

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 August 2022

**Public Authority:** London Borough of Croydon  
**Address:** Bernard Weatherill House  
8 Mint Walk  
Croydon CR0 1EA

#### **Decision (including any steps ordered)**

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1. The complainant has requested correspondence between the London Borough of Croydon ("LB Croydon") and a firm of solicitors. Initially, LB Croydon gave an unclear response which appeared to rely on section 42 (legal professional privilege exemption) which it did not clarify at internal review. It clarified its position in subsequent correspondence and confirmed that it sought to rely on section 42 as its basis for not disclosing information it held within the scope of the request that was not otherwise the complainant's personal data.
2. The Commissioner's decision is that LB Croydon is entitled to rely on section 42 as its basis for withholding information it holds within the scope of the request that was not otherwise the complainant's personal data. It should have refused to confirm or deny whether it held any of the complainant's personal data under section 40(5) of FOIA.
3. No steps are required.

#### **Request and response**

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4. On 25 February 2020, the complainant requested information of the following description: "Please provide me with copies of all correspondence, by whatever medium, between Jo Negrini, the council chief executive, Tony Newman, the council leader, the council's chief legal officer or other executives and the firm of solicitors, Harbottle and Lewis, dated between October 1, 2019 and today's date."

5. On 16 April 2020, LB Croydon responded. There were aspects of its response which were unclear. Although it cited the exemptions at section 42 (legal professional privilege) and section 40 (personal data) as its basis for refusing to comply with the request, it was far from clear from LB Croydon's response whether it was refusing to confirm or deny that it holds the requested information or whether it was confirming it holds such information but was refusing to provide it because it believes an exemption applies.
6. The complainant requested an internal review on 16 April 2020. LB Croydon sent him the outcome of its internal review on 16 June 2020. The internal review letter was similarly unclear. Following a further review of its position once it had been advised that the Commissioner had received a complaint about this matter, LB Croydon sent a further letter to the complainant on 17 August 2021. Unfortunately, it neglected to send a copy to the Commissioner. In this letter, it confirmed that it was refusing to provide the information citing section 42(1). The letter of 17 August 2021 also addressed data protection concerns that the complainant had raised.

## **Scope of the case**

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7. The complainant contacted the Commissioner in June 2020 to complain about information requests he had made under both freedom of information and data protection law.
8. There had been regrettable delays on the Commissioner's part in taking this forward. These were, in part, due to the impact of the pandemic but also related to misallocation of the case. The complainant had also raised data protection related concerns and, unfortunately, the FOIA aspect of his complaint was not processed in a timely manner.
9. On 5 October 2021, the Commissioner wrote to the complainant to explain that, given LB Croydon's unclear internal review, he first had to establish what its position was: was it refusing to confirm or deny whether it held the requested information or was it confirming it held it but refusing to provide it because it believed an exemption applied. When the Commissioner wrote to LB Croydon to ask for its latest position, it provided him with a copy of its letter of 17 August 2021 (referred to above). As noted above, the Commissioner had not previously seen a copy of this letter.
10. It confirmed that it was seeking to rely on section 42(1) in a letter to the Commissioner of 1 March 2022 where it also explained its basis for relying on that exemption. The Commissioner has therefore considered

whether it is entitled to rely on section 42 as its basis for withholding information described in the request which is not the complainant's personal data.

11. As noted in paragraph 6, LB Croydon addressed the complainant's data protection right of access to their personal data in its letter of 17 August 2021. An individual is not entitled to access their own personal data under FOIA. The requester's own personal data is subject to an absolute exemption under section 40(1) of FOIA. This is regardless of whether or not an exemption under data protection legislation applies to it.
12. A public authority should, strictly speaking, refuse to confirm or deny whether it holds any of the requester's personal data under section 40(5) of FOIA. The Commissioner understands why, when trying to communicate its position on both FOIA and data protection information access matters to the complainant in the same letter, LB Croydon neglected this step. However, it should have ensured that it made the clear differentiation between what it was addressing under FOIA and what it was addressing under data protection legislation.

## **Reasons for decision**

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13. 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."
14. The Commissioner has been provided with the information withheld under this exemption.
15. The withheld information comprises communications between a professional legal adviser and their client regarding published articles. LB Croydon argues that such communications are subject to legal professional privilege. For ease of future reference, the Commissioner will use the acronym LPP when referring to legal professional privilege.
16. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry EA/2005/0023*, the FTT described LPP as [9]: "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."

17. 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.
18. 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 by disclosing the information. However, this exemption is subject to the public interest test.
19. 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, 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.
20. The Commissioner is satisfied that at the time the withheld information was created, LB Croydon considered that there was a reasonable prospect of litigation and that the dominant purpose for creating that information was the seeking or giving legal advice. He is also satisfied that privilege has not been waived – although he notes the complainant's comments set out below that LB Croydon was not entitled to obtain legal advice using the public purse in this case.
21. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### Public interest test

#### Public interest in favour of disclosure

22. The complainant submitted very compelling arguments in favour of disclosure. Specifically, they argued that LB Croydon used public funds to obtain legal advice for what could reasonably be considered a private matter. They explained their connection to the matter in question: namely, proposed libel action. They argued that LB Croydon using public

funds to obtain legal advice on this was illegal under local authority law.<sup>1</sup> They drew attention to article 6(3) which states:

"No indemnity may be provided under this Order in relation to the making by the member or officer indemnified of any claim in relation to an alleged defamation of that member or officer but may be provided in relation to the defence by that member or officer of any allegation of defamation made against him".

23. They argued that "This legal order is supposed to prevent council staff ("officers") and elected councillors ("members") from using the tax-payer funded resources of their local authority to fund libel cases." They drew attention to recent cases as reported in "Local Government Lawyer".<sup>2</sup> They also drew attention to the fact that LB Croydon had published the amount it had spent in legal fees on this issue: £25,434. This added weight to the public interest in knowing more about how considerable public funds came to be spent on a matter which, the complainant argues, legal precedent shows cannot be covered by public funds.

#### Public interest in favour of maintaining the exemption

24. The complainant did not submit any arguments in favour of maintaining the exemption, neither did the Commissioner require them to.
25. LB Croydon argued that even though legal proceedings were not progressed in this case, it is still entitled to claim legal professional privilege and that the public interest in disclosure did not outweigh the public interest in maintaining the exemption. It explained that a third party (the publication connected to the complainant) "had published articles containing factual inaccuracies which it had been asked to correct". The Commissioner notes that the complainant characterises communications it received from LB Croydon on this matter in a different way. LB Croydon said that it "took legal advice to understand its options".
26. Referring to comments of the First-tier Tribunal (Information Rights) *Crawford v Information Commissioner & Lincolnshire County Council*

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<sup>1</sup> [The Local Authorities \(Indemnities for Members and Officers\) Order 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>2</sup> [Protecting the reputation of the council \(localgovernmentlawyer.co.uk\)](https://www.localgovernmentlawyer.co.uk)

(EA/2011/0145)<sup>3</sup>, LB Croydon noted that the Tribunal in that case sought clear, compelling and specific justification for overturning reliance on the section 42 exemption. It argued that this was not applicable here.

27. It said that when considering the balance of public interest it had placed the public interest over the interests of LB Croydon but that concluded that the balance of public interest favoured maintaining the exemption.

#### Balance of public interest

28. The Commissioner recognises that 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.
29. In his guidance on section 42, the Commissioner acknowledges that there is a general public interest in openness and transparency and the following factors may add weight to arguments in favour of disclosure:<sup>4</sup>
- large amount of money involved;
  - large number of people affected;
  - 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.
30. In *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* (EA/2005/0023), which was endorsed by Wyn Williams J in *DBERR v O'Brien v IC* [2009] EWHC 164 (QB) the general importance of LPP communications was acknowledged [41 and 53]: "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

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<sup>3</sup> [EA/2011/0145Crawford v Information Commissioner & Lincolnshire County Council \(EA/2011/0145\)](#)

<sup>4</sup> [legal\\_professional\\_privilege\\_exemption\\_s42.pdf \(ico.org.uk\)](#)

established that legal professional privilege attaches to the document in question... [it] is acknowledged to command significant weight".<sup>5</sup>

31. However it was established in *Boyce v IC and PHSO EA/2019/0032* that the public interest in disclosure does not need to be exceptional [89]:

"In our view every case must be considered on its own merits, and it would be an error to seek to limit the application of the public interest test in relation to LPP material so as to give rise to a presumption that only in very exceptional cases would the public interest be in favour of disclosure."<sup>6</sup>

32. The Commissioner recognises that there is a strong public interest in protecting LB Croydon's ability to access full and frank legal advice. The Commissioner also recognises that there is a public interest in knowing more about what advice LB Croydon received, particularly given the legal framework referred to by the complainant which appears to indicate a ban on councils taking action on behalf of individual council officers or members who believe they have been libelled.

33. Taking the five bullet points set out above in turn, the Commissioner thinks that £25,000+ of public money is a large figure. As for the number of people affected, only those who may have been subject to libel action against them would have been directly affected. Obviously, council tax payers in the area (a much larger number) would be indirectly affected. LB Croydon published the amount of money it spent on this legal advice which goes some way to serve the public interest in transparency about what it has done with public money. It enables the local community to discuss further whether it believes tax payers' money was well-spent. The Commissioner is not certain that LB Croydon has misrepresented how it used its money although disclosure would serve the public interest in clarifying that point. There has been no selective disclosure of the actual advice obtained and therefore further disclosure would not be needed to give a fuller picture beyond selective disclosure.

34. The Commissioner recognises the complainant's argument that public money may have been spent on something which it should not have

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<sup>5</sup> [Bellamy v Information Commissioner & Secretary of State for Trade and Industry \(EA/2005/0023\)](#)

<sup>6</sup> [Boyce v IC and PHSO EA/2019/0032](#)

been. As such, the public interest in protecting LPP in this specific case appears to be weakened. However, the Commissioner recognises that there remains a very strong public interest in protecting LB Croydon's ability to obtain free and frank legal advice.

35. By a narrow margin, the Commissioner has concluded that more weight should be given to the public interest in protecting LB Croydon's ability to access full and frank legal advice. On balance, the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

## Right of appeal

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36. 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)

37. 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.
38. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**