading statements made to a resident and registered elector's representative in relation the compliance of official legally required public notices published in the London Gazette for a period of no less than 20 years.

The negligence and misleading actions became evident after those cited made unambiguous statements in February 2017 to early March 2017 that the process and notices were fully complaint. Furthermore it is noted that the Deputy CEO's name is attached to notices with a significant change of wording in subsequent published notices that was made and has been in constant use since April 2017. This small but legally significant change was in contradiction of those previous

statements in that the term "Intends to make" being no longer used and replaced with the standard use by all other local authorities of "Proposes to make" despite no recent change in legislation or directives warranting that change indicating that the previous term used was indeed erroneous and voiding said notices using that term prior to April 2017.

The fact that the majority of notices still fail to cite the relative 1984 act or appropriate acts and sections while a significant minority do compounds the lack of legitimacy of those erroneous notices as does the aforementioned

action in changing the wording policy. These actions were not in the interest of the Borough, Residents and or the Electorate.

I can go into further details but this makes the point and gives a good basis for the procedure to deal with such a complaint.

The following has to be taken into consideration prior to response.

The LG Ombudsman only acts if there is a direct out of pocket issue to the resident or it is to do with social care. As there is no direct financial loss incurred at this stage, pursuance through the LG Ombudsman is negated at this stage.

That other local authorities have a procedure in place for complaints against the Borough Solicitor in which they are referred to another Borough's Solicitor for action, otherwise an independent chair of the standards committee can be appointed in order to review the complaint."