

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2012

Public Authority: Poole Borough Council
Address: Civic Centre
Poole
Dorset
BH15 2RU

Decision (including any steps ordered)

1. The complainant submitted two requests for information ("request 1" and "request 2") relating to the sale of the former Hamworthy First School site in Hamworthy. The council provided some of the requested information but refused to provide other information, citing the exemptions for legal professional privilege, information provided in confidence and personal data.
2. The Commissioner's decision is that, in relation to request 1, the council has failed to demonstrate that the exemptions for information provided in confidence and commercial interests are engaged but that it has correctly applied the exemption for legal professional privilege. The Commissioner has also decided that, in the case of both requests, the council failed to respond within the time for compliance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under the exemptions for information provided in confidence (section 41) and commercial interests (section 43(2)).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 October 2011, the complainant wrote to the council and requested information ("request 1") in the following terms:

(in relation to the conditional agreement to sell the former Hamworthy First School site) "...a copy of all correspondence and minutes of cabinet meetings relating to this dispute from 30 October 2008 to date."
6. On 19 November 2011 the complainant wrote to the council and requested information ("request 2") in the following terms:

(in relation to a contract between the council and the prospective purchasers of the Hamworthy First School site) "...a copy of the contract."
7. On 23 December 2011 the council wrote to the complainant to acknowledge that it had failed to respond to the requests and gave assurances that responses would be issued by January 2012.
8. Following the involvement of the Commissioner the council responded to request 2 on 12 June 2012 and provided the requested information.
9. Again, following the involvement of the Commissioner, the council responded to request 1 on 19 June 2012. It provided some of the requested information and withheld the remainder under the exemptions for legal professional privilege, information provided in confidence and personal data.
10. Following an internal review into its handling of request 1 the council wrote to the complainant on 10 October 2012. It stated that further information could now be disclosed but that other information remained withheld under the exemptions initially cited.

Scope of the case

11. On 13 October 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The Commissioner's investigation has looked at procedural matters as they relate to both requests and, in relation to request 1, whether the council has correctly applied exemptions to withhold information.

Reasons for decision

Section 10 – time for compliance

13. Section 10(1) of the FOIA provides:

"...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."

14. The complainant submitted the requests on 24 October 2011 and 19 November 2011 and the council provided responses on (respectively) 19 June and 12 June 2012.

15. As the timescale for responding for both requests significantly exceeds 20 working days the Information Commissioner has, therefore, recorded that the council has breached section 10(1) of FOIA in respect of both requests, namely on 2 occasions.

Section 1 – information held

Request 1

16. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.

17. The Commissioner considers that the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.

18. The complainant has suggested that, aside from information withheld under exemptions, the council might not have identified and provided all the relevant information which falls within the scope of the request.

19. In order to reassure the complainant that it conducted reasonable and proper searches for the information, the council explained what steps it took in this regard.

20. The council confirmed that searches were made of paper files and electronic records. It explained that, due to the terms of the request, which referred to a dispute, the majority of the information is held within records maintained by the council's legal services department. The council stated that, by the time of the start date identified in the request (30 October 2008), the matter had become a dispute and had been referred to this department for action. It explained that any

relevant information held by other council departments would be likely to be duplicates of information retained in the relevant legal files.

21. The council explained that the period from 2008 to the present day straddles the time when its legal services department was moved to an electronic case management system and relevant information has been retrieved from that system under the relevant reference number. The council has confirmed that it does not retain paper copies of documents that have been scanned onto its electronic system for more than 3 months.
22. The council also confirmed that, at the beginning of the period of transition to an electronic case management system, it appears that a number of hard copy letters falling within the scope of the request were not scanned. The documents in question consist of 5 letters from Moore and Blatch solicitors that are referred to in other correspondence. The council stated that searches have not located copies of these letters.
23. The council explained that, as the dispute in question was active until relatively recently, relevant information has not reached the potential time for destruction in accordance with its records retention policy. The council confirmed that there has been no destruction of information relevant to the request.
24. In correspondence with the Commissioner the council explained that, in reviewing the extent of information it held, it also sought the assistance of specialist FOI officers from another public authority, Dorset County Council to assist with this task.
25. Having considered the council's explanations of the extent and thoroughness of its searches it has conducted the Commissioner is satisfied that, on the balance of probabilities, the council has identified all the relevant information it holds.

Section 41 – information provided in confidence

Request 1

26. Section 41 of the FOIA sets out an exemption from the right to know where the information requested was provided to the public authority in confidence. There are two components to the exemption:
 - The information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other "legal entity". It is not restricted to information provided verbally or in writing. For example, information recorded by a doctor carrying out a physical examination of a patient is information obtained from that patient. The exemption does not cover information which the public authority has generated

itself, although it may cover documents (or parts of documents) generated by the public authority if these contain confidential information provided by a third party. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.

- Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court.
27. The council has argued that correspondence leading up to, and details of the settlement between itself and the purchaser of the land were expressed as 'confidential'. It has stated that details of the settlement could be argued to have an impact on the commercial interests of the previous developer and could also be adverse to the council's commercial interests going forward. The council has explained that it maintains relations with a number of commercial organisations and that, sometimes, information is shared in confidence. The council considers that it needs to be able to maintain that confidentiality.
 28. Having considered the council's submissions, the Commissioner finds that no reference has been made to the specific content of the withheld information: the council has simply stated, in very general terms, that the information was provided in confidence.
 29. The Commissioner has not been given any evidence that the information was provided to the council with any explicit conditions attached to its subsequent use or disclosure. The Commissioner accepts that the context to which the information relates, namely the negotiation of a settlement between the council and third party, is not trivial. However, the Commissioner considers that the council has not demonstrated how this is applicable in relation to the specific withheld information.
 30. The Commissioner also notes that the council has failed to demonstrate or even make reference to any actionable breach of confidence which disclosure could effect.
 31. In cases where an authority has failed to adequately explain why withheld information engages an exemption the Commissioner is not obliged to generate relevant arguments on an authority's behalf.
 32. In this instance, the Commissioner considers that the council has failed to demonstrate that disclosure of the requested information would give rise to an actionable breach of confidence. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. He requires the council to disclose the withheld information.

Section 42 – legal professional privilege

Request 1

33. Section 42(1) of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt from disclosure.
34. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI1* 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).

35. There are two types of privilege: litigation privilege and legal advice privilege.
- 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.
 - 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 principal or dominant purpose of obtaining legal advice.
36. In this instance, the category of privilege upon which the council is relying is litigation privilege. It has argued that during the period covered by the request, litigation was being seriously contemplated between the parties and it was within this context that legal advice was sought.
37. Having viewed the withheld information the Commissioner notes that this constitutes advice provided by the council’s in-house legal team and external legal advisors and their clients, the council itself. The Commissioner notes that the information was created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. The Commissioner is satisfied that the withheld information falls within the scope of the exemption.

38. The council has confirmed that the privilege which the advice attracts has not been lost through any inadvertent breach or unrestricted disclosures. The Commissioner is, therefore, satisfied that the claim to litigation advice privilege can still be maintained and he has concluded that the exemption is engaged.
39. As section 42(1) is a qualified exemption it is necessary to consider 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 test

40. Section 2 of the FOIA sets out the circumstances under which a public authority may refuse a request for information. Where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest arguments in favour of disclosing the information

41. The complainant has argued that the dispute was settled in September 2011, that their request for information was made in October 2011 and that the council's in-house lawyers do not have a lawyer/client relationship with the council, but are its employees. He has also argued that the council was, therefore, unable to rely on legal confidentiality as grounds for non-disclosure after September 2011.
42. The complainant has also questioned the council's approach in relation to the handling of Hamworthy First School matter and argued that it has acted on the basis of erroneous legal advice.
43. According to the arguments proposed by the complainant, disclosure of the information would enable the public to decide whether the council has acted appropriately and whether the associated legal costs incurred were an appropriate use of public funds.

Public interest arguments in favour of maintaining the exemption

44. The council has argued that it has applied the exemption sparingly and only sought to withhold information which actually reveals specific pieces of advice, assessment of likely success and negotiations between the parties which reveal the legal advice.
45. The council has argued that there is a fundamental public interest in preserving the confidentiality of legal advice and the ability of the council to receive such advice. Whilst it acknowledges, as argued by the complainant, that the matter is currently settled, the issues to which the advice relates are still very much live and disclosure of the information

would be prejudicial to future negotiations regarding the site and would inhibit the council's ability to defend the legal basis of its actions.

Balance of the public interest arguments

46. The Commissioner considers that it is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal or litigation advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".¹

47. In light of the above, there will always be a strong argument in favour of maintaining privilege because of its very nature and the importance attached to it as a long-standing common law concept.

48. The Commissioner observes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as decisions that will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no obvious sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. He notes that the council has made a significant volume of information available in its responses to the request and he has no evidence of any specific factors which would tip the balance of public interest factors towards disclosure.

49. Whilst the Commissioner accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx

sound advice this general principle does not in itself overturn the public interest in protecting the confidentiality of legal advice. Although the genuine interest of the complainant in the council's decision in this regard and disagreement with the approach taken is relevant, the Commissioner does not consider it to be decisive. For this counterbalancing to take place, there would need to be specific arguments or evidence demonstrating that an equivalent or greater public interest would be served by disclosure.

50. In this instance, the litigious context within which the information was created and the ongoing possibility of litigation provides a powerful argument for maintaining the exemption because of the obvious impact on the council's ability to defend its legal position. The Commissioner considers that there would need to be compelling evidence of, for example, maladministration or misuse of public funds to provide a sufficient counterbalance to this impact rather than simply a contrary view. In the absence of such arguments or evidence the Commissioner considers that there is a stronger weight to the arguments for maintaining the exemption.
51. The Commissioner has, therefore, concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 43 – commercial interests

Request 1

52. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
53. In its initial response to the request the council provided the complainant with a "schedule of documents not disclosed" (the "schedule"). This listed each item of withheld information and indicated under which exemption disclosure was being refused.
54. A number of documents were withheld by the council for reasons of "commercial confidentiality". A note provided with the schedule explained that the relevant exemption was section 43 and that the information was being withheld because its release "...could harm the commercial interests of any person".
55. Despite being given an opportunity by the Commissioner to provide any final arguments in respect of its continued use of exemptions to withhold information, the council's internal review and its submission to the

Commissioner did not make reference to its decision to apply section 43 of the FOIA.

56. In cases where an authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any such prejudice and the disclosure of information, the Commissioner is not obliged to generate relevant arguments on an authority's behalf.
57. In failing to explain the nature of the prejudice, to clarify the likelihood of the prejudice occurring and to demonstrate the causal link between disclosure and the occurrence of the prejudice, the Commissioner considers that the council has not shown that the withheld information engages the exemption. In addition, as no reference was made to section 43 in the council's internal review or in its submissions to him, the Commissioner must conclude that the council is no longer relying upon the exemption to withhold the requested information.
58. As he has concluded that the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

Right of appeal

59. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

60. 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.

61. 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

**Andrew White
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