

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2023

Public Authority: Cheltenham Borough Council
Address: Municipal Offices
Promenade
Cheltenham GL50 9SA

Decision (including any steps ordered)

1. The complainant requested information relating to a Cabinet meeting agenda. Cheltenham Borough Council (the "council") withheld the information under the exemption for legal professional privilege (section 42)
2. The Commissioner's decision is that the council is entitled to rely on section 42 to withhold the requested information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 21 May 2023 the complainant submitted the following request to Cheltenham Borough Council (the "council") :

"Under the Freedom Of information Act, I request to know the details of items 10 and 11 of the below Cabinet Meeting Agenda for Tuesday 23rd May 2023:

<https://democracy.cheltenham.gov.uk/ieListDocuments.aspx?CIId=166&MIId=3522.>"

5. The council responded on 23 May 2023 and confirmed that it was withholding the information under the exemption for legal professional privilege (section 42).
6. On 23 May 2023 the complainant asked the council to review the handling of the request.
7. On 22 June 2023 the council sent the outcome of its internal review which confirmed that it was maintaining its position.

Scope of the case

8. On 26 June 2023 the complainant contacted the Commissioner to complain about the council's handling of their request.
9. The Commissioner has considered whether the council correctly withheld the requested information.

Section 42 – Legal Professional Privilege

10. Section 42(1) states:

"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."

11. The client's ability to speak freely and frankly with their legal adviser to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings.

12. The Commissioner's guidance confirms that there are two types of privilege within the concept of LPP: Advice privilege and litigation privilege¹. In this case the council has confirmed that it considers that the withheld information is subject to litigation privilege.
13. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be ongoing litigation or 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. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
14. The withheld information in this case consists of a report presented to the council's cabinet on 23rd May 2023, an expert witness report and legal advice provided to the council as client. Having viewed the withheld information the Commissioner is satisfied that it relates to live action being undertaken by the council and that the information was created for the dominant purpose of preparing a case for litigation.
15. The council has confirmed that none of the withheld information has been provided to the potential defendant in the case and that it has not been disclosed to any third parties.
16. Having considered the available evidence the Commissioner is satisfied that the withheld information is subject to litigation privilege and that the exemption is, therefore, engaged. He has gone on to consider the public interest test.

Public interest in disclosure

17. In relation to the public interest in disclosing the information the complainant has argued that they are the public and wish to see the information. The complainant considers that there is no evidence that

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/#Litigation>

for the rest of the public there is greater public interest in maintaining the exemption.

18. The complainant has also argued that members of the council are public servants and any information that they willingly do not disclose when requested is seen as a clear sign that they are not acting in the public's interest.
19. The council has acknowledged that the general public interest in transparency counts in favour of disclosure and that there is a specific interest in knowing that litigation, which can incur public costs, is properly undertaken.

Public interest in maintaining the exemption

20. The Commissioner considers 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.
21. The Commissioner also considers that additional weight may be added to the above factor if the advice is recent and relates to a live issue, as it does in this case.
22. The council confirmed that, when determining whether to disclose it considered the potential impact of disclosing legal advice in relation to a 'live' potential claim: For example, revealing prospects of success, would weaken the council's position if, for example, the claim was subject to mediation and/or settlement.
23. The council has also argued that, going forward, the claim and the legal basis of any claim brought by the council will become public and the subject of judicial scrutiny.

Balance of the public interest

24. The public interest here means the public good, it is not what is of interest to the public; or the private interests of the requester (unless those private interests reflect what is the general public good, e.g., holding public authorities to account).
25. The Commissioner recognises that, in this case, the complainant's interest in the information may align with a broader public interest. However, the fact that the specific subject of the information is not reflected in the public record and is unlikely to be known to the complainant suggests that the interest here is generic, that is, an

interest in simply knowing what is unknown. He does not, therefore, consider that this argument carries significant weight.

26. The complainant also argued that, as council officers are public servants, their resistance to disclosing information confounds the public interest. The Commissioner considers that this is not a legitimate argument in favour of disclosure as it assumes that the public interest in disclosure always outweighs the interest in withholding information. What is under consideration here is whether, factoring in the general public interest in transparency and accountability, there is a specific and stronger public interest in withholding the information.
27. As set out above, the purpose of the exemption is to protect fairness in legal proceedings. There is a general public interest in this purpose which is enhanced when proceedings are, as in this case, live.
28. The public interest here, then, is in ensuring that the council is able to engage in legal proceedings without its position being prejudiced by the disclosure of information outside the course of justice. Whilst the Commissioner recognises that there is a general public interest in understanding the council's position and its use of public resources in taking this action, he considers that disclosure would, in this case and at this time, undermine the effectiveness of the council's position and prejudice its ability to successfully pursue its case. The Commissioner notes the council's suggestion that information relating to the matter will be made public as the process unfolds and he accepts that this will go some way to addressing the public interest in transparency and accountability.
29. In balancing the public interest arguments for and against disclosure the Commissioner has given particular weight to the fact that disclosing the information has the potential to affect the outcome of ongoing legal action. Disclosing the information in these circumstances would undermine the confidence that people would have in their ability to have free and frank discussions with their legal advisers.
30. The legal process contains the necessary safeguards to ensure the matter is settled fairly. It would not be in the public interest to undermine that process by disclosing the withheld information.
31. Having considered the relevant factors the Commissioner is satisfied that that the public interest in withholding the information in this case outweighs the public interest in disclosure. He considers that any public benefits in disclosure would be overshadowed by the resulting detriment to the council's position.

Right of appeal

32. 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

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

33. 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.
34. 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

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