

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2015

Public Authority: Prendergast School
Address: Adelaide Avenue
London
SE4 1LE

Decision (including any steps ordered)

1. The complainant has requested information from Prendergast School ("the School") broadly relating to its requests for legal advice and copies of legal advice it has received which were referred to in a meeting on 6 November 2014.
2. The Commissioner's decision is that the School does not hold the information sought in requests 1, 3 and 4. He has also determined that the School correctly withheld the information sought in requests 2 and 5 under section 42(1) of the FOIA. The Commissioner is also satisfied that the School complied with section 10 of the FOIA.
3. The Commissioner requires the School to take no steps.

Request and response

4. On 5 May 2015 the complainant wrote to the School and requested information in the following terms:
 1. *A copy of the request to law firm Stone King requesting the advice they provided referred to in the Governors minutes of the meeting on 6 November 2014.*
 2. *A copy of the response/advice/correspondence provided by law firm Stone King referred to in the Governor's minutes of the meeting 6 November 2014.*
 3. *A copy of any request to law firm Stone King by the Governors working party established at the meeting on 6 November 2014 – this to*

include requests by any member of that working party or on behalf of that working party.

4. A copy any advice or correspondence provided by law firm Stone King to the working party established at the Governor's meeting on 6 November 2014.

5. A copy of the notice and any attached or connected correspondence (agenda, reports etc) calling the extra Governor's meeting of 6 November 2014. These are referred to in the minutes of that meeting under section 1.4 as: 'Governance proposal papers that had been circulated and tabled'.

5. The School responded on 20 May 2015. It stated that the information falling within the scope of requests 1, 3 and 4 was not held. In relation to requests 2 and 5, the School advised the complainant that this information was held. However it was exempt from disclosure under section 42(1) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner has had to consider whether the School holds the information sought in requests 1, 3 and 4. He has also had to consider whether the School was correct to withhold the information sought in requests 2 and 5 under section 42(1). The Commissioner will further consider whether the School complied with section 10.

Reasons for decision

Requests 1, 3 and 4

8. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled:-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him".

9. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
10. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
11. With reference to request 1, the School explained that the information provided by Stone King to the Governing Body shared at the meeting on 6 November 2014 was the result of a discussion. There was therefore no written record of this request held by the School.
12. With regards to requests 3 and 4, the School explained that there were no requests made for advice from the working party established on 6 November 2015, either by individual members of the committee or on behalf of the working party. Therefore no legal advice was provided to the working party by Stone King. The School confirmed that the legal advice was provided to the Chair of Governors before the working party was formed.
13. In light of this, the Commissioner is satisfied on the balance of probabilities that the School does not hold the information requested at requests 1, 3 and 4.

Requests 2 and 5

14. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. This exemption is subject to a public interest test.
15. There are two types of privilege – litigation privilege and legal advice privilege.
16. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
17. Advice privilege will apply where no litigation is in progress or being contemplated. In both these 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.

18. The Commissioner's Guidance¹ on section 42 makes it clear that information meets the criteria for engaging the category of litigation privilege:
- a. where litigation is underway or anticipated. Where litigation is anticipated there must be a real prospect or likelihood of litigation taking place; it is not sufficient that litigation is merely a fear or possibility;
 - b. the dominant (or main) purpose of the communications must be to give or obtain advice to assist in preparing for litigation;
 - c. and the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
19. Advice privilege applies where there is no litigation contemplated or in progress. It also protects confidential communications between a lawyer and their client, and the communications have to be made for the dominant purpose of obtaining or providing legal advice.
20. The School has stated that the information sought in requests 2 and 5 attracts advice privilege. In this case, the School was receiving information from its legal advisor and it was communicated in the legal advisor's professional capacity. Having had sight of the information in question, the Commissioner is satisfied that the information does constitute legal advice.
21. The Commissioner considers that the legal advice will remain confidential if it has only been shared with a limited number of people on a restricted basis. The School confirmed that the information remains confidential and there has not been a loss of confidentiality in the information that has been sought in requests 2 and 5.
22. In light of this, the Commissioner is satisfied that section 42(1) is engaged.
23. Section 42 is, however, subject to the public interest test. The
-

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

public interest test requires the public interest in favour of maintaining the exemption to be weighed against the public interest in disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

Public interest test

24. The public interest test is set out in section 2 of FOIA. The test requires the balancing of all the public interest factors in favour of maintaining the exemption against all the public interest factors in favour of disclosing.
25. The information can only be withheld if, in all the circumstance of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
26. As stated in the Commissioner's guidance, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind the legal professional privilege i.e. safeguarding the confidentiality of communications between a lawyer and their client.

Public interest in favour of maintaining the exemption

27. The School considered that there is a public interest in safeguarding openness in all communications between a client and a lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
28. The School also argued that the advice relates to an on-going process and access to the School's legal advice during an on-going process would undermine its ability to freely obtain legal advice. The School accepted that if the information was historic or uncontentious, the arguments in favour of maintaining the exemption might not be so strong. To support this, the School referred to the case *Szucs v Information Commissioner* in which the Tribunal agreed with the Commissioner in that if advice was live, it carried significant weight.
29. In this particular case, the School explained that the Governing Body does not consider that there is a wider public interest in the information. It argued that the public interest in the academy conversion issue has been fully satisfied by the extensive information that has already been disclosed.

Public interest in favour of disclosing the information

30. The complainant explained that the School has claimed that it has fully investigated all alternatives before deciding on its chosen model. He

further explained that if it had done so, the legal advice would include a variety of other proposals with the pros and cons outlined. The complainant concluded by stating that the only way to prove that the School are telling the truth is to see the legal advice. He therefore argued that it was in the public interest for the information sought in requests 2 and 5 to be disclosed.

31. The School accepted that there is an inherent public interest in demonstrating transparency in the public sector.

Balance of the public interest

32. The Commissioner notes that a key reason for the existence of legal professional privilege is to enable a client to obtain confidential advice. It is also necessary to take into account the inbuilt public interest in this exemption; that is the public interest in the maintenance of legal professional privilege.
33. This inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...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 interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (Paragraph 35).
34. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
35. The view of the Commissioner is that the public interest inbuilt into this exemption is particularly weighty in this case as the legal advice relates to a matter that was live at the time of the request.
36. The Commissioner recognises that there is a public interest in transparency in the requested information. However, he does not believe this is sufficient to outweigh the inherent public interest in legal professional privilege.

37. The Commissioner concludes that the public interest in the maintenance of legal professional privilege in upholding the exemption provided by section 42(1) outweighs the public interest in disclosure. Accordingly, the School is not, therefore, required to disclose the information in question.

Section 10 – time of compliance

38. Section 10 of FOIA states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt"*.

39. The complainant argued that he has repeatedly asked for this information and the School has refused to provide it.

40. The Commissioner notes that in this case, the request was made on 5 May 2015 and the School responded on 20 May 2015. It is clear that the School responded within the 20 working day timeframe and it has therefore complied with section 10.

Right of appeal

41. 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@hmcts.gsi.gov.uk

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

42. 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.
43. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF