

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2022

Public Authority: Honiton Town Council
Address: The Beehive
Dowel Street
Honiton
Devon
EX14 1LZ

Decision (including any steps ordered)

1. In two requests the complainant has requested information about a particular dispute. Honiton Town Council ('the Council') withheld the majority of the information as it considered it attracted legal professional privilege. The Council advised it does not hold some of the requested information, advised other relevant information was already in the public domain and advised that elements of one of the requests were vexatious because of the disproportionate burden of complying with them.
2. The Commissioner's decision is as follows:
 - At the time of the requests, the Council had correctly applied section 42(1) of FOIA to information it withheld within scope of parts 1, 2 and 3 of Request 1 and part 2 of Request 2. This information attracted legal professional privilege and the public interest favoured maintaining this exemption.
 - On the balance of probabilities, the Council does not hold the discrete risk assessment that the complainant requested and its response to part 1 of Request 2 complied with section 1(1)(a) of FOIA.

- The Council incorrectly applied section 14(1) of FOIA (vexatious request) to parts 4 and 5 of Request 1.
 - The Council's responses to the requests did not comply with section 10(1) of FOIA and its refusal of elements of both requests did not meet the requirements of sections 17(1) and 17(5).
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation:
 - Provide the complainant with a fresh response to part 4 and 5 of Request 1 that complies with FOIA and that does not rely on section 14(1).
 4. The Council must take this step 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 21 October 2020 the complainant submitted a request for information to the Council in the following terms ('Request 1'):

"For the period 1st August 2017 to 20th October 2020 please provide the following information in digital format:

 - 1 – All reports provided to council re this legal action.
 - 2- All correspondence to and from the council's legal and professional advisors.
 - 3 – All email correspondence to and from the council's legal and professional advisors.
 - 4 – All email communications between the following councillors on this matter: Cllrs. [redacted 1], [redacted 2], [redacted 3], [redacted 4], [redacted 5], [redacted 6] and [redacted 7].
 - 5 – A list of the documents that were provided to Foot Anstey in support of this case."
6. On 25 January 2021 the Council responded. It advised that it considered parts 1, 2, 3 and 5 attracted legal professional privilege and that the public interest favoured withholding this information. The Council said it would "ascertain the cost time of providing the

information requested" in part 4 and contact the complainant by 12 February 2021 about that.

7. On 9 February 2021 the Council provided a response to part 4 of the request, advising that it considered this part to be vexatious because of the "time cost of retrieving the information requested" and the burden associated with redacting exempt information. The Council said it considered that at least some of the information would attract confidential legal privilege and so would be exempt, and that it could take 100 hours to redact exempt information.
8. On 29 January 2021 the complainant had requested information in the following terms ('Request 2'):

"1 A copy of the risk assessment carried out by the council before it initiated the legal action against [Redacted] re its project management of the construction of the Beehive Community Centre

2 For the period 1st August 2017 to 20th October 2020 all Part B Council minutes relating to discussion of the legal action against [Redacted] together with related reports."
9. On 18 February 2021 the Council provided a response to this request. With regard to part 1, the Council advised that relevant Council minutes were already in the public domain. With regard to part 2, the Council advised that the information attracted legal professional privilege and the public interest favoured withholding the information.
10. The complainant requested a review of the responses to both requests on 24 February 2021.
11. The Council provided an internal review on 14 April 2021. It upheld its responses to Request 1 of 25 January 2021 and 9 February 2021. Regarding the response of 18 February 2021 to Request 2, the Council now confirmed that it does not hold a stand alone risk assessment that was requested in part 1 of Request 2. The Council confirmed that the information requested in part 2 attracts legal professional privilege.

Scope of the case

12. The complainant contacted the Commissioner on 28 April 2021 to complain about the way their requests for information had been handled.
13. It appeared from its correspondence with the complainant that the focus of the complaint was the Council's reliance on section 42(1) and whether

it held further relevant information. On 24 February 2022 the Commissioner wrote to the Council and asked it a series of focussed questions on those matters.

14. The Commissioner sought a number of submissions from the Council as its position regarding the two request remained unclear. On the basis of these submissions his final investigation has focussed, first, on whether the Council was entitled to withhold the information requested in parts 1, 2 and 3 of Request 1, and part 2 of Request 2 under section 42(1) of FOIA, and the balance of the public interest.
15. The Commissioner will then consider whether the Council holds information within scope of part 1 of Request 2. Next, he will consider whether the Council was entitled to rely on section 14(1) of FOIA to refuse to comply with parts 4 and 5 of Request 1. Finally, the Commissioner will consider the timeliness of the Council's responses and its refusal of elements of the requests.
16. The Commissioner will also discuss under 'Other Matters' the Council's handling of the requests more broadly, and its engagement in this investigation.

Reasons for decision

Section 42 – legal professional privilege

17. Under section 42(1) of FOIA, information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. This exemption is subject to the public interest test.
18. The purpose of legal professional privilege (LPP) is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and their client remain confidential.
19. The Council has confirmed to the Commissioner that it is relying on section 42(1) to withhold information requested in parts 1, 2 and 3 of Request 1 and part 2 of Request 2, namely, and for the period 1 August 2017 to 20 October 2020:
 1. All reports provided to the Council about a particular legal action

2. All correspondence to and from the Council's legal and professional advisors
 3. All email correspondence to and from the Council's legal and professional advisors; and
 2. All 'Part B' Council minutes relating to discussion of the legal action against [redacted] together with related reports.
20. On 22 March 2022 the Council provided the Commissioner with copies of the information it said it was withholding under section 42. This was not a large amount of information and mostly comprised information withheld from Council meeting minutes.
 21. First, not all this information was within scope of the requests of 21 October 2020 and 29 January 2021 because it post-dated these requests. FOIA concerns only the information a public authority holds at the time of the request. The Commissioner therefore disregarded Council minutes for the period after January 2021 and an agenda item from the Council's 14 March 2022 minutes.
 22. In correspondence to the Council on 13 April 2022, the Commissioner questioned the Council on the information it said it was withholding under section 42, as its position was not clear. After a delay, the Council responded on 12 May 2022 but again, its position remained unclear.
 23. In a telephone conversation on 15 June 2022 the Council confirmed to the Commissioner that the information it had sent to him was all the information it held that is relevant to the four parts of the requests, and that it was withholding all that material under section 42. In correspondence with the Council from 15 June 2022 to 8 July 2022, the Commissioner continued to ask the Council to confirm what information it was that it was withholding under section 42 and to send that information to him. The Commissioner explained that he would need to view the information in order to decide whether it engaged section 42(1).
 24. On 22 July 2022 the Council finally sent to the Commissioner copies of the information it now confirmed it was withholding under section 42(1), which it had saved as 39 documents. The Commissioner has all reviewed this material. It comprises correspondence between the Council and its legal team, between the Council's legal team and the third party's legal team, correspondence between the Council and the third party, correspondence between the Council's legal team and consultants, material associated with arbitration, a report, a meeting minute and a meeting agenda item. All the material concerns the legal dispute about which the complainant's request is focussed.

25. The Commissioner is satisfied that all the withheld information concerns the legal dispute between the Council and another party. It can be categorised - directly (in the case of correspondence) or indirectly (in the case of, for example, the meeting minutes or the arbitration material) – as communications from and to lawyers acting in their professional capacity for the dominant purpose of obtaining and providing legal advice about possible legal action. In addition, the subject that the legal advice concerned remained 'live' at the time of the request.
26. The Commissioner has therefore decided that the information the Council has now confirmed it was withholding under section 42(1) of FOIA was exempt under that exemption at the time of the request in October 2020. He has gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

27. In their complaint to the Commissioner the complainant has expressed concerns with the Council's governance and the way, it appears to the complainant, the Council has managed a particular project and public funds associated with that project.
28. The Commissioner also notes that there is a general public interest in public authorities being open and transparent in the way they make decisions and manage public finances.

Public interest in maintaining the exemption

29. The Council advised the Commissioner that it considers that there is stronger public interest in the Council being able to safeguard its "legal arguments" while the matter was not "historic" ie while the dispute was ongoing.

Balance of the public interest

30. The public interest in the Council being open and transparent was met, to a degree, through relevant information that the Council had published through its meeting minutes. But the Commissioner acknowledges that, given the amount of taxpayers' money involved in the matter that the request concerns, there was undoubtedly a strong public interest in understanding the circumstances behind that dispute, and how the dispute might be resolved. That level of public interest was not met through information that was in the public domain at the time of the request.

31. However, the public interest in withholding information that attracts LPP will always be very strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. The material is legally privileged and there is weight in that principle in itself; that of solicitor/client confidentiality.
32. Given that the dispute was still live at the time of the request the Commissioner finds that there was a stronger public interest in lawyers and clients being able to talk frankly and openly with each other during that period. For this reason, the Commissioner is satisfied that the balance of the public interest fell in favour of maintaining the section 42(1) exemption.

Procedural matters

Section 1 – general right of access to information held by public authorities

33. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
34. In part 1 of Request 2, the complainant has requested a particular risk assessment which the Council advised it does not hold.
35. In conversation with the Commissioner on 15 June 2022 the Council explained that the subject of risks associated with the legal action was discussed in Council meetings (minutes of which are being withheld under section 42) but that the Council did not produce a discrete risk assessment document. Moreover, there was no requirement on the Council to produce such a document.
36. FOIA is not concerned with information another person may think a public authority **should** hold; FOIA is solely concerned with information a public authority does or does not hold. In this case the Commissioner sees no reason to doubt the Council's explanation and he has decided that, on the balance of probabilities, the Council does not hold the risk assessment requested in part 1 of Request 2. Its response to that part therefore complied with section 1(1)(a) of FOIA.

Section 14 – vexatious request

37. Under section 14(1) of FOIA a public authority is not obliged to comply with a request for information if the request is vexatious. An authority

may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure – by redacting exempt information from it - would impose a grossly oppressive burden on the organisation.

38. The Commissioner considers there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
- the requester has asked for a substantial volume of information; and
 - the authority has real concerns about potentially exempt information, which it is able to substantiate, if asked to do so by the Commissioner; and
 - the authority cannot easily isolate any potentially exempt information because it is scattered throughout the requested material.
39. The bar for refusing a request as “grossly oppressive” under section 14(1) is likely to be much higher than for a section 12 refusal. It is therefore in a public authority’s interests to apply section 12, rather than section 14, if a request would exceed the cost limit.
40. The Commissioner has discussed the terms of section 12 in his communications with the Council. Section 12 of FOIA can be applied when the cost of complying with request exceeds the appropriate limit – currently £450 for public authorities such as the Council. Under section 12, a public authority can take account of the cost involved in determining whether the information is held; locating the information, retrieving the information and extracting information from a document containing it.
41. In its response to the complainant, the Council indicated it was relying on section 14(1) of FOIA (though did not refer to this exemption) to refuse to comply with part 4 of Request 1 only, because of the burden associated with “identifying” and redacting relevant information. This part was for email correspondence between Councillors about the legal action in question. However, in its submission to the Commissioner the Council discussed part 5 of that request also. That part was for a list of documents.
42. In its initial submission of 22 March 2022, the Council first referenced part 4 of request 1 and said that it had searched for relevant information (noting that it included emails that also relate to part 5 of the request) but had not reviewed all the information it identified. This was because, the Council said, to do so would itself be too burdensome and “similar to

the burden of reviewing and redacting the same information".
Therefore, said the Council, it is relying on section 14(1) of FOIA.

43. The Council went on to say that, via its IT provider, it had searched on emails relevant to part 5, explaining that the "...search query specifically searches the title to see if it contains "[Redacted]" AND ALSO finds a "[Redacted]" or "[Redacted]" in the Body text". The search retrieved 595 emails and 1,649 unindexed items in 33 mailboxes. The Council estimated it would take "more than 100 hours" [to comply with part 5, and presumably part 4] because of the burden associated with redacting exempt information.
44. The Commissioner did not find the Council's submission on its response to parts 4 and 5 of Request 1 to be clear. He assumed that the Council had identified some 2,244 items that fall within scope of part 4 – the request for correspondence between the seven Councillors named in the request, about a particular legal matter. However while the Council referred to 33 mailboxes, the request concerned correspondence between seven individuals and so the relevance of the remaining 26 mailboxes was not clear.
45. In wider correspondence to the Council on 13 April 2022, the Commissioner outlined what he understood the Council's position to be regarding section 14(1).
46. In a further submission on 12 May 2022 the Council said, with regard to part 4:

"The Council has completed the search (for emails that relate to part 5 also – quoted below) but not reviewed all the information, because to do so would itself be too burdensome (similar to the burden of reviewing and redacting the same information). And therefore, is relying on section 14(1) of the FoI Act."
47. Turning to part 5, the Council said it had, to date, only withheld "all those collection of exempt meeting minutes and reports because they include or refer to legal privilege advice provide to the Council by Foot Anstey and therefore relies on section 42(1)."
48. On 16 May 2022 the Commissioner asked the Council to clarify its position regarding parts 4 and 5 of Request 1 as it remained unclear.
49. Regarding part 4, the Commissioner again queried the extra 26 mailboxes the Council had referred to, the nature of the 1,649 "unindexed items" and under what exemptions it would need to redact information contained in the retrieved emails.

50. The Commissioner also noted that part 5 of the request is for a **list** of the documents the Council provided to Foot Anstey LLP; it is not a request for the documents themselves, or for the accompanying emails, it is a request for a list of the documents sent.
51. The redaction of information from such a list was not relevant, in the Commissioner's view, and so any burden associated with a redaction process did not exist. Nor had the Council made a compelling case that assembling a list would be oppressively burdensome. The Council had not advised it does not hold such a list and had not maintained reliance on any other exemption to withhold this information.
52. In correspondence dated 9 June 2022 the Commissioner advised the Council that he would need to know the volume of the information caught by parts 4 and 5, what information would be exempt information that needed to be redacted, and whether the information to be redacted was spread throughout the information and not easy to isolate.
53. In response to the telephone conversation with Council on 15 June 2022 and correspondence from the Council on 15 June 2022 and 16 June 2022, the Commissioner again asked the Council to clarify its position in correspondence to it on the same dates.
54. In correspondence dated 4 July 2022 the Council advised the Commissioner that:

"In responding to Request 1, part 4, the Council has said it applies S14 and that the burden of redaction is estimated at more than 100 hours. It seems that the Council could apply either of or both S14 and S12 to this part of the Request."
55. In the interests of concluding this complaint without any further delay, and because by this point the Council has had many opportunities to provide a clear justification for its reliance on section 14(1), the Commissioner has taken its 4 July 2022 position as the Council's final position and final submission.
56. In correspondence on 16 May 2022, the Commissioner had directed the Council to his published guidance on section 14(1) and he had indicated to the Council the circumstances that could warrant a reliance on section 14(1) (ie volume of material, the redactions necessary and whether the redactions were spread throughout the material). However, the Council has not made a coherent or compelling case that parts 4 and 5 are vexatious because of the undue burden of complying with them. For example the Council has not explained why it would take more than 100 hours (approximately three working weeks) to redact information from material in scope of the two parts of the request and has not explained

why it has searched 33 mailboxes. It may be the case that it **would** take 100 hours to redact information but the Council has not explained why it would take that long. Based on the submissions the Council has provided to him, the Commissioner has therefore decided that the Council incorrectly applied section 14(1) of FOIA to parts 4 and 5 of Request 1.

Section 10 – time for response / Section 17 – refusing a request

57. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection a) to be told if the authority holds the information and, under subsection b), to have the information communicated to them if it is held and is not exempt information.
58. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
59. With regard to both requests, the Council did not comply with section 1(1) within the required timescale and therefore breached section 10(1). With regard to Request 2, this was submitted on 29 January 2021 and the Council did not confirm it does not hold the information requested in part 1 until 14 April 2021.
60. Under section 17(1), a public authority that is relying on an exemption under Part II of FOIA to withhold information should, again, within 20 working days following the date of receipt of a request, give the applicant a notice which (a) states that fact, (b) specifies the exemption in question, and (c) states (if that would not otherwise be apparent) why the exemption applies.
61. Under section 17(5), a public authority that is relying on a claim that section 12 or section 14 applies must also give the applicant a notice within 20 working days, stating that fact.
62. In this case the Commissioner considers that the Council's refusal of aspects of the requests was deficient. The Council did not clearly state what exemptions it was relying on to withhold information within scope of some parts [section 42(1)] and to refuse to comply with other parts [section 14(1)]. The Commissioner also finds that the reasoning it gave to the complainant for its reliance on these exemptions was not well explained. The refusals were also given outside the 20 working day requirement. The Commissioner has therefore decided that the Council's refusal of parts of the two requests did not meet the requirements of section 17 of FOIA.

Other matters

63. It may be the case that the Council, being a relatively small public authority, does not receive many FOIA requests and has not built up the necessary experience to deal efficiently with such requests and any resulting complaints to the Commissioner. Whatever the reason, the Commissioner has found it necessary to engage with the Council – to advise it and to seek clarity from it - more than he would expect to engage with a public authority in the course of investigating a FOIA complaint.
64. In the initial correspondence that the Commissioner sends to all public authorities, he advises that he “will give a public authority **one** opportunity to justify its position before issuing a decision notice...”.
65. The Commissioner therefore expects a public authority to provide him with a submission, in response, that clearly confirms and explains its final position with regard to the request, and which addresses the questions the Commissioner put to it in his initial correspondence to that authority.
66. On this occasion, the Commissioner afforded the Council more than one opportunity to justify its position but he is not obliged to do so in the future. As noted, the Commissioner is entitled to make a decision on the first submission he receives from a public authority. That is especially the case at this time when his resources are stretched.
67. To that end, the Commissioner reminds the Council that he has published comprehensive guidance on all aspects of FOIA on his website¹. This includes his ‘FOI self-assessment toolkit²’, which the Council may find helpful. A clear and well explained response to a request for information reduces the risk of a subsequent complaint to the Commissioner. In the event that a complaint **is** investigated, that response, together with a clear and well explained submission to the Commissioner is likely to lead to an investigation that is less onerous for both the Commissioner and the public authority.

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

² <https://ico.org.uk/for-organisations/foi-self-assessment-toolkit/>

Right of appeal

68. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

69. 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.
70. 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

Cressida Woodall
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