

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 December 2016

**Public Authority:** Leicestershire County Council  
**Address:** County Hall  
Glenfield  
Leicestershire  
LE3 8RA

#### Decision (including any steps ordered)

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1. The complainant has requested information from the county council relating to correspondence and other documents with a Parish Council regarding the parish council's plan to take over the running of a library from the County Council. The council provided some information, withheld other information under section 42 (legal professional privilege), section 41 (information provided in confidence) and section 43 (commercial interests). The complainant also questioned whether further information should have been disclosed to him.
2. The Commissioner's decision is that the council has correctly applied section 42 to the information. Following further information being disclosed to the complainant during her investigation she has also decided that on a balance of probabilities no further information is held by the council. She has also decided that the council failed to comply with the timescales required by section 10(1).
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 2 February 2016, the complainant wrote to the council and requested information in the following terms:

*"Further to my request number 6131 dated 9 February 2015 relating to Kirby Muxloe Library and to which I received a full response, please now provide copies of all correspondence between Leicestershire County Council and Kirby Muxloe Parish Council (or individual parish councillors) related to the present and future use of the library building in Kirby Muxloe since 9 February 2015 to date. Please also include any notes of any telephone conversations between the relevant parties and the records of any meetings that may have been held between the two councils, of which I believe there was one in November or December 2015, very possibly attended by [name redacted] and other officers, likely to have included [name redacted]. These records of meetings should identify the attendees and include any documents tabled as well as notes taken by officers.*

*I am happy to receive all this information in electronic format as far as possible."*

5. The council responded on 3 March 2016. It provided some information in response to his request. The complainant wrote back on 4 March 2016 stating that he believed that more information should be held by the council.
6. Following an internal review the council wrote to the complainant on 8 April 2016. It provided further information, applied legal professional privilege to a copy of legal advice which it had obtained from Kirby Muxloe Parish Council and stated that no other information was held.

## Scope of the case

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7. The complainant contacted the Commissioner on 23 March 2016 to complain about the way his request for information had been handled. He considers that the council should hold further information and provided examples of why that was the case. He also asked the Commissioner to consider the application of section 42 to the information (legal professional privilege).
8. During the course of the investigation the council reconsidered its position. It confirmed that no other information was held, and having considered the legal advice, it also chose to apply section 43

(commercial interests) and section 41 (information provided under a duty of confidence) in addition to section 42.

9. Following further questions from the Commissioner the council did disclose an outline business plan received from the parish council and later, further documentation which it held which it had not initially located.
10. The Commissioner considers that the complaint is that further information should be held by the council, and that the exemptions have been wrongly applied to withhold the legal advice.

## **Reasons for decision**

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### The background to the case

11. Kirby Muxloe Parish Council has a separate role as custodian trustee of a charity which manages land bestowed on it with a covenant requiring the land to be used for 'public pleasure grounds'.
12. In 1985 the Parish Council entered into a lease with the County Council for a part of the land for a period of 20 years. The lease required that the County Council used the land for the purposes of building and maintaining a public library. A further subsequent lease was entered into for part of the land to be used for the purposes of a car park for the use of staff and visitors to the public library. The complainant said that a further lease was entered into in 2006 for a period of 99 years including the same terms.
13. Recently the County Council sought to make cuts to its library budget and decided to reduce the amount of smaller public libraries in the county. It therefore sought to have community groups volunteer to apply to run a number of the smaller libraries with its support. Kirby Muxloe Library was one of these.
14. The Parish Council applied to run the library with the Parish Clerk taking over the additional role of running it as part of her role. A new clerk was hired by the Parish Council (as reported in the Leicester Mercury on 29 August 2015), and her salary was partly based on the potential for this to occur.
15. Subsequent to the request, and during the Commissioner's investigation a decision on this plan was initially delayed until September 2016 due to unresolved legal issues with the Parish Council taking control of the Library (reported in the Leicester Mercury on 12 April 2016). On 30 July 2016 however the Parish Council announced that for legal reasons it would not be able to run the library directly, and instead advertised for a

new Community Group to manage the library with its support (<http://www.kirbymuxloe-pc.org.uk/news.php?template=2&id=335>). The Commissioner therefore understands the current situation to be that the future of Kirby Muxloe Library remains unresolved.

16. The complainant argues that the County Council is legally obliged by the terms of its lease with the Parish Council to provide a library service and to keep it open during normal business hours. He considers therefore that the County Council cannot close the library or reduce its hours of opening. He therefore made his request to establish what the position was between the County Council and the Parish Council as regards the status of the library, aware that there were concerns over the Parish Council's ability to take over the Library.
17. On a side note, the complainant also understands that there have been concerns raised by Regulators such as the Charity Commission regarding the issues relating to the land and the library, primarily relating to the issue of the management of the Trust by the Parish Council. Although this is raised as part of the relevant background to some parts of her decision, the Commissioner does not need to elaborate on this further for the purposes of her decision.

Is further information held?

18. Section 1(1) of FOIA provides 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."*

19. Following the initial request some information was provided to the complainant but he considered that further information must be held.
20. In his request for review the complainant highlighted instances in the emails which were disclosed to him which refer to other correspondence which had not been disclosed to him in response to his initial request. In response the council found and provided further information. It clarified that the complainant had not initially mentioned that he wished any correspondence from the legal services, the Chief Executive's Office and Adults and Communities services. After checking with these departments further information was provided. It then confirmed that other than legal advice it had obtained from the Parish Council it had now disclosed all of the information which it holds which fell within the scope of his request.

21. The complainant still considered further information must be held which has not been disclosed, again referring to sections of the correspondence which he has as evidence of this. For instance he highlighted a section of the Minutes of the Council's Agenda reports pack for a meeting of the Adults and Communities Overview and Scrutiny Committee of the County Council on 6 September 2016 which referred to an outline business plan being provided by the Parish Council in the past. He said that this had not been disclosed to him in spite of him specifically asking the council about this. He also clarified that he had not been provided with any attendance notes of the meetings which led to the Parish Council providing a copy to the County Council.
22. 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.
23. 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). For the absence of doubt therefore, the Commissioner is not required to categorically find that no information is held by the authority. Her decision, based on the evidence which is provided to her, is whether any information is held on a balance of probabilities.
24. In such cases the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and she will consider any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
25. The Commissioner wrote to the council asking it a number of questions relating to the searches it had carried out in order to determine whether all of the information had been located and disclosed to the complainant, other than the legal advice.
26. The council confirmed that both manual and electronic searches had been carried out to locate the information. It said that laptops or other electronic devices which store files locally were not used to prepare correspondence.
27. It confirmed searches were undertaken by date, and by using the relevant search terms such as 'Kirby Muxloe' and 'Kirby Muxloe Library'.

28. It confirmed that relevant officers had been asked whether information was held in order to determine whether all relevant materials had been disclosed.
29. It did not consider that any information had been destroyed and did not consider that information would be held at any other locations.
30. It said it had been unable to contact the former County Solicitor to ask if he held any further information, however it considered that if that was the case this would be covered by legal professional privilege in any event.
31. The Commissioner has considered the councils searches and its argument that it does not hold any further information. The complainant considers that as a payment to the Parish Council was agreed there should be minutes from a meeting with the Parish Council where this transaction was discussed. He also considers that the County Council would hold attendance notes for that meeting.
32. The Council however argued that no minutes are held. The council confirmed that meetings took place and that County Council officers attended these, however its argument is that these were instigated by the Parish Council and no formal records were taken by the County Council officers. The notes which were taken were disclosed to the complainant.
33. The complainant also outlined that a payment was agreed between the parties for the County Council to pay the Parish Council for a copy of the legal advice. The County Council provided a 'Request for Payment' document drawn up by officers in the County Council to pay the Parish Council for a copy of the advice. Following the Commissioner's further questions regarding whether a payment had in fact been made it provided the Commissioner with a copy of the receipt it had received from the Parish Council for the money.
34. The complainant pointed out that council minutes evidenced that it had held an outline business plan from the Parish Council which had not been disclosed to him. The Commissioner wrote to the council and pointed out that it had clearly held this information within the recent past and asked the council to confirm whether this was still held. The council subsequently located the document and disclosed this to the complainant in September 2016.
35. Further to this disclosure the complainant suggested that the council would have received an introductory correspondence with the outline business plan, comments made by the County Council to the parish council regarding the plan and potentially a letter informing the County Council that the Parish Council was withdrawing the plan. However the County Council's searches had not located any of this information.

36. The Commissioner therefore wrote to the council on 4 October 2016, reiterating the complainant's concerns and asking the council to carry out further searches for information. This was on the basis that the council's initial searches had failed to locate the outline business plan, and that the further information which the complainant considered should be held were documents which the Commissioner considered were likely to have been held at some point in time by the County Council.
37. The Council wrote to the Commissioner on 11 October 2016 attaching further information which had been located, and confirmed that it had now disclosed this information to the complainant.

### Conclusions

38. The council did explain why it did not provide all of the information in response to the first request by stating that a new officer had dealt with the request and that she had subsequently received training.
39. Nevertheless the fact that outline business plan was located after the councils initial searches had failed to find it, and after the Commissioner's initial request for it to reconsider the request and confirm whether further information was held does raise the Commissioner's concerns. However following further searches being carried out further documentation was located and disclosed to the complainant.
40. Given these further searches, the Commissioner has taken the council's responses regarding the searches it has carried out on face value. It has now carried out searches on a number of occasions for further information and confirmed that everything it holds falling within the scope of the request has now been disclosed other than the legal advice. It has explained why notes from the meetings are not held, other than those already disclosed.
41. On this basis the council has answered the Commissioner's questions and described the searches adequately. In light of the description of the searches it has carried out the Commissioner considers that on a balance of probabilities no further information is held by the County Council.

### Section 42

42. Section 42 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."*

43. In broad terms legal professional privilege protects the confidentiality of communications between a client and their legal adviser. This allows the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses of their client's position.
44. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated.
45. The Council has asserted that the information is protected by advice privilege, but it also considers that litigation privilege would also be applicable under the circumstances of the case.

#### Advice Privilege

46. The council argues the advice is subject to advice privilege. The Commissioner is satisfied that the advice was provided by a professional barrister, a qualified legal adviser who was acting in her professional capacity in providing legal advice to her client.
47. However, as privilege serves to protect communications made for the purpose of seeking or providing legal advice, it primarily applies to information between a lawyer and their client. The Commissioner notes that the advice was initially obtained by the Parish Council rather than the County Council. The County Council confirmed that when it discovered that the opinion was held by the Parish Council it agreed to provide a copy but asked the County Council to pay a contribution to the overall costs. The County Council agreed and was provided with a copy of the advice.
48. In this respect it was the Parish Council which was the 'client' rather than the County Council. The complainant therefore questioned whether legal professional privilege (and therefore section 42) was applicable given that the communication was not, (in the hands of the county council), a communication between lawyer and client. He further argues that the provision of the advice from the Parish Council to the County Council constituted a waiver of privilege.
49. The Commissioner has considered this further. She is satisfied that the Parish Council could rely upon legal professional privilege in order to withhold the information from disclosure if a request were made to them directly. Although the information was disclosed to the County Council this was a restricted disclosure which was intended to be in confidence.

Legal professional privilege was not therefore waived by this restricted disclosure.

50. The Commissioner also notes that the information was passed to the County Council on the basis of their common interest in agreeing a change of responsibility for managing and running the library from the County Council to the Parish Council. The information was therefore passed, albeit with a fee, to the County Council due to their joint or common interest in pursuing an agreement over the management of the Library.

Joint or common interest privilege

51. Joint or common interest privilege arises where two or more parties share a joint or common interest in the subject matter of a privileged communication. The relevant principle in this case relates to common interest privilege.
52. The main elements of common interest privilege are as follows:
- Common interest privilege applies in relation to privileged documents shared with a third party;
  - It operates to preserve privilege where a person voluntarily discloses a privileged communication to a third party who has a common interest in the subject matter of the privileged document (or in litigation in connection with which the document was brought into existence);
  - It applies in relation to documents protected by both legal advice privilege and litigation privilege;
  - The common interest must exist at the time the communication is disclosed to the third party.
  - A third party with a common interest in communications held by another party may have a right to access the communications held by the other (on the basis of his common interest with the other party);
  - Both the party disclosing the privileged document, and the party receiving it can assert privilege in the document against all other parties.
53. The Commissioner has considered the above points. A fee was asked for by the Parish Council prior to the advice being provided to it, however the Commissioner does not consider that this in itself prevents the transaction from being 'voluntary'.

54. The Commissioner is also satisfied that at the time that the advice was provided to the County Council both parties had a common interest in the advice on the basis of seeking a robust legal opinion on the ability of the Parish Council to take over the role of managing the library from the County Council.
55. The Commissioner considers that the County Council would not have had a right to access the information held by the Parish Council on the basis of its common interest with the Parish Council. Effectively however it was in the interests of both parties to seek that advice to take forward and identify any issues with the proposal. Both parties wished to reach agreement over the Parish Council taking over the management of the library. The advice was voluntarily shared on that basis and so the Commissioner considers that there was a common interest in sharing the legal advice at the time that the information was disclosed to the County Council.
56. The Commissioner decision is therefore that the information is subject to common interest privilege. The County Council was therefore correct to rely upon section 42 in this case. The Commissioner must therefore carry out a public interest test as required by section 2 of the Act.
57. The test is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### The Public Interest in maintaining the exemption

58. The central public interest in maintaining the exemption relates to the ability of the council to seek and obtain legal advice free from concerns that the advice it seeks might subsequently be disclosed, thereby potentially disclosing any weakness or concerns which might be voiced by its advisors. A disclosure of information subject to legal professional privilege may lead to a lack of full and frank advice being sought and provided in the future by council officers and advisors.
59. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, well established and important common law principle. The Information Tribunal affirmed this in the Bellamy case when it stated:

*"...there is a strong element of public interest inbuilt into 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..."*

60. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
61. The Commissioner has considered the timing of the request and the status of the advice. She notes that the request for information (including the advice) was received prior to the final decision being taken by the Parish Council that it was not able to take over the management of the Library. Additionally the issue of the library's management in the future has yet to be determined by the County Council. Although the Parish Council has now announced that it cannot take over the library for legal reasons, it is still seeking volunteers to do so. The County Council is also still seeking volunteers to run the Library. In these circumstances there is still a possibility of a challenge to the County Council's ultimate decision due to the uncertainty of obtaining any suitable volunteers to run the library. The advice was therefore still 'live' at the time of the request.
62. There is a strong public interest in protecting privileged information where the advice is still 'live' and in use by the client. Effectively where privileged information is still live a disclosure may harm the legal case or of the client or undermine their position, which in future may lead to a chilling effect where legal advice is sought. It would undermine the rights of clients to seek full and frank advice from their legal advisors, and undermine legal adviser's ability to put forward their full legal interpretation of situation, including any deliberation on the weaknesses of their client's position.

The public interest in the information being disclosed

63. The Commissioner recognises that there is a public interest in the information being disclosed in order to create greater transparency over an issue which affects the local community.
64. She notes that the complainant has raised questions about the ability of the County Council to close the library or to pass control over to volunteers under the terms of the lease it signed with the Parish Council.
65. The complainant has also questioned the legal powers of the Parish Council to lease the ground for the library to be developed in the first instance, and has said that he understands that the Charity Commission may have had issues with the Parish Council's actions over this.

66. The complainant therefore argues that there is a public interest in the information being disclosed in order to provide a clearer picture of the legal issues which affect the councils' decisions over this matter and how this is likely to affect the local community. Effectively the library's future is in an uncertain position with a potential threat of closure or a limitation in the hours it is opened, whilst there is (he considers) a clear obligation in the lease for the council to retain the service and to provide it during normal business hours.

The balance of the public interest

67. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information on a full and frank basis with legal advisers in order that any advice is given in context and with the full appreciation of the facts.
68. She does not however consider that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.
69. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
70. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. In this case, disclosure would increase transparency in the way that both councils have acted insofar as regards the land, the lease of the library, and the intended actions of the County Council to pass management of the building to volunteers.
71. Over time there have been judgements which demonstrated a limited degree of factors which can tip the balance of the public interest in favour of a disclosure of the information. Although these factors are not exhaustive in any way, these include,
- Where a large amount of money is involved;
  - Where a large number of people are affected;

- Where there has been a lack of transparency in the public authority's actions;
  - Whether there has been a misrepresentation of advice that was given;
  - Where a selective disclosure of only part of advice that was given.
72. In this case the Commissioner has seen no evidence to suggest that there is a large amount of public money at stake or that a large number of people are affected. Having said this, the potential closure of a local library is a frontline service which would be removed from the local area. The potential for volunteers to take over is still present however there is still the potential that it will simply be closed. Although the library is relatively small and the number of users within the Community is therefore likely to be relatively small in number, these are still factors which weigh, to an extent, in favour of disclosure.
73. The Commissioner is further satisfied that there has been no lack of transparency over the issue. Neither has there been any misrepresentation or any selective disclosure of any part of the advice.

The issue is that the County Council wishes to withdraw from running the library and has sought volunteers, one of which was the Parish Council. The Parish Council submitted a business plan to do so however it has subsequently explained that for legal reasons it has now withdrawn that offer. There has been no misrepresentation of the advice it has received.

74. Legal professional privilege cannot be used as a cover for illegal or corrupt behaviour or conduct by public authorities or those representing them. The complainant has raised issues regarding the ability of the Parish Council to lease the land to the County Council in the first instance, however this in itself would not be grounds upon which privilege could be overturned.
75. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisors. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice. It would also put the two councils in a position where they would be unlikely to share privileged information on the issue which the both have an interest in. This is on the basis that privileged information sold to the County Council under a duty of confidence would subsequently be disclosed to the whole world without the Parish Council having the option to defend its position.

76. In reaching a view on where the public interest lies, the Commissioner is satisfied that in this case the public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. She therefore determines that the exemption at section 42 has been applied correctly by the Council.

#### Section 41 and Section 43(2)

77. As the Commissioner has agreed with the councils application of section 42 to the information he has not therefore gone on to consider the application of section 41 (information provided under a duty of confidence) and section 43 (commercial interests).

#### Section 10

78. The complainant made his initial request for the information to the council on 2 February 2016. Its initial response was on 2 March 2016, however it took further correspondence from the complainant before further information was finally provided to him on 8 April 2016. Further to this a copy of the Parish Council's outline business plan was not provided to the complainant until September 2016 and further documents were provided in October 2016.

79. Section 10(1) of the Act provides that *"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt"*.

80. The Commissioner is therefore satisfied that the council failed to comply with section 10(1) as its responses fell outside of the period of 20 working days required by the section.

## Other matters

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- a) The Commissioner has concerns regarding the council's searches to locate information falling within the scope of the request, both when it received the request for information and when she initially wrote to it requesting it reconsider its response to the request.
- b) In this case the council's response to the Commissioner outlined searches which may have appeared adequate on the face of it, however further questions regarding specific documents quickly established that not all information had been located, in spite of the fact that a number of previous searches had been carried out.
- c) The Commissioner expects public authorities to be thorough with searches for requested information. Insofar as possible, searches should encompass all areas where relevant information is likely to be held and relevant officers should be asked whether they are aware of any information that is held and where any relevant information may be held.

## Right of appeal

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81. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

82. 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.

83. 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** .....

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