

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

### **Decision notice**

**Date:** 15 November 2022

**Public Authority:** Sandwell Metropolitan Borough Council  
Sandwell Council House  
Oldbury  
B69 3DE

#### **Decision**

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1. The complainant has requested, from Sandwell Metropolitan Borough Council (the Council), information relating to some litigation that involved the complainant themselves and a Council employee. The complainant believes that the Council unlawfully funded the litigation.
2. The Commissioner's decision is that the Council is entitled to rely on section 42 (the 'legal professional privilege' exemption) to withhold the information within scope of the request.
3. The Commissioner does not require any steps to be taken following this decision notice.

#### **Request and response**

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4. The complainant made the following information request to a named councillor on 29 October 2021:

"... I now know that you directly approved the disastrous litigation yourself and have (unlawfully) cost the taxpayer over £100,000.

I suspect that your decision was ill-informed because you were fed incorrect legal and other advice from [name redacted] and/or [name

redacted]. Accordingly please send me the report from officers upon which you based your decision and a copy of your decision notice.

Please also confirm the enquiries you made of the officers, if any ...".

5. In the 'decision notice' issued by the Council, the Council had said that the Council employee was to be indemnified "on the terms detailed appendix 1 to the report". That is the report the complainant is seeking.
6. The complainant has emphasised in the internal review request that they want to know why the councillor authorised the funding of the litigation and what advice the councillor received before authorising it.
7. The final position of the Council was to uphold its original position that section 42 of FOIA ('legal professional privilege') applies to information within scope of the request that is not already accessible to the complainant. (The Council had said that the complainant already has a copy of other documents within scope, through the complainant's involvement in the litigation; and that the requested 'decision notice' had been published on 25 February 2021.) The Council also expanded on its initial response, and said that a "cover report" is being withheld under section 44(1)(a) of FOIA ('prohibitions on disclosure') (with schedule 12A of the Local Government Act 1972); and that the published decision already in the public domain is exempt from disclosure pursuant to section 21 ('information accessible to applicant by other means').

## **Scope of the case**

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8. The Commissioner did not ask the Council for a copy of the withheld information and he has not seen it – he considers he is able to make the present decision without it, given the wording and context of the request and the Council's responses.
9. The complainant listed a number of reasons why they are unhappy with the Council's response. The Commissioner considers that the issue he needs to address in the present decision is the Council's application of section 42. The complainant already has a copy of the 'decision notice' published by the Council, so the Commissioner will only consider whether the Council is entitled to withhold the "cover report" and other documentation. Because the Council relied on section 42 in respect of all the withheld information, the Commissioner will consider that exemption first.
10. At times in their correspondence with the Council (the internal review request) and the Commissioner, the complainant has emphasised a wish

to have certain other pieces of information such as the name(s) of the officer(s) involved in the discussions/correspondence ("so that I can determine whether s/he was part of the conspiracy to bring the unlawful litigation"). That type of information was not the focus of the 29 October 2021 request.

## Reasons for decision

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### Section 42

11. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege and this claim to legal professional privilege could be maintained in legal proceedings.
12. The legal professional privilege exemption is subject to a public interest test.
13. For a detailed explanation of section 42, the Commissioner directs the complainant to his [guidance](#).
14. The Commissioner considers that the information that is said to have been withheld under section 42 – "terms of the indemnity" and "Discussions and correspondence" with a legal adviser about the legal proceedings – will be covered by 'legal advice privilege' and/or 'litigation privilege'.
15. Regarding the "terms of the indemnity", the Council told the complainant that its legal adviser "presented" them to the Council in the context of discussions about the litigation.
16. Although the Council did not specifically refer to the "cover report" until internal review, the Commissioner considers that the cover report will fall under the "Discussions and correspondence" the Council had with its legal adviser.
17. There is no evidence that privilege has been waived – indeed the Council's comments indicate that information being withheld has not been provided to the complainant during the course of the litigation.

### *Public interest – complainant's position*

18. The complainant has said that the Council has "wasted over £100,000 of taxpayers' money" on the litigation. The complainant has also claimed there has been local outrage about the Council funding the litigation and made reference to media coverage.

19. The Council said it recognised a personal interest in the disclosure of the information on the part of the complainant, and a public interest in the Council being transparent/helping the public to understand a decision to take legal action.

*Public interest – Council's position*

20. The Council highlighted the existence of the decision published by the Council (which sets out the Council's position about who was being indemnified and why); and argued that the factors in favour of maintaining the exemption outweigh those in favour of disclosure.
21. It emphasised the importance of the ability to obtain full and candid legal advice, whose confidentiality is crucial to the overall administration of justice.

*Public interest – Commissioner's position*

22. The Commissioner agrees with the Council that the factors in favour of maintaining the exemption outweigh those in favour of disclosure in this instance. The Commissioner's guidance explains that the public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege. Looking at the factors listed at paragraph 54 of the Commissioner's [guidance](#), the cost involved here is not particularly large in the context of the Council's annual budget, the Council has already published its decision and there is no evidence that there has been a misrepresentation of the advice that was given.
23. Because the Commissioner has decided that section 42 applies to the withheld information it is not necessary, as part of the present decision, to address whether section 44 applies.

**Other matters**

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24. Given his decision above, the Commission has not needed to determine whether the Council was entitled to rely on section 44 of FOIA. However, in the circumstances, he considers it appropriate to direct the Council to his [guidance](#) on this exemption. In particular, paragraph 14 of the guidance refers to a decision notice involving the Local Government Act 1972 (LGA) and explains:

"Part 1 of Schedule 12A lists the types of information that are exempt from the requirements of Part VA of [LGA]. Part VA contains a requirement for councils to make certain information available to the public proactively, for example the agendas, minutes and reports from

council meetings. If [the information] is of the type listed in Part 1 of Schedule 12A ... the council does not have to make it available under [LGA]. However, this does not mean that it cannot be disclosed at all. An exemption from a duty to publish information is not the same as a prohibition on disclosing it ... [LGA] does not prohibit disclosure, and so section 44 is not engaged”.

25. A public authority may only rely on section 44 of FOIA where another piece of legislation (or a court order) specifically **prohibits** disclosure of the information in question.

## Right of appeal

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26. 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](mailto:grc@justice.gov.uk)

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

27. 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.
28. 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 .....**

**Daniel Kennedy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**