

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 September 2011

Public Authority: Cornwall Council
Address: County Hall
Treyew Road
Truro
TR1 3AY

Summary

The complainant requested a copy of legal advice in relation to the Council's decision to accept a named premises as a hotel. The Council confirmed that it held the requested information, but stated that it was exempt from disclosure by virtue of section 42(1) of the Act. The Commissioner finds that the Council was entitled to withhold the information by virtue of section 42(1). He has found that the exemption was engaged and that the balance of public interest favours maintaining the exemption. He requires no remedial steps to be taken in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The disputed information in this case consists of a legal opinion relating to a specified premises which has been subject to enforcement action by the Council, through a planning contravention notice. The legal opinion requested in this case relates to the Council's decision in respect of this planning issue, that the premises in question should be classed as a hotel.

The Request

3. On 28 March 2010, the complainant wrote to the Council following a series of emails relating to the Council's decision to accept a named premises as a hotel, and made the following request for information:

"Following on from our email exchange detailed below, we would like to make a formal request for a written copy of Counsel's decision under the freedom of information act. If you still feel unable to provide us with this information, can you be clear under which of the sections for exemptions in the act you believe this is covered by?"

4. The Council responded to the request on 28 April 2010 and confirmed that it held the requested information, but that the information in question was exempt from disclosure by virtue of section 42(1) of the Act. The Council confirmed that the information being withheld consisted of a copy of legal advice dated 12 May 2009.
5. The complainant wrote to the Council on 24 May 2010 to request an internal review of its decision to withhold the requested information.
6. The Council issued the outcome of its internal review on 25 June 2010, upholding its decision to withhold the requested information by virtue of section 42(1).

The Investigation

Scope of the case

7. On 23 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the requested information had been correctly withheld by virtue of section 42(1).

Chronology

8. On 18 April 2011 the complainant wrote to the Council and confirmed that the complaint had been deemed eligible for formal consideration. The Commissioner also requested copies of the withheld information.
9. The Council responded on 28 April 2011, providing a copy of the withheld information.
10. On 10 June 2011 the Commissioner wrote to the Council to confirm the scope of his investigation. The Commissioner requested further

arguments to support the Council's decision to withhold the requested information.

11. The Council responded on 15 July 2011, providing further arguments to support its decision to withhold the information by virtue of section 42(1) of the Act.

Analysis

Exemptions

Section 42(1)

12. The Council has explained that, in its view, all of the withheld information is covered by legal professional privilege and that it can apply section 42(1) to it all. It also explained that in its view the public interest in maintaining the exemption outweighed that in disclosing the material.

13. Section 42(1) of the Act provides 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 application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] where legal professional privilege was described 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" (Paragraph 9)

15. Section 42(1) is a qualified exemption. The Commissioner must first consider whether the exemption is engaged and then, where it is, he will go on to consider whether or not the balance of public interest favours maintaining the exemption.

(1) Is the exemption engaged?

16. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
17. The category of privilege which the Council is relying on to withhold this information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. This was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* [2004] UKHL 48 ("*Three Rivers*"). It explained that there were three requirements for material to be covered by legal professional advice privilege. The Commissioner has adopted that approach in this case and those factors can be summarised as follows:
 - The material must be between a qualified lawyer acting in their professional capacity and a client
 - It must be created with the sole or dominant purpose of obtaining or providing legal advice
 - It must be confidential
18. The first requirement is one of fact. In this case all of the information amounts to communications between a lawyer acting in their professional capacity and the Council (their client). This requirement is therefore satisfied.
19. The second requirement is also one of fact. The Commissioner has examined the withheld information and is satisfied that the sole purpose of it was the obtaining or providing of relevant legal advice. This requirement is therefore also satisfied.
20. The last requirement is an issue of law. The Commissioner considers that the information can be deemed to be confidential. This is because the information is of substance and was imparted in circumstances that led to an expectation of confidence (formal legal advice between a lawyer and their client). The final requirement is therefore also satisfied.
21. The Commissioner's view is also that the advice has not lost its confidentiality and therefore is privileged in this case. The Commissioner notes that this is a situation of advice privilege. He believes that in circumstances other than litigation partial disclosure, such as the decision made as a result of the advice, will not result in the loss of confidentiality and therefore the loss of legal advice privilege. His view

has been supported by the Information Tribunal in *FCO v Information Commissioner* [EA/2007/0092]¹ which stated:

“There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object”. (Paragraph 22)

22. The Commissioner is satisfied that the information that has been provided to the public about this matter does not falsely represent the withheld information. After careful consideration, he is satisfied the confidentiality of the advice remains and the exemption is engaged.

(2) The public interest test

23. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner can only consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure. It is important to note that the Act is a public disclosure regime and therefore the Commissioner is only able to consider whether the information can be disclosed to the public, rather than the complainant by themselves.
24. It is also important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. However, it is clear that just because some members of

¹ This decision can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

the public may be interested in the information, this does not necessarily mean that releasing the information would be in the public interest. The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public².

Public interest arguments in favour of maintaining the exemption

25. In arguing that the public interest favoured withholding the information, the Council confirmed that it had placed considerable weight on the inherent public interest present in legal advice privilege. The Council went on to argue that it should, as an entity in its own right, be able to seek legal advice on the basis of full and frank discussions with and disclosures to its advisors that do not result in prejudice to its position. That prejudice could arise through a weakening of its position in bringing enforcement action and as the regulatory authority with statutory responsibility for taking such enforcement action, to undermine its ability to do so would not be in the public interest.
26. In the Council’s view, the legal opinion may be of interest to specific objectors but their interest in this matter would not translate into the broader public interest being served through the disclosure.
27. The Council also argued that disclosure could result in the officers concerned with the enforcement case being subjected to scrutiny and questioning by anyone who was vaguely interested. The Council explained that the relevant parties have the opportunity to put their position forward and that to enable input by the wider community would be detrimental to the process.
28. The Council also stated that it is unaware of any allegations regarding the probity of the Council’s actions in this matter. Whilst the Council acknowledges that there may have been some disagreement as to whether the Council was correct in taking a particular stance in relation to an enforcement matter, it is the Council that is tasked with exercise of this judgement based on appropriate planning and legal advice. The Council maintained that there was nothing to suggest that it should be required to disclose the advice due to concerns that it has acted in any way illegally.
29. The Council’s central argument in favour of maintaining the exemption appears to be the potential prejudice to its relationship with its legal advisor, arguing the importance of safeguarding openness in

² *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

communications between the Council and its legal advisers to ensure access to full and frank legal advice.

Public interest arguments in favour of disclosing the requested information

30. However, it is important to remember that the factors outlined above must be balanced against the arguments in favour of disclosing the legal advice which forms the requested information; Parliament did not intend the exemption contained at section 42(1) of the Act to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* [EA/2007/0052] underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. It placed weight on the fact that the legal advice related to an issue that affected a substantial number of people. The complainant explained that the Commissioner must place similar weight on the factors that favour disclosure because the issue in question is crucial to the quality of life for residents in the local area, and could have a huge impact on the residents of Newquay.
31. The complainant argued that the Council had erred in its balancing of the public interest in this case; suggesting that the Council had mistaken its own interests for those of the public.
32. The complainant went on to argue that, in his view, all residents and businesses located in the vicinity of the property to which the legal advice related were denied the right to object to the change of use of the premises. The complainant explained that, as a result, the decision has had a huge negative effect on the quality of residents' lives, local businesses, property values, and the wider locality more generally.
33. The complainant argued that in view of the number of similar establishments currently operating in the wrong planning category, disclosure of this information has a great deal of public interest for many people. The complainant argued that the Council's decision in this matter went against current attempts to create an atmosphere of transparency and cooperation in the locality. The complainant stated that the Council's decision would cause huge damage to the public's confidence in their Council. The complainant concluded by pointing out that since no legal proceedings currently surround this issue, there is nothing to jeopardise.
34. The Council itself acknowledged the fact that disclosure of the documents relating to enforcement proceedings might improve public understanding of the way in which the Council undertakes that role more generally.

Balance of the public interest arguments

35. The Information Tribunal in *Calland v Financial Services Authority* [EA/2007/0136]³ explained its approach when considering the balance of the public interest in this exemption (at paragraph 37):

“What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential”.

36. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071) the Tribunal usefully distilled the High Court's approach into six principles:

1. There is a strong element of public interest inbuilt into the exemption;
2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.

³ This decision can be found at:
http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

37. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case the basis for its decision that the property in question should be classed as a hotel. Disclosure of the legal advice may therefore assist the public's understanding of the legality of its current position.
38. The Commissioner also accepts the points made by the complainant in relation to the fact that the wider issue of the planning decision made by the Council in this case has had a detrimental effect on local residents and businesses, and the locality more generally.
39. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the *DBERR* where he said:

"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 [at paragraph 41] ... The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (Paragraph 53)

40. Justice Williams indicated though that section 42 should not accordingly become an absolute exemption "by the back door". Public interest favouring disclosure would need to be of "equal weight at the very least" (at paragraph 53).
41. In deciding the weight to attribute to each of the factors on the competing sides of the public interest test and determining where the overall balance lies the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people and the timing of the request.
42. The Council has been transparent about the fact that it received legal advice on this matter, and has informed the public that its decision that the property in question should be classed as a hotel was based on the legal advice that it had sought. It is important that the Council should be able to consult freely and frankly with its lawyers in relation to these matters and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest in this case.

43. In the case of *Mersey Tunnel Users Association*, the Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 per weekday. Whilst the Commissioner accepts that the issues involved in this case have the potential to affect a reasonable number of people in the local area, he does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exemption.
44. It is important to note, in line with point 6 of *Thornton*, the Commissioner has not received any evidence from either party to suggest that the Council is being accused of misrepresenting any advice received, pursuing an unlawful policy or ignoring any unequivocal advice in relation to the specific planning issue in question.
45. Taking into account all the factors above, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 42(1).
46. For the avoidance of doubt, the Commissioner has also considered whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged. He has concluded that the weight of the arguments favours the maintenance of the exemption to the whole of the withheld information.
47. For all the reasons above, he therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

The Decision

48. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

49. The Commissioner requires no steps to be taken.

Right of Appeal

50. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

51. 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.

52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 21st day of September 2011

Signed

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

Legal Annex

Legal Professional Privilege

Section 42(1) provides 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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”