

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2022

Public Authority: Haringey London Borough Council

Address: 7th Floor, River Park House
Wood Green
London
N22 8HQ

Decision (including any steps ordered)

1. The complainant has requested information about the sale of a residential property. Haringey London Borough Council ('the Council') disclosed some relevant information and withheld the remainder under section 40(2) (personal data), section 42(1) (legal professional privilege) and section 43(2) (commercial interests) of FOIA. The Council subsequently revised its position. It has withdrawn its reliance on section 43(2) and confirmed it is also relying on section 41(1) (information provided in confidence) with regard to some of the information it is withholding.
2. The Commissioner's decision is as follows:
 - Some of the requested information is exempt from disclosure under both section 41(1) and section 42(1) of FOIA.
 - The Council is entitled to withhold the majority of the remaining information under section 42(1) of FOIA as it attracts legal professional privilege. The public interest favours maintaining this exemption.
 - The Council had already disclosed to the complainant particular Council minutes which it then sought to withhold under section 42(1). It also incorrectly applied section 41(1) and section 42(1)

to a Land Registry document that was already in the public domain and so was exempt under section 21(1).

- The Council breached section 17(1) of FOIA as its refusal of the request was not adequate.
3. The Commissioner does not require the Council to take any remedial steps.

Request and response

4. On 18 January 2021 the complainant submitted a request to the Council of the following description:

"I wish to obtain all documents, emails, text messages and records of dates and times of phone calls made by council officers and councillors pertaining to the purchase of [property 1 redacted] and [property 2 redacted]. I also wish to see all documentation relating to any fees, expenses or moneys paid over and above the purchase price of [property 2 redacted]."

5. The Council refused this request on 3 February 2021 under section 12(1) of the FOIA (cost exceeds the appropriate limit) and on 2 March 2021 the complainant submitted a new request, as follows:

"Could the council please assist me in this matter. I can narrow the query to a single address – [property 2 redacted].

I can narrow the time period to 1 Jan 2018-31 December 2018. Plus the dated contract/exchange document that indicates when the sale took place.

Would that much more limited request fall within the limit?"

6. The Council provided a response to the new request on 3 March 2021. It provided the complainant with links to relevant published Council meeting minutes. The Council also said that "Additional material on this acquisition is available on the Land Registry site which shows ownership, date acquired / bought and amount paid." The Council provided the complainant with a link to the Land Registry. It advised that all other documents it holds are subject to FOIA's legal professional privilege exemption.
7. On 1 April 2021 the Council provided an internal review. The Council confirmed it was withholding requested information under "section 40(1)", section 42(1) and "section 43(3)" of FOIA.

8. The Council said that it was relying on "section 40(1)" with regard to any document relating to the sale of property 2 between any Council officer and the seller. The Council also said that this was because the complainant had "asked to access information that we hold about another person."
9. The Council said that it was relying on section 42(1) with regard to documentation relating to fees, expenses or moneys paid over and above the purchase prices of property 2. The Council also said it holds "legal documents which includes the contract and correspondence with the seller's solicitor which cannot be released under FOIA as it "contains advice and correspondence between the lawyer and the client and correspondence between lawyers none of whom acted for you."
10. Finally, the Council confirmed that it considered "section 43(2)" could also be applied to correspondence and documentation about the sale of property 2.

Scope of the case

11. The complainant contacted the Commissioner on 1 April 2021 to complain about the way their request for information had been handled.
12. The Council had first confirmed to the Commissioner that it was relying on section 40(2) and section 42(1) of FOIA to withhold information requested on 2 March 2021 and has withdrawn its reliance on section 43(2).
13. The Council subsequently confirmed to the Commissioner that, on reconsideration, it is also withholding certain information under section 41(1). On 23 May 2022 the Commissioner advised the Council to communicate its new position to the complainant if it had not already done so.
14. The Commissioner's investigation has first considered the Council's application of section 41(1) to information it obtained from the seller via their legal team. He will then consider its application of section 42(1) both to that information and the remaining information in scope of the request, and the balance of the public interest. Finally, the Commissioner has considered the Council's refusal of the request.
15. As noted, this investigation concerns the request of 2 March 2021. The Commissioner confirmed this with the complainant in correspondence of 27 and 28 January 2022.

16. During the course of the investigation, the complainant raised the issue of property 1 which they had referred to in their first request of 18 January 2021 and indicated they wanted the request for that information considered too.
17. Information about property 1 is outside the scope of this investigation. However, the Commissioner observes that since that property is the complainant's own property, information about property 1 can be categorised as the complainant's own personal data which would be exempt from disclosure under section 40(1). A subject access request under the data protection legislation is the appropriate route through which to request that information.

Reasons for decision

Section 41 – information provided in confidence

18. The Council now considers that the information it received from the property seller's legal team is exempt from disclosure under section 41(1) of FOIA. This information comprises email correspondence about the sale and purchase of the property in question, with attachments. This was provided to the Council by the seller's legal team on behalf of the seller. The Council has provided this information to the Commissioner.
19. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.

(a) Did the Council obtain the information from another person?

20. The Commissioner is satisfied that the Council obtained the information from another person as it obtained it from the seller via their legal team.

(b) Would disclosure constitute a breach of confidence actionable by that person or another person?

21. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
 - whether the information has the necessary quality of confidence

- whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
22. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. One of the documents that the seller's legal team sent to the Council is a Land Registry 'Official Copy of Register of Title' document. As the Council suggested in its response to the request and as will be discussed under the section 42 analysis, this information is available from the Land Registry and is therefore otherwise accessible. However, the Commissioner is satisfied that the remaining information is not otherwise accessible and that, since it concerns the sale of a property to the Council for a significant sum, the remaining information is more than trivial.
23. **Circumstances importing an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
24. The information here is associated with the sale of a private individual's property. As such the Commissioner considers that it would be reasonable for that individual to expect that the details of the sale would be treated confidentially and would not be put into the public domain as the result of a FOIA request from a third party.
25. **Detriment to the confider:** The First-tier Tribunal (Information Rights) in *Bluck v ICO* and *Epsom and St Helier University Hospital Trust* refers to the fact that "...if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information...", this exemption can apply. The Commissioner has accepted that disclosing the information in question in this case would be contrary to the reasonable expectations of the individual whose property was sold. Disclosure would therefore cause detriment to that individual.

Is there a public interest defence for disclosure?

26. As noted, section 41 is an absolute exemption and not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).
27. In their initial complaint to the Commissioner the complainant explained to him that the Council purchased property 2 from the property owner for a particular sum. The complainant is the owner of the adjacent property - property 1. The complainant says that the Council had indicated to them over several years that it would buy their property but withdrew after purchasing property 2. The complainant considers that the Council's purchase of that property is now of significant public interest as well as a private interest to them. They consider that there are "ample reasons" to believe that the Council has acted unfairly throughout the purchase, and it is vital to the complainant to establish the timeline of the sale.
28. The complainant subsequently sent the Commissioner links to published news articles and published Council minutes about the Council's acquisition of property throughout the Borough and its acquisition of property 2, referred to in the request. They consider that there is growing evidence of incompetence "and possibly worse" by the Council, and that Council officers are withholding the requested information "to hide their own incompetence or wrong-doing".
29. In the complainant's view, the Council's purchase of property 2 was conducted "in secret" in order to further the development of the site. The complainant confirmed that they own the adjacent property, which was not purchased, and the Council did not contact them at a key period between April 2018 and August 2018. As the sole remaining freeholder on the site, the complainant considers this was a large oversight which had a significant impact on a multimillion pound housing development.
30. The complainant believes the former owner of property 2 was already in negotiations with the Council at this stage [ie between April and August 2018]. They consider it would very much be in the public interest to know if that was the case and, moreover, why the Council paid the final sum that it did, for that property.
31. The Commissioner appreciates that the Council is facing very serious allegations about a particular development scheme. The complainant drew the Commissioner's attention to another news article published in

February 2022 which reported that police are investigating allegations of fraud in relation to that scheme.

32. The Commissioner has also noted, however, that, in January 2022, the Local Government Ombudsman (LGO) considered a complaint about the Council's handling of the purchase of the property referred to in the request, and associated issues.
33. In the Commissioner's view, the previous owner of property 2 would have had the reasonable expectation when they entered into a negotiation with the Council about the sale of their property, that information about the sale would not be disclosed to the wider world in response to a request under FOIA.
34. The complainant's private concerns are valid, but the LGO has now considered concerns raised about the purchase of the property in question. The complainant may have exhausted some or all of them but there are also other channels through which the complainant can pursue their concern about the Council, which do not involve putting into the public domain information that was provided to the Council in confidence.
35. There is also a legitimate wider public interest in how the Council has managed development of a particular site, but other bodies are considering that matter.
36. The Commissioner has considered all the circumstances of this case and the information being withheld under section 41(1). He has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, with the exception of the Land Registry 'Official Copy of Register of Title' document, the Commissioner finds that the condition under section 41(1)(b) is also met and that the Council is entitled to withhold the remaining information in scope under section 41(1) of FOIA.
37. For the sake of completeness the Commissioner will consider whether this particular information is also exempt under section 42(1), in tandem with his consideration of the remainder of the requested information to which the Council has applied section 42. This includes the 'Official Copy of Register of Title' document.

Section 42 – legal professional privilege

38. Section 42(1) of FOIA states 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.”

39. This exemption is subject to the public interest test.
40. In its internal review the Council indicated that it was relying on section 42 with regard to any information about fees, expenses or moneys paid over and above the purchase prices of property 2, and "legal documents which includes the contract and correspondence with the seller's solicitor".
41. To summarise, the Council is withholding under section 42(1) information that comprises communications between its legal team and between its legal team and its officers about the sale and purchase of the property. It also comprises communications from its legal team **to** the seller's legal team. The Council considers that its communications to the seller's legal team gives insight into the advice the legal team gave to the Council as its client.
42. The Commissioner has found that the communications **from** the seller's legal team to the Council are exempt under section 41(1). But the Council considers that these communications give insight into the advice that team gave the seller as its client and are therefore also exempt under section 42(1) for that reason.
43. From its correspondence with the Commissioner the Council is also withholding the Land Registry 'Official Copy of Register of Title' document under section 42(1), as well as section 41(1). The Commissioner assumes that this is because the Council's legal team communicated this between team members and/or to Council officers, although he has not been able to identify any relevant, covering email.
44. 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.
45. The Council has provided the Commissioner with the information it is withholding under section 42(1). This information is email correspondence about the acquisition, with attachments, and includes:
 - a) Correspondence with attachments between the Council's legal team
 - b) Correspondence with attachments between the Council's legal team and other parts of the organisation: the Housing team, Treasury and Banking team

- c) Correspondence with attachments from the Council's legal team to the seller's legal team
 - d) The correspondence with attachments from the seller's legal team to the Council's legal team, which the Commissioner has found to be exempt under section 41.
46. Legal advice privilege is generally considered where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:
- the communications must be made between a professional legal adviser and client
 - the communications must be made for the sole or dominant purpose of obtaining legal advice; and
 - the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.
47. The Commissioner has first considered a) the correspondence between the Council's legal team b) the correspondence between the legal team and Council officers and c) correspondence from the legal team to the seller's legal team.
48. In its initial submission the Council told the Commissioner that it considers that the information is subject to legal advice privilege as it meets the requirements above. First, the Council says that the correspondence is between a professional legal adviser and client ie between the Council's solicitor and their client contacts. Second, the Council says that the correspondence was made for the sole or dominant purpose of providing legal advice to the client contacts about the Cabinet report and the acquisition of property 2. It was also made for the sole or dominant purpose of obtaining legal advice - for the purpose advising the client on the governance, authority and acquisition of property 2. Finally the Council says that the information was communicated in a legal adviser's professional capacity as the communication was between lawyers within the Council's legal services and its client contacts.
49. Legal advice privilege can only attach to communications which remain confidential. Where a privileged communication has been made available to the public or to a third party without restriction any privilege attached to the document will have been lost. In its submission the Council confirmed that it is satisfied that the legal advice remains privileged.

50. However, the Commissioner noted that the majority of the Cabinet meeting minute information to which the Council has applied section 42(1) is published on the Council's website – the minutes from September 2018. Indeed, it had sent the complainant a link to those published minutes in its response of 3 March 2021. That particular information cannot therefore be said to be confidential. And, as has been discussed under the section 41(1) analysis, it appeared to the Commissioner that at least one Land Registry document that the Council had withheld – the 'Official Copy of Register of Title' form – would be available from the Land Registry and would therefore not be confidential.
51. The Commissioner raised with the Council these two pieces of information that he had identified. The Council confirmed that this was the only information to which it had applied section 42(1) that is, in fact, already in the public domain. The Council acknowledged that it had therefore incorrectly applied section 42(1) to this information.
52. There is one exception to the general rule that publicly available information cannot attract privilege because it is not confidential. This applies when LPP is claimed for documents which the lawyer has used their skill and judgement to select, and which would indicate the trend of the legal advice given or the trend of litigation arguments. In this case privilege can be claimed for the selected documents even if they were publicly available, because disclosing them would reveal the substance of the advice given.
53. The Commissioner does not consider that disclosing the Council minutes that have been published or the Land Registry document would reveal the substance of any advice given, that is not already clear given the nature of the information as a whole in this case, concerning as it does the acquisition of a property. Skill and judgement have not been used to select the Land Registry document, for example. It is simply a routine document that one would expect to be included in a property sale.
54. The Commissioner therefore finds that the Council incorrectly applied section 42(1) to two items of information: published meeting minutes from September 2018 and a Land Registry 'Official Copy of Register of Title' document. With regard to the first item, the Council had sent the complainant a link to the published meeting minutes. With regard to the second item, individuals can access this document through the Land Registry. The Commissioner notes that information that is already reasonably accessible to an applicant is exempt information under section 21(1) of FOIA. While the Council did not refer to the 'Register of Title' document specifically in its response of 3 March 2021, it did direct the complainant to the Land Registry where they would have been able

to access that information. As such, the Commissioner finds that that particular information is exempt under section 21(1) of FOIA.

55. However, the Commissioner's decision is that the remaining information within scope of a), b) and c) above and to which the Council has applied section 42(1) of FOIA is engaged under that exemption. He has next considered the Council's application of section 42(1) to d) – the communications that the seller's legal team sent to the Council's legal team .
56. The Commissioner has found that the communications the Council's legal team's sent to the seller's legal team about the purchase and sale of their property attracted LPP. It must follow that, with the exception of the Land Registry document, the communications from the seller's legal team to the Council's legal team about the same matter also attract LPP and are also exempt under section 42(1). He has gone on to consider the associated public interest test.

Sections 2(1)(b) and 2(2)(b) – public interest test

Public interest in favour of disclosing the information

57. With regard to section 42 specifically, in their correspondence to the Commissioner the complainant alleges that there have been numerous occasions throughout Haringey of developers acquiring 'ransom strips' just before the Council is ready to buy up key properties for development. The complainant says this has cost the taxpayer millions and cited as an example what they say was the £10m or so that the Council was forced to overpay for its own offices.
58. The complainant says that such incidents were serious enough that a councillor and the deputy Chair went to see the police over the matter, but they did not have enough evidence for the police to pursue the matter further at the time. The complainant believes that this adds further to the argument in favour of full and complete disclosure. They consider there is an urgent need to understand how the Council's officers are going about acquiring properties in the borough.
59. The Council says it considered arguments for disclosure in its internal review response. It had acknowledged that disclosure would allow greater public scrutiny of the decisions that the Council made about the acquisition of property 2. It would demonstrate that the Council is diligent in assessing matters relating to this acquisition. The Council noted that there is also a broad public interest in the Council's actions being transparent and accountable.

Public interest in favour of maintaining the exemption

60. In its internal review the Council had advised that legal advice is protected by LPP and is therefore exempt from being disclosed under section 42 of FOIA. It argued that there is a strong public interest inherent in maintaining LPP. The Council said it and its lawyers [and the seller's lawyers] must be able to share all information that is available to them frankly and in confidence. This enables effective decision-making based on the facts and an informed assessment of the legal risks.
61. The Council also noted that there are a number of ongoing legal issues with regards the acquisition of property 2 which may lead to litigation. It considers there is the possibility that the complainant may be seeking information in order to bring an action against the Council. The Council has noted that the LGO, following the complaint to it, has requested that the Council reconsider its decision regarding property 1 and property 2. The Cabinet has not yet made that decision.
62. In its internal review, the Council noted that the concept of LPP is founded on the strong public interest in maintaining privacy between lawyers and their clients. As a result, in cases involving LPP, the public interest in favour of disclosure must outweigh the acknowledged public interest in safeguarding openness in communications between lawyers/solicitors and their clients and the protection of full and frank legal advice.
63. The Council said it did not think that the public interest in favour of disclosing the requested legal advice is sufficiently strong in this case. It considers that the complainant is trying to force the Council to acquire their property at a price which they want to dictate to the Council. Disclosing legal advice may also provide them with a commercial advantage if the Council decides to proceed with the acquisition as part of the site redevelopment. The development of that site is a live matter, the Council having been asked by the LGO to reconsider the exclusion of both property 1 and property 2. Therefore, the Council argues, disclosing legal advice about property 2 may be detrimental to the Council, both in respect of its proposals for the overall site, and any potential future litigation involving the complainant.

Balance of the public interest

64. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be 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. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.

65. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate.
66. The Commissioner does though recognise that there is a strong public interest in transparency and accountability. The Commissioner has noted the wider concerns about the Council's development of a particular site and the complainant's own personal concerns, disclosing any information in this case would increase transparency around the Council's actions.
67. However, the Commissioner notes that the wider matter of the development in question was live at the time of the request and remains live to date. The complainant's own concerns about the Council also remain live and they may bring legal action against the Council. The information considered in this notice would be relevant to any future litigation.
68. The Commissioner considers there are other routes through which the wider and more specific concerns could be addressed, which do not involve disclosing to the wider world information that attracts LPP. Whilst he is sympathetic to the complainant's concerns and acknowledges the wider ongoing concerns, for the reasons set out above the Commissioner does not consider that these alone are sufficient to override the need to preserve the principle of legal privilege.
69. The Commissioner has concluded that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 17 – refusal of request

70. Under section 17(1) of FOIA, a public authority which is relying on a claim that information is exempt information must, within 20 working days of the 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.
71. In its response of 3 March 2021, the Council suggested certain information they had requested could be accessed elsewhere – the Land Registry - but it did not specify the associated exemption, section 21(1). The Council also erroneously referred to section 40(1) with regard to

property 2 in its internal review. This was not the complainant's property and so information about that property was not the complainant's own personal data.

72. The Commissioner therefore finds that the Council's refusal of the request did not fully meet the requirements of section 17(1).

Right of appeal

73. 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

74. 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.
75. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF