



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2013/0235**

**Appellant:** Wirral Borough Council

**Respondent:** Information Commissioner

**Date of Decision:** 28<sup>th</sup> May 2014

**Date of Promulgation:** 30<sup>th</sup> May 2014

**Before**  
Melanie Carter  
(Judge)

and

Alison Lowton  
David Wilkinson

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal decided to uphold the appeal save in relation to certain of the document requested. Thus, it ordered that the following Decision Notice be substituted for the original Decision Notice.

**SUBSTITUTED DECISION NOTICE**

**Dated 28<sup>th</sup> May 2014**

**Public authority:**

**Wirral Borough Council**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Information Commissioner's Decision Notice in this appeal is substituted by the following.

1. Save as set out in paragraph 2, the information held by Wirral Borough Council that is within scope of the request of 4 February 2012 (as determined by this Tribunal's decision) is exempt from disclosure.
2. The documents at tab 6 of the open bundle for these proceedings are not exempt under the Act (save in relation to certain personal data exempt under section 40(2) FOIA). These documents have already been disclosed to the requester.

Dated this 28<sup>th</sup> day of May 2014

Signed

Melanie Carter

Judge

## REASONS FOR DECISION

### **Introduction**

1. This appeal arises from a request for information made on 4 February 2012 to Wirral Borough Council (“the Council”) for the following information:  
  
*“Please forward copies of ALL correspondence you have whether received or sent, regardless of the medium used (letter; email; fax; memorandum etc.) and regardless of subject matter, with the following law firm:  
  
DLA Piper UK LLP”.*
  
2. The background to this request is that the Council had appointed Anna Klonowski Associates Limited (‘AKA’) as an independent consultant to undertake an investigation following whistleblowing claims made by a former employee of the Council alleging defects and impropriety in the charging of fees for social care work (‘the inquiry’). AKA entered into a contractual arrangement with the Council dated 6 December 2010 (later amended in September 2011).
  
3. AKA instructed DLA Piper UK LLP Solicitors (‘DLA’) to advise AKA as regards this inquiry and on risk mitigation measures which needed to be put in place in connection with the draft and final report provided to the Council by AKA.
  
4. AKA reported on the findings and conclusions of the inquiry in a document dated 9 January 2012. The report was critical of the Council. The Council published the report.

5. Following an intervention by the Commissioner, the Council responded to the requester refusing to provide the requested information, relying upon the exemption under section 41 of the Act (exemption for confidential information). Following an internal review, the Council maintained its reliance on section 41 and argued that the requested information was also exempt under section 42 of the Act (legal professional privilege).

### **The Commissioner's Decision**

6. The Commissioner served a Decision Notice dated 3 October 2013 concluding that the Council was not entitled to rely on section 41 in relation to some of the information as it was not provided by another party and had not provided sufficient justification for the application of section 41 to the remainder of the information. The Commissioner therefore required the Council to disclose the requested information.

### **The Notice of Appeal**

7. The remaining relevant grounds of appeal may be summarised as follows:-
  - i) The Commissioner erred in failing to conclude that section 42 was engaged with respect to the withheld information on the basis that the withheld information would attract "common interest privilege", an aspect of legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
  - ii) The Commissioner erred in failing to conclude that the exemption under section 31(1) was engaged.

### **Concessions made by Commissioner during appeal process**

8. Since this appeal was lodged, the Commissioner has changed its stance in relation to a large proportion of the withheld information and has conceded that the Council is not obliged to make disclosure. Given that the requester is not a party to this appeal, this decision sets out in detail the Commissioner's rationale for now accepting that the Council was not obliged to make this disclosure under the Act.

#### Scope of request

- a. The Commissioner has now accepted that all information dated after 4 February 2012 (the date of the request) was out of scope.
- b. The Commissioner refers in his decision notice in paragraphs 16 and 17 to two documents, an amendment to the original contract AKA had entered into with the Council dated November 2011 and a communication from the Council's Director of Law to councillors setting out his legal advice on publishing AKA's preliminary report. Upon further consideration of these documents, the Commissioner is of the view and the Tribunal agrees that these do not fall within the scope of the requested information.

#### Email exchange of 13 September 2011

- c. The Commissioner now accepts that the exchange of emails between 9 and 13 September 2011 relates to advice for which legal advice privilege would attach (that is the usual such privilege, not based on 'common interest privilege' – see below). The Commissioner therefore now accepts, and the Tribunal agrees, that the exemption under section 42 is engaged with respect to this exchange. Given the strong in-built public interest in maintaining legal professional privilege and

the absence of any clear compelling and specific justification for the public interest in the disclosure of privileged information such as to outweigh the obvious interest in protecting communications between lawyer and client, the Tribunal accepts that the public interest balancing test is against disclosure.

Correspondence from DLA to AKA

- d. The Commissioner now accepts, and the Tribunal agrees, that disclosure of certain of the withheld information (for which section 41(1) is claimed) would, on the facts of this case, give rise to an actionable breach of confidence by DLA against the Council. The Commissioner believes that AKA would have agreed to the Council being provided with correspondence between the company and DLA on the reasonable expectation that the information contained therein would remain confidential in the hands of the Council. The Commissioner therefore accepts, and the Tribunal agrees, that the information had the necessary quality of confidence and was transmitted in circumstances imparting an obligation of confidence. The Commissioner had maintained that, as the disputed information comprises commercial information, for there to be an actionable breach of confidence (for the exemption under section 41 to apply), disclosure of the information must be likely to cause a detriment to the confider of that information. Therefore, on the facts of this case, the Council would need to demonstrate that disclosure of the remaining withheld information for which it relies upon the exemption under section 41 would have been likely to cause detriment to AKA or DLA being the confiders of the information to the Council. The Commissioner, having reconsidered the matter, has come to the view that disclosure of the withheld information (for which section 41 is claimed) would be likely to cause detriment to DLA as confider of the information to the Council. The Commissioner has

already accepted that the information would otherwise be the subject of legal professional privilege as it constitutes legal advice communicated between DLA and its client (AKA). AKA would have had a reasonable expectation that that advice would remain confidential even if it chose to share that advice with a third party as it would not have expected the same to be disclosed more widely. The Commissioner considers that disclosure of this information to the public would undermine the concept of the confidential nature of legal professional privileged material. If such a disclosure were permitted under FOIA in such circumstances, a legal adviser would not be able to advise a client that its advice would remain confidential in the event that the client chooses to share that advice with a third party. In the circumstances, the Commissioner now accepts, and again the Tribunal agrees, that disclosure of the information would affect the reputation of DLA if it were known that its confidential legal advice would be disclosed under FOIA in certain circumstances. As such the disclosure of the withheld information (for which section 41(1) is claimed) would give rise to an actionable breach of confidence by DLA against the Council. The Tribunal agrees with the above views of the Commissioner and is moreover of the view that the public interest in disclosure of this particular information is very limited and that, in the circumstances of this particular case, it is unlikely that a public interest defence would have succeeded. In light of the above, the Tribunal has accepted the Commissioner's view that the Council has correctly applied section 41(1) to the information withheld in reliance upon this exemption.

- e. The Commissioner now accepts that the information contained within the body of the email at document 26( i and ii) of the closed bundle was obtained by the public authority from any other person and that therefore section 41(1) is engaged. The Commissioner further accepts and the Tribunal agrees, disclosure would be likely to result in detriment to the confider and be an actionable breach of confidence for which there would not be a public interest defence. As such, the exemption under section 41(1) is engaged and the documents need not be disclosed.

Document 26 (iv-vi)

- f. The Commissioner having reconsidered the remaining withheld information contained within the now limited closed bundle, notes that document 26 iv is duplicated in an email chain which does fall within the scope of the request. The Commissioner notes that this document represents internal legal advice. As such, the Commissioner considers, and the Tribunal agrees, that the information within the document would attract legal professional advice privilege. Accordingly, the Commissioner accepts and the Tribunal agrees that the exemption under section 42(1) is engaged and that given the inherent weight given to documents attracting legal professional privilege, the public interest in maintaining the exemption under section 42(1) with respect to the information in this particular document would outweigh the public interest in disclosure.

Correspondence from the Council to DLA / Third Party

- g. The Commissioner notes that documents 12 and 28 in the closed bundle constitute correspondence from the Council to AKA (copying in DLA). Whilst these emails



were sent by the Council, the Commissioner now accepts, and the Tribunal agrees, that the information contained within the body of email was obtained by the public authority from another other person and that therefore section 41(1) is engaged. Having considered the information in these documents further in light of the witness statement from Mr Tour, the Council's Head of Legal and Member Services, who is also the Council's Monitoring Officer. and the Council s submissions, the Commissioner accepts and the Tribunal agrees, that disclosure of the information in these documents would be likely to result in detriment to the confider and that disclosure would lead to an actionable breach of confidence for which there would not be a public interest defence. As such, the absolute exemption under section 41(1) applies and the Council is not obliged to disclose the information contained in documents 12 and 28.

#### Section 40(2)

- h. The Council has argued that the names, identifiers and email addresses of the individuals listed at paragraph 1 of the annex to Mr Tour s statement are exempt under section 40(2). The Commissioner accepts that, in assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public-facing role where they represent the authority to the outside world. The Council argues in its submissions that the individuals concerned in this case were junior employees who had no public-facing role or decision-making responsibilities for which they should be publicly accountable. The Council further argues that those individuals would reasonably have expected that their names would not be disclosed to the world at large and that given the highly sensitive nature of the disputed information, disclosure of their identities in

this context could be upsetting. Having reviewed the matter further in light of the witness statement from Mr Tour and the written submissions from the Council, the Commissioner is now prepared to accept that, on the particular facts of this case, those individuals would have a reasonable expectation that their names / identifiers / email addresses would not be disclosed to the public following a FOIA request. Accordingly, the Commissioner now accepts and the Tribunal agrees that disclosure of the names, identifiers and email addresses of those individuals listed in the annex to the statement of Mr Tour would be unfair. Thus, this information is exempt under section 40(2).

9. The above sets out the Commissioner's change in position during this appeal. The Council itself has also changed its position and has now accepted that some information previously withheld should be disclosed. It has sent to the requester the documents at tab 6 of the open bundle. Some names of junior employees were redacted from those documents on the grounds of section 40(2) of FOIA (personal data). The Tribunal agrees that the redacted information is properly subject to that exemption.
  
10. In light of the concessions made by the Commissioner as set out in paragraph 8 above, all of which are accepted by the Tribunal and for the reasons there set out, the only remaining issues in the appeal relate to documents 13-21 and 29 in the closed bundle, in relation to which the Council relies upon the exemptions under sections 31 and 42.

**Section 31(1)**

11. The Council relies on section 31(1) of FOIA for all of the disputed information remaining at issue (documents 13-21 and 29). This exemption provides in the relevant parts that:

*“31(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

*...*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

*31(2) The purposes referred to in subsection (1)(g) to (i) are—*

*(a) the purpose of ascertaining whether any person has failed to comply with the law,*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*

*...*

*(d) the purpose of ascertaining a person’s fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,*

*...*

*(i) the purpose of securing the health, safety and welfare of persons at work”*

12. When commissioning an independent inquiry into allegations such as those at issue in AKA’s report, the Council argued it needed a safe space in which to discuss issues freely and frankly with the relevant consultant and/or their representatives. This included issues about how to resolve and manage the confidentiality difficulties raised arising from AKA’s investigation. Disclosure of the disputed information would have intruded upon that safe space such as to create a very significant and

weighty chance of substantial prejudice to the Council's ability to work with such independent consultants in future.

13. The Commissioner agrees that section 31(1) FOIA is in principle applicable to such cases, given the need for a safe space for public authorities to carry out investigations such as the one to which this appeal relates. He says, however, that he is not persuaded that a safe space was needed *at the time* of this request.
14. The Council disagrees. The request was made (4 February 2012) a matter of weeks after the final report was published (9 January 2012). The issues were, it says, fresh and live: the approach taken by AKA and the Council to the confidentiality/disclosure issue had only very recently been publicly explained. The prospects of someone criticising or taking action with respect to that approach were real at the time of the request. Disclosure of the disputed information would have been premature and would have intruded upon the necessary safe space.
15. Mr Tour attested to this in his witness statement, but in the Tribunal's view failed to give detailed and specific reasons for why this was the case in this particular matter or from whom the threat of challenge might have come. In the Tribunal's view, having read the disputed information, it was very difficult to discern on the face of it what possible prejudice there could be. Thus in the Tribunal's view, the Council has not provided an adequate explanation as to how such prejudice would or would be likely to occur at the time of the request or indeed provided evidence from AKA to support such a contention.
16. In these circumstances, the Tribunal was not satisfied that section 31(1)(g) FOIA was engaged.

## **Section 42**

17. The Council also sought to rely upon section 42(1) of FOIA, which provides that:

*“42(1) 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.”*

18. The Council argued that the disputed information (as indicated in the index to the closed bundle) attracted so-called common interest privilege. The origin of this form of privilege is generally considered to be the judgment of the Court of Appeal in *Buttes Gas & Oil Company v Hammer (No 3)* [1981] 1 QB 223. In this case it was stated that:

*“Privilege in aid of litigation can be divided into two distinct classes:*

*The first is legal professional privilege properly so called. It extends to all communications between the client and his legal adviser for the purpose of obtaining advice. It exists whether litigation is anticipated or not.*

*The second only attaches to communications which at their inception come into existence with the dominant purpose of being used in aid of pending or contemplated litigation.”*

19. The rationale for common interest privilege is explained in the judgment of Colman J in *Formica Ltd v Export Credit Guarantees Department* [1994] C.L.C. 1078 at 1087-1088:

*“ Where in circumstances of a mutual interest in a particular transaction \*1088 or transactions the recipient of legal advice relating to such transactions*

*passes documents or information containing that advice to someone who shares that interest, the essential question in each case is whether the nature of their mutual interest in the context of their relationship is such that the party to whom the documents are passed receives them subject to a duty of confidence which the law will protect in the interests of justice.”*

20. As is clear from the extracts above, contrary to the Commissioner’s assertion, the Tribunal was of the view that common interest privilege applies to both litigation privilege and advice privilege. Advice privilege (which is being asserted in the present case) extends not only to the advice itself (or to instructions and documents evidencing the advice) but to all communications for the purposes of obtaining that advice.
21. While common interest cases often involve two parties using the same lawyers, this is not a requirement for common interest privilege to apply (see for example Lord Denning’s example in *Buttes Gas* of two parties exchanging counsel’s opinions).
22. Common interest privilege, however, is not a free-standing head of privilege but is parasitic on orthodox legal privilege: *WXY v Henry Gewanter, Public Profile Limited, Mark Burby* [2012] EWHC 1071 (QB) per HHJ Richard Parkes QC at 30. Therefore, in order for common interest privilege to apply, one of the parties must be able to assert that privilege, before it can be extended to the other party.
23. In the present case, AKA could assert that privilege. The disputed information is correspondence with the lawyers she was instructing. All of these communications are, however, part of the process of obtaining and giving legal advice related to the confidentiality/disclosure issues.

24. The Commissioner, in his submissions, accepted the principles underpinning common interest privilege. He says, however, that there was insufficient commonality of interest here. AKA and the Council could have conflicting interests. The Tribunal was of the view, that that may have been correct as regards the relationship between AKA and the Council on some issues, but it is not correct as regards the particular issues with which the disputed information is concerned. The Council argued and the Tribunal agreed, that there is no requirement for the parties to have harmonious interests in all respects: see *The World Era (2)* [1993] 1 Lloyd's Rep. 363 at 366. What matters is whether on the issues with which the communications are concerned, the parties' interests were harmonious.
25. Mr Tour's evidence is that this is precisely what was happening here. On the confidentiality/disclosure issue both the Council and AKA risked being sued. Both wanted the same advice from the same source so they could ensure they were doing things correctly. The Council and AKA faced the same potential legal questions. Mr Tour further told the Tribunal that as part of her appointment, the Council had agreed to provide AKA with independent legal advice services. The initial plan was for DLA to be instructed by AKA and the Council on a joint basis, but it was thought that the parties' interests could potentially come into conflict on some issues. It was therefore decided that DLA would be instructed by AKA, with the Council covering the cost of their services to AKA in connection with her work. On this issue regarding the tension between confidentiality and disclosure, however, the interests of the Council and AKA were directly aligned. If they deliberated and acted jointly on this issue, there could be no conflict between their interests. Mr Tour told the Tribunal therefore, that it was therefore agreed that DLA Piper would on this issue advise both AKA and the Council.

26. In light of the above, the Tribunal was of the view that the particular disputed information attracts common interest privilege. Section 42(1) FOIA is engaged and given the inherent weight given to documents attracting legal professional privilege, the public interest in maintaining the exemption under section 42(1) with respect to the information in this particular document would outweigh the public interest in disclosure. The Tribunal took into account that the contents of most of this information was particularly anodyne and insofar as it contained anything of substance, did not, on the face of it, contain anything of particular public interest which might otherwise call for disclosure. Thus, albeit documents 13-21 and 29 were not exempt by virtue of section 31, they were by virtue of section 42.

### **Conclusion**

27. In light of the reasons set out in this decision, the Tribunal upholds the appeal against the Commissioner's Decision Notice save in relation to the information referred to in paragraph 9 of this decision. Thus, the Decision Notice at the beginning of this document should be substituted for the original Decision Notice.

28. Our decision is unanimous.

Signed

Melanie Carter  
Judge

Date 28<sup>th</sup> May 2014