

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2013

Public Authority: Manchester City Council
Address: Town Hall
Albert Square
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant requested information from Manchester City Council ("the council") about any Traffic Regulation Orders ("TROs") in place on Peter Street in Manchester City Centre relating to parking and no loading dual purpose bays. The complaint also requested any internal correspondence or works orders regarding signage of the dual purpose bays. The council disclosed some information that it had initially sought to withhold however it continued to withhold some legal advice using section 42(1) of the Freedom of Information Act 2000 ("the FOIA"), the exemption relating to legal professional privilege. The council also cited the equivalent exception under regulation 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR"). The complainant alleged that this information had been incorrectly withheld and that the council held more relevant information.
2. The Commissioner's decision is that the council held some additional information and he therefore finds a breach of section 1(1) and 10(1) for the failure to supply this within 20 working days. However, this has now been provided and on the balance of probabilities, the Commissioner accepts that no further information was held. The Commissioner also considers that the council correctly withheld some legal advice using the exemption under section 42(1) of the FOIA.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 23 February 2011, the complainant requested information from the council in the following terms:

"Under the freedom of information act please could you provide details of any traffic regulation order (TRO) that is in place on Peter Street Manchester M2 5 regarding Parking/no loading dual purpose bays.

Please also provide any internal correspondence or works orders regarding signage of these dual purpose bays.

Where possible please provide in electronic form".

5. The council wrote to the complainant on 23 March 2011 and asked for some clarification.

6. The complainant replied on the same day, providing clarification. He said the following:

"...I am asking you under the freedom of information act for ANY traffic regulation orders that the council have in relation to these bays.

In the event that Manchester City Council has applied for a TRO relating to these bays then please provide any internal correspondence or works orders regarding signage of these dual purpose bays from the date of the TRO to present".

7. The council responded on 23 June 2011. It provided some information but it said that it could not provide any more because to do so would take longer than 18 hours. It referred to the cost limit under section 12(1) of the FOIA and regulation 12(4)(b) of the EIR.

8. The complainant replied on 27 June 2011 and expressed dissatisfaction with the response.

9. The council completed an internal review on 13 September 2012. It said that it had decided not to maintain its refusal and it provided information to the complainant. It said that it had redacted the names of individual officers and it referred to section 40(2) of the FOIA and regulation 13(1) of the EIR. In relation to some additional information, the council cited the exemption under section 42(1) of the FOIA and the exception under regulation 12(5)(b) of the EIR, relating to legal professional privilege.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the following issues:
 - Whether the council had correctly identified the extent of all of the information it held.
 - Whether the council had correctly redacted some information using section 40(2) of the FOIA or regulation 13(1) of the EIR.
 - Whether the council correctly withheld information using section 42(1) of the FOIA or regulation 12(5)(b) of the EIR.
11. During the Commissioner's investigation, the council disclosed the information that it had sought to withhold using section 40(2) or regulation 13(1) and some additional emails falling within the scope of the request thereby informally resolving these particular aspects of the complaint.
12. For clarity, when the Commissioner sought clarification from the complainant in an attempt to narrow the scope of the investigation, the complainant referred to a number of items of information that in the Commissioner's view fall outside the scope of the particular request for information that was made and he also sought to expand on the initial clarification provided to the Commissioner. The Commissioner has limited the scope of his investigation only to points raised by the complainant falling within the scope of the request that he made as outlined further below and which were highlighted when the Commissioner originally sought clarification from the complainant.

Reasons for decision

Are the EIR relevant?

13. Information that is "environmental" must be considered separately under the terms of the EIR. Environmental information is defined by regulation 2 of the EIR. The council initially dealt with the request under the FOIA but by the time of the internal review, the council had introduced exceptions under the EIR but appeared to remain unsure about whether or not the EIR were relevant. Under regulation 2(1)(c), any information on activities, plans, measures etc. that affect or are likely to affect the elements and factors of the environment, will be environmental information for the purposes of the EIR. The Commissioner considers that works orders relating to signage would fall under the scope of the EIR and internal correspondence relating to

works orders. However, the Commissioner understands that this information was provided to the complainant before the Commissioner's investigation began and will not therefore be addressed in this notice. There was no persuasive evidence to suggest that any other aspect of the request should be considered under the EIR and the Commissioner has therefore limited his considerations to the FOIA.

Section 1(1) – General rights of access

14. Section 1 of the FOIA provides a general right of access to recorded information held by public authorities. It states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
15. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
16. The Commissioner asked the complainant if he could explain why he considered that the council had not provided all of the recorded information that it held. In response, the complainant outlined various concerns. The complainant subsequently tried to expand the scope of his area of interest and also to include requests for information that were outside the scope of the original request. On 5 March 2013, the Commissioner wrote to the complainant and confirmed that the scope of his investigation would be limited to the issues raised originally when the Commissioner initially sought clarification. The complainant in particular asked for information to show:
 - If the council had investigated the complainant's representation regarding the legality of the signage on Peter Street correctly
 - If there was a legal TRO (Traffic Regulation Order) or TTRO (Temporary Traffic Regulation Order) regarding Peter Street

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

- The reasons why the council took the matter to appeal when it had previously been informed that the TTRO and signage was illegal
 - Why the tribunal's earlier findings had not been acted upon
 - The circumstances surrounding the decision made as to non-attendance at the tribunal
 - The legal advice that the council has withheld.
17. It is pertinent to note that the terms of the original request limit the considerations to internal correspondence with the exception of the parts of the request that asked for works orders and details of any TRO and TTRO in place. The only outstanding issue that does not relate to internal correspondence is therefore confirmation of whether there was a legal TRO or TTRO regarding Peter Street.
18. The council explained to the Commissioner that it had experienced significant difficulties in understanding the scope of the complainant's request for information. It highlighted that it had sought clarification from the complainant, but did not consider that he had clearly highlighted the extent of his interest until a much later stage and a more limited consideration was therefore given to the request by the council's highways section based on the clarification provided. It was only during the Commissioner's investigation that the complete extent of the intended scope appears to have become clear to the council and further consideration of the request was undertaken by the council's parking section. The council also highlighted that it had not been clear that the complainant's daughter was the legal appellant in the tribunal case referred to and this had also contributed towards the difficulties in identifying information relevant to this request. The outcomes of the further consideration given have been set out below.
19. By way of background to the issues raised in the first bullet point above, the council issued a Penalty Charge Notice ("PCN") when the complainant parked a car belonging to his daughter on Peter Street in October 2010. The complainant subsequently challenged the PCN and, acting on behalf of his daughter who was liable to pay the PCN, lodged an appeal with the Traffic Penalty Tribunal. Ultimately, the tribunal issued a notice in February 2011 stating that the complainant's daughter's was not liable to pay because the council did not contest the appeal.
20. The council confirmed that the Parking Services Team's electronic records had been searched. It said that it held various items of correspondence relating to the case involving the complainant's daughter but none of these were internal. No paper information is retained as this is disposed routinely in accordance with the council's data retention policy. The council also said that it had consulted its legal department who had confirmed that no legal advice in respect of this

case was sought or provided. The council said that there was no reason to believe that any information had been deleted, destroyed or mislaid except for duplicate paper copies as mentioned.

21. The council said that it understood that the Parking Services department would have taken a decision to reject the complainant's case in the belief that at the time, the lines and signs were enforceable. The council accepts that it was regrettable that it did not send a detailed response to the complainant's representations. The council said that it subsequently formed the view that it was not necessary to respond to the representations since by the time the appeal came to be heard the council had received a further outcome from the tribunal relating to another case and legal advice which made the position clear and decided not to contest the appeal.
22. With regard to whether or not there was a legal TRO or TTRO in place, the council initially told the Commissioner that it had provided this information. When the Commissioner queried this with the complainant, he said that he considered that the council had provided information about illegal TTROs and he wanted to know if any legal TROs or TTROs had existed prior to these. The council confirmed that it did not hold any information about any TROs or TTROs other than those details already provided. It said that it had confirmed to the complainant that a permanent traffic order was made on 2 October 2003 and it made it clear that while there were temporary orders as well, none were validly in force at the time of the request. The council said that relevant searches had been carried out by its Highways Support Team. It said the legal department had been consulted and had confirmed that no records were held by them. There was no evidence to indicate to the Commissioner that any relevant information had been deleted, destroyed or mislaid. The council said that it had been unable to locate a copy of one of the temporary orders however the complainant has specifically said his interest is in valid orders only.
23. With regard to the reasons why the council took the complainant's daughter's case to appeal when it had previously been informed that the signage was illegal and why the tribunal's earlier findings were not acted upon, the Commissioner asked the complainant if he could explain in more detail what he was referring to in particular when he said that the council had previously been informed that the signage was illegal and when he had referred to earlier tribunal findings. The complainant referred to the outcome from the Traffic Penalty Tribunal relating to his daughter's case which mentioned various other decisions. As already mentioned, the council has not been able to locate any internal correspondence relating to the case involving the complainant's daughter and it has explained to the Commissioner that the initial

decision to take the case forward at the time had been based on an understanding that the lines and signs at this location were correct. Following the outcome of all the relevant cases and the provision of legal advice, the council decided not to contest the case relating to the complainant's daughter. By way of explanation for the actions it took more generally, the council said that although in some previous cases, the adjudicators had expressed dissatisfaction with the unorthodox additional carriageway lining, as there had previously been other decisions from adjudicators which had upheld the signing of the TTRO, the council decided to continue to enforce.

24. The council said that electronic searches and staff consultations were undertaken within Parking Services and the Highways Team. The council also said that it had asked its legal department to check for any relevant legal advice relating to the previous tribunal cases but there was no record to suggest that any legal advice had ever been sought in relation to these previous cases, with the exception of one case. The council had already identified that it held some legal advice relating to this case, which it had withheld as mentioned in the last bullet point above. However, upon further searches, the council identified that it held relevant additional legal advice relating to the same case. It said that it wished to withhold this information for the same reasons. The refusal to provide the legal advice has been considered further below. The council also identified some additional relevant emails that it was able to provide to the complainant, thereby informally resolving that issue. The council confirmed that other than this information, all relevant information had already been provided to the complainant and nothing more was held. The Commissioner understands that there is no reason to believe that relevant information has been deleted, destroyed or mislaid.
25. With regard to the circumstances surrounding the council's non-attendance at the Traffic Penalty Tribunal, the council said that it had located some internal emails setting out the actions that were taken by council officers following the directions of the Traffic Penalty Tribunal in a previous case. It had also located a copy of an email sent by the council's Parking Manager on 17 February 2011 which explains that in light of the previous tribunal case, all outstanding PCNs relating to the Peter Street loading bay (which would include the PCN issued to the complainant's daughter) would be cancelled. This information was provided to the complainant during the Commissioner's investigation and therefore informally resolved this aspect of the complaint as referred to in the scope section of this notice. There is no evidence to indicate any relevant information was deleted, destroyed or mislaid.
26. It is apparent from the history of the way this request developed that there had been considerable difficulties in understanding the precise

scope of the complainant's interest and this had become somewhat of a moving target. However, once the areas of interest had been more clearly defined and limited, the council was able to conduct appropriate searches and satisfy the Commissioner that on the balance of probabilities, no further relevant recorded information was held falling within the scope of the original request and more specifically relating to the outstanding areas of interest identified.

Section 42(1) – Legal Professional Privilege

27. This exemption 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.
28. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). In this case, the council sought to rely on advice privilege.
29. The council applied this exemption to two emails relating to a legal officer in the council's highway's legal team dated 15 and 16 February 2011 and some handwritten notes by the same legal officer associated with this email exchange. It also sought to withhold another email from the council's principal solicitor dated 17 February 2011 with a draft response to the Traffic Penalty Tribunal prepared by the solicitor. Having inspected the withheld information to which the council had applied the exemption, the Commissioner was satisfied that it was covered by legal professional privilege. It represents advice provided by legally qualified persons to the council and there is no evidence available to the Commissioner to indicate that the information had lost its confidential character.

Public interest arguments in favour of disclosing the requested information

30. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
31. In this case, the Commissioner appreciates that disclosure of the legal advice would help the public to understand more about the way in which the council took the decisions that it did. The complainant has expressed

concerns about the council's actions in the light of previous tribunal outcomes. There is a significant public interest in the council being transparent about its decision-making in this regard, not least because of the use of public resources expended on appeals of this nature.

Public interest arguments in favour of maintaining the exemption

32. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
33. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal 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".
34. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
35. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...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..."

36. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

37. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the authority's right to consult with its lawyers in confidence.
38. The Commissioner would observe 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 circumstances where substantial amounts of money are involved, where a decision 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 signs that these factors were present in this case to tip the balance in favour of disclosure.
39. The council has highlighted to the Commissioner that while it accepts that there were weaknesses in its decision-making processes, particularly with regard to not seeking legal advice at an earlier stage, once clear legal advice had been received, the council acted to cancel all outstanding PCNs. Furthermore, the council had taken steps to review its TTRO procedures. The council said that in 2012, the council's Neighbourhood Services' Internal Audit Team undertook a thorough review of the TTRO processes which resulted in significant changes to the way that TTROs are processed, approved and retained. The council said that a procedure is currently being developed to support staff and give clear step by step instructions around the development of TTROs and the powers and legislation that support this process. Training was provided by the Legal Team for all officers responsible for making TTROs after the issues relating to this matter came to light and training will continue to be provided on a regular basis. Parking Services will also review the situations in which it seeks legal advice and how it responds to detailed representations made by appellants.
40. In view of the above, the Commissioner took the view that full disclosure of the legal advice would not be a proportionate response to the complainant's concerns in the circumstances. The council has been able to account for the actions it took and acknowledge the weaknesses. These matters appear to have been effectively resolved by the non-pursuit of the appeal against the complainant's daughter and the steps

taken to improve processes. The Commissioner accepts that the action pursued by the council in this case caused inconvenience to the complainant at the very least. However, the wider public interest has now been addressed to a reasonable extent. Given this, the public interest in withholding the information was stronger than the public interest in disclosing it.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

42. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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