

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 05 October 2009

Public Authority: Durham County Council
Address: County Hall
Durham
DH1 5UL

Summary

On 10 September 2008 the complainant submitted a Freedom of Information request to Durham County Council (the 'council'). This asked *'to see all legal advice to support the Authorities [sic] public policy regarding the processing of confidential correspondence – Code of Conduct members, Human Rights Act etc'*. This was part of an ongoing exchange between the complainant and the council concerning a letter which was opened in accordance with council procedure and read by their Monitoring Officer despite it being marked "private and confidential" and addressed to the Chairman of the Standards Committee. At internal review, the council refused to supply the information and cited section 42(1) of the Freedom of Information Act. The Commissioner considers that the council were correct to cite section 42(1) and has determined that the information does attract legal professional privilege and that the public interest favours maintaining the exemption. However, the Commissioner has found that in failing to provide the full public interest arguments, the council has breached section 17(3).

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.

The Request

2. On 10 September 2008 the complainant submitted a Freedom of Information request to Durham County Council (the 'council'). This asked:

'to see all legal advice to support the authorities [sic] public policy regarding the processing of confidential correspondence – Code of Conduct members, Human Rights Act etc'

3. This was part of an ongoing exchange between the complainant and the council concerning a letter which was opened in accordance with council procedure and read by their Monitoring Officer despite it being marked "private and confidential" and addressed to the Chairman of the Standards Committee.
4. On 7 October 2008, the council refused to provide the complainant with the information he had requested regarding their post opening procedures. The council claimed the information was exempt under section 36 (effective conduct of public affairs) and section 42 (legal profession privilege) of the Freedom of Information Act (the 'Act').
5. On 13 October 2008 the complainant requested that the council provide him with their public interest arguments with respect to section 36 and 42 of the Act.
6. On 12 December 2008 the complainant reminded the council that they had not replied to his request for detail of their public interest arguments.
7. On 8 March 2009 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 the following points:
 - The failure of the council to provide him with the full public interest test under section 36.
8. On 20 April 2009, following the intervention of the Information Commissioner's Office (the 'ICO'), the council sent the complainant the result of their internal review. They again refused to provide him with the requested legal advice regarding the processing of confidential correspondence. The council cited section 42(1) of the Act and stated that they did not believe that disclosure of the requested information was in the public interest.

The Investigation

Scope of the case

9. On 17 July 2009 the Commissioner wrote to the complainant and asked him to clarify the nature of the complaint.
10. On 19 July 2009 the complainant confirmed that he wished the ICO to investigate two specific points:
 - The alleged failure of the council in their initial refusal to provide a copy of the full public interest test under section 36.

- The refusal of the council under section 42(1) of the Act to provide him with the requested legal advice regarding the processing of confidential correspondence.

Chronology

11. In the letter of 23 July 2009 the ICO requested that the council should provide the Commissioner with a more detailed consideration of the public interest test with regard to their exemption claimed under section 42(1). This was provided on 4 August 2009.
12. On 8 September 2009 the Commissioner wrote to the complainant and explained that the first part of the complaint would not be pursued. This was because the public interest arguments were to be considered with respect to the response of the council at internal review. This review had refused to provide the requested legal advice under section 42(1) of the Act. The public interest test under section 36, which had been cited in the initial response, would therefore not be considered as it was no longer being relied upon.
13. In the same letter of 8 September 2009 the complainant was provided with the public interest arguments of the council, as applied to section 42(1).
14. On 10 September 2009 the complainant provided the Commissioner with his own public interest arguments supporting release of the requested information and explained his reasons for believing his privacy rights had been breached.

Analysis

Exemptions

Section 42

15. The full text of section 42 is available in the Legal Annex at the end of this Notice.
16. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023; 4 April 2006)* 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, and even exchanges between the clients and [third] * parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (para. 9)*

17. There are two types of privilege – litigation privilege and legal advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated. In 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.

Communications made between adviser and client in a relevant legal context will attract privilege.

18. For the avoidance of doubt, the Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/013; 8 August 2008)* also confirmed that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.

19. In this case the legal advice regarded the council's policy regarding the processing of confidential correspondence. The complainant is objecting to the fact that his letter, addressed to the Chairman of the Standards Committee and marked "private and confidential", was opened in accordance with council procedure and read by their Monitoring Officer.

20. A senior officer of the council (the client) sought legal advice from the council's Legal Services Department (the professional legal adviser) in connection with this complaint. The advice sought was confidential and the sole purpose of the communications was to obtain and provide legal advice.

21. The advice therefore meets all three conditions and is therefore be covered by LPP.

22. Since section 42 is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the requested information

23. It could be argued that disclosure of this legal advice is necessary due to the requirement for transparency and accountability from the council. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately, and also where disclosure would help further the understanding of issues of the day. In this case, disclosing legal advice could allow the public a greater comprehension of the legal issues which can arise out of freedom of information requests, and may assist in helping establish whether public authorities are adequately prepared to address the issues to which such requests give rise.

24. The complainant believes that the council has an obligation to be open and accountable and that it has a duty to comply with its own Code of Conduct. The complainant has explained further that he believes his privacy rights have been breached.
25. The complainant has also argued that the requested legal advice directly affects all confidential communications sent directly to any of the 126 county councillors that represent approximately 400,000 members of the electorate. He therefore believes that the advice affects a large number of people.

Public interest arguments in favour of maintaining the exemption

26. It cannot be denied that the council has an obligation to respect an individual's privacy. Likewise a council must follow its Code of Conduct. It has a clear duty to ensure that it does not breach equality and human rights enactments. These duties govern how a council must behave and it is not the role of the Commissioner to judge whether or not the council has met its obligations with respect to its own Code of Conduct. This issue is therefore outside the remit of the ICO. The complainant could seek his own advice regarding this question.
27. The council argue that LPP exists in order to ensure that legal advice sought in connection with an inquiry or proceedings is protected and does not enter the public domain. It is a system to enable the free interchange of views, opinions and advice between a lawyer and his client.
28. The Commissioner acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In the case of *Bellamy v the Information Commissioner and the DTI* the Tribunal stated that:

‘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 public interest’.
29. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be. The Tribunal in the *Bellamy* case made it clear that disclosure was unlikely to be justified in most cases:

‘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 cut case...’.
30. The council argue that it is in the public interest that this protection is maintained and that the parties involved should not be deterred by the fear that advice may be brought into the public domain. This view therefore reflects the position of the Tribunal and the Commissioner agrees that there must be very strong reasons to release legal advice covered by LPP.

31. In addition, the council argues that as the advice is still 'live' and concerns current matters, they consider that the balance of the public interest supports withholding the requested information. This is an important consideration.
32. There have been relatively few occasions where section 42 has been applied and the Commissioner or Information Tribunal have considered that in all the circumstances, the public interest in disclosure was strong enough to order disclosure.
33. One such case was that of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel (EA/2007/0052; 15 February 2008)*. In this case, the Information Tribunal judged that the number of people affected was significant. The advice affected 80,000 drivers every weekday and could also affect around 1.5 million residents. There was also a large amount of money at stake: around £70 million. These were some of the factors which weighed in favour of disclosing the information.
34. The council have argued that in this case none of these factors apply. There are no amounts of money involved and the issue only affects one person. The complainant has argued that the issue of opening mail marked 'confidential' affects approximately 0.4 million members of the electorate. However, the advice in this instance only affects one person and the opening of mail by a council's monitoring officer is not a subject of great public debate. There is no evidence that this issue has been raised by anybody other than the complainant.
35. Finally, the requirement that a council must promote accountability and transparency must be considered. This was an important factor in the *Merseytravel* case. However, in the case *Foreign and Commonwealth Office v the Information Commissioner (EA/2007/0092; 29 April 2008)*, the Tribunal stated that the public interest in favour of disclosure must be "more than curiosity as to what advice the public authority has received". The cases where transparency and accountability were significant factors must be those where "there is reason to believe that the 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".
36. There is no such evidence that such circumstances apply in this case.
37. The council also argue that the question of lack of transparency does not apply here. They consider that they have adequately dealt with the matters that gave rise to the request for legal advice. They have explained that their post opening procedures allow that "all post marked private and confidential should be opened unless specific alternative instructions have been given to the mail opening staff by the Senior Administration Officer". According to the authority's constitution, the Monitoring Officer is the person responsible for ensuring the authority's procedures comply with the law. They believe that this officer dealt with the relevant letter appropriately.

Balance of the public interest arguments

38. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure of the information.

Procedural Requirements

39. The full text of section 17(3) is available in the Legal Annex at the end of this Notice.
40. Section 17(3) of the Act provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information must:
- ‘either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
-
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.’
41. The Commissioner takes the view that in their initial response of 7 October 2008 the council failed to explain to the complainant adequately how the section 36 or section 42 exemptions applied to the requested information. The refusal notice failed to identify any public interest factors in favour or against disclosure of the requested information.
42. In addition, the Commissioner does not consider that the council’s assessment of the public interest in its internal review decision adequately stated the reasons for claiming that the public interest in maintaining the exemption under section 42(1) outweighed the public interest in disclosing the requested information. No attempt was made to identify and weigh up the effect of factors in favour of, or against, disclosure.
43. The council have acknowledged this and explained that they considered that given the specific circumstances of the case, the overriding exemption (section 42) meant that the public interest test did not apply. They have apologised for not providing this consideration to the complainant.
44. The ICO have acknowledged the apology of the council; however, the Commissioner has reminded the council that it is a requirement of section 17(3) of the Act that the complainant should be informed of the public interest arguments with regard to the refusal of a request. It is neither sufficient nor correct here to state that the public interest test does not apply.
45. The Commissioner has therefore concluded that the council acted in breach of section 17(3) of the Act.

The Decision

46. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

- Refusal to provide the requested information under section 42(1)

However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:

- Failure to explain the public interest in maintaining the exemption under section 17(3).

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following as matters of concern:

On 13 October 2008 the complainant requested that the council provide him with their public interest arguments with respect to sections 36 and 42 of the Act. This should have been interpreted as a request for an internal review by the council; however, they failed to reply. It was only after the intervention of the ICO that an internal review was held on 20 April 2009.

49. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that it took 136 days for an internal review to be completed; well in excess of the time stated in his guidance.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 5th day of October 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 42 (Legal Professional Privilege) provides that -

- (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.
- (2) 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”

Section 17

Section 17(3) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”