

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 September 2011

Public Authority: Bolton Metropolitan Council
Address: Town Hall
Civic Centre
Bolton
Lancashire
BL1 1RU

Summary

The complainant requested information held by the council relating to a parking bay in Queen Street, Bolton. The council provided some information however it withheld other information on the basis of section 40(2) (personal data) and other information on the basis that section 42 applies (legal professional privilege). The Commissioner's decision is that the information is exempt under section 42. He has however decided that the council incorrectly applied section 40(2) to the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In 2010 the Bolton News published a number of articles relating to parking fines issued by Bolton Council relating to Queen Street in Bolton. The articles related to appeals which had been taken against fines which had been issued at Queens Street which the Ombudsman had overturned. The articles highlighted a number of issues relating to the signage on the bays which, the Bolton News alleged, had led to

public confusion on the rights to park in the bays and resulted in a large number of fines being issued compared to the months prior to the signs being installed.

The Request

3. On 13 October 2010 the complainant wrote to the council requesting:

"Provide copies of all Emails or of any other correspondence between any officers of Bolton Council which discuss Parking Appeals, Regulations, signs, TRO or Consolidation Order issues between the dates of January 2008 up to the present day in relation to the area around Permit Only Holder Bay Queen Street at the rear of the old police station at Howell Croft :-

I am aware that the following senior officers of Bolton Council have been involved.

There may be more officers involved of which I may be unaware please also provide any other so associated Emails as well.

[names of officers redacted]"

4. The council responded on 12 November 2010 stating that it was still considering his request. The complainant wrote back on the same date stating that the councils reply fell outside of the 20 working day deadline provided by section 10(1) of the Act.
5. On 26 November 2010 the council wrote to the complainant referring him to its letter of 12 November 2010 stating that further time would be needed to respond.
6. On 8 December 2010 the council responded to the complainant's request. It provided some information but withheld other information on the basis that section 40(2) personal data, and section 42 (legal professional privilege) applied.

The Investigation

Scope of the case

7. On 11 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the

whether the information should have been disclosed to him and whether the council's response was appropriate.

8. The council then responded to the complainant prior to the Commissioner beginning his investigation.
9. The complainant wrote to the Commissioner on 6 May 2011 to confirm his wish for a decision to be made on his complaint.

Chronology

10. The Commissioner wrote to the council on 12 May 2011. He explained that there had been a delay and the reasons for that delay and asked the council to carry out a review of its decision of 8 December 2010.
11. The council carried out its review and responded to the complainant and to the Commissioner on 1 June 2011. It confirmed that it was withholding the information under section 40(2) and section 42.
12. The council then provided copies of the withheld information to the Commissioner on 17 June 2011.
13. On 8 July 2011 the Commissioner confirmed the status of one of the officers within the council by telephone.

Analysis

Exemptions

Section 42

Is the exemption engaged?

14. Section 42(1) of the Act provides an exemption for information that is subject to legal professional privilege. The Commissioner must first assess whether the withheld information is subject to legal professional privilege.
15. Legal professional privilege protects the confidentiality of communications between a lawyer and client. The Information Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* defined legal professional privilege 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)

16. There are two types of legal professional privilege: litigation privilege and legal advice privilege.
 - Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
 - Legal advice privilege applies where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and legal advisor acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice. Communications made between an advisor and client in a relevant legal context attract privilege.
17. The council argues that the information is subject to advice privilege.
18. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because it is advice provided to council officers by professional legal advisers at the council on the issue of signage at the bays and on appeals to parking enforcement notices.
19. Although the Commissioner considers that the requested information is subject to legal advice privilege, he also notes that the Council would rely on the advice if it faced any legal challenge in relation to parking enforcement matters on Queen Street. The Commissioner consequently finds that the exemption at section 42 of the Act is engaged.
20. Section 42 of the Act is a qualified exemption under the Act. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs that in disclosing the information. If the public interest in maintaining the exemption is greater then the information is exempt from disclosure.

The public interest test

General considerations

21. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that:

“There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest.” In summary, legal professional privilege was referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.

22. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information “*where the privilege holder no longer has a recognised interest to protect*”. The Tribunal also said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect “*a significant group of people*”. In the case of *Shipton v Information Commissioner and the National Assembly for Wales* [EA/2006/0028], a differently constituted Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information “*when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming*” (paragraph 14b).

Public interest arguments in favour of disclosing the requested information

23. The central public interest arguments in favour of the information being disclosed revolve around creating greater transparency around the problems associated with parking enforcement matters on Queen Street. As highlighted above, the amount of parking enforcement notices issued on this particular area greatly increased shortly after the signage was changed, and The Ombudsman’s findings further highlighted issues with the restrictions in place in the area. There have also been further arguments that the signs which were introduced were unclear or unlawful. It also appears from the above that many hundreds of individuals have been issued fines from parking in the area, and a great many more may have parked their and paid the parking charges concerned. The Commissioner therefore notes that a disclosure of the information would affect a fairly large number of people.
24. The Commissioner therefore accepts that this is a clear public interest in disclosing information which would highlight the council’s views and actions in this matter, not least because of the amount of potential claims which could be brought by individuals who had received parking

tickets which, following the adjudicator's decision, may prove to have been unlawful.

25. The Commissioner is however satisfied that the central information which needed to be disclosed is that there is a potential issue with tickets which were issued within the relevant dates, and that this has already been made public via the Bolton News and other avenues. The councils stated position according to the Bolton News is that it will not issue refunds to all those who received penalty notices.
26. It therefore appears from the press cuttings the councils position is not to issue refunds to any parties concerned. The council's stated to the Bolton News that this position is correct because parking adjudication decisions are independent, based on individual cases, and do not set precedents for future cases. The Commissioner recognises that the matters discussed within the withheld information do tie in very closely with this policy. Clearly therefore the information is still 'live advice', albeit that the signage for the area has now been changed. There may still be the possibility of individuals making appeals based on the facts of their case, and the advice contained within the information would have be used to formulate the defence of the councils position in such circumstances.

Public interest arguments in favour of maintaining the exemption

27. The central public interest arguments in favour of maintaining the exemption are those inherent in the maxim of legal professional privilege in the first instance. There is clearly a very strong, and recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or his ability to make fully informed and robust legal decisions.
28. The Commissioner accepts that there is a public interest in ensuring that the Council is transparent in its actions and accountable for the decision making process relating to events taking place in the Park.
29. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exemption. The Council argues that it is vital that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues

before decisions are made. The Commissioner accepts that ordering disclosure of the requested information could inhibit the Council's ability to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council* [EA/2006/0044] the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."

30. In its summary of *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023], the Information Tribunal commented that:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest."

The Tribunal referred to legal professional privilege as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases.

Balance of the public interest arguments

31. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in the non disclosure of the information which is subject to legal professional privilege in this case. Whilst the Commissioner recognises the weight of the arguments in favour of releasing the requested information he has, on balance, decided that they are outweighed by the arguments in favour of maintaining the exception. He places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. He therefore concludes that the Council correctly withheld the requested information under the exemption at section 42.

Section 40(2)

32. The council also provided the complainant with a copy of email correspondence between its officers but redacted the names of its officers from them on the basis that section 40(2) applied. Section 40(2) applies to information which is the personal data of third parties

where a disclosure of that information would breach one of the data protection principles.

33. Personal data is defined in section 1 of the DPA as data *'which relate to a living individual who can be identified—*
- (a) from those data, or*
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*
34. The Commissioner is satisfied that the information is personal data of officers at Bolton Council. The information provides their name and, given the context it also identifies that they work at the council.
35. The First Data Protection Principle requires that personal information is processed "fairly". This generally (but not always) requires that individuals would have an expectation that their information would be disclosed, either because it would be reasonably obvious to the individual that that would be the case, or because the public authority told them it would be processed in that way at the time that the information was obtained.
36. The Commissioner notes that the complainant is already aware of the identities of some of the officers concerned. He specifically named them within his request. Other individuals' identities may have also been redacted. The Commissioner notes that some of the individuals whose names have been redacted from the information have specifically requested that their information is not disclosed to the complainant.
37. The fact that the complainant already knows the officers concerned would not prevent a disclosure of that information from being a breach of the fair processing requirements however. A disclosure under the Act is considered to be to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should also be prepared to disclose the same information to any other person who asks for it.

38. The Commissioner must therefore consider the wider context of a disclosure of the information rather than simply whether it would be fair to disclose the information to the complainant.
39. In his guidance on the section 40 exemption the Commissioner states that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the Act: *"It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair."* In previous decision notices the Commissioner has stated that he considers that senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.
40. The Commissioner also considers that those in public facing roles will have a greater expectation that some details about them, for instance their name and the fact that they work for the authority, might be disclosed as part of carrying out their day to day duties.
41. The Commissioner has therefore considered the roles of the officers whose names have been withheld. They hold managerial and media officer positions within the council. The Commissioner therefore considers that they would have an expectation that details about them may be disclosed to the public whilst carrying out their day to day duties because of the roles they carry out at the council. They would, for instance be expected to respond to inquiries from the public and the media and when doing so there would be an expectation that they would sign letters with their name, and therefore disclose the fact that they work for the council in any event.
42. Given this, the Commissioner considers that there must be some expectation that in their dealings with the public the officers would disclose their name, and the fact that they work for the council as a matter of course, whilst carrying out the day to day business of the council.
43. In the *Corporate Officer of the House of Commons v IC and Norman Baker MP* (EA/2006/0015 & 0016) it was said that:

"... The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money." (para 43).

44. The Tribunal also found that this approach applied “....*even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject’s public life.*” (para 78).
45. Having considered the nature of the emails in question, the Commissioner is satisfied that when carrying out a test of the public versus private information as expressed in the Baker case that a disclosure of the information would in fact provide little private information about the individuals’ private lives. It would provide details of the actions they took as part of their role in the council in the circumstances of the case.
46. The Commissioner also notes that the information is unremarkable in nature. It does not for instance directly address the council’s formulation of policy in respect of the decision not to issue automatic refunds to those who have received parking tickets. A disclosure of the officers names would not therefore be likely to lead to the type of “direct, virulent criticism” envisaged by the Tribunal in the case of *Baker v Information Commissioner & DCLG EA/2006/0043* (at p.17).
47. Given the role of the officers whose details have been redacted the Commissioner is satisfied that there would be some general expectation that details about their role at the council may be disclosed during the course of their duties. He is therefore satisfied that a disclosure would neither be harmful nor distressful to the officers concerned.
48. The Commissioner is therefore satisfied that a disclosure under the Act would be fair for the purposes of the first data protection principle in these circumstances.

Schedule 2 condition

49. Having decided this, the Commissioner must decide whether a condition with paragraph 6 schedule 2 can be satisfied in order for the information to be disclosed.
50. This provides that the processing of the information (i.e. in these circumstances its disclosure in response to the request) is

“necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

51. The Commissioner considers that in circumstances such as this the test requires a balancing of the data subject's right to keep his or her information private against the legitimate interests of the public to have access to the information concerned. In carrying this out he will take into account that the officers involved have made clear that they do not wish their information to be disclosed to the complainant.
52. For the most part the balancing of interests required under schedule 2 have already been considered when considering the fairness of any disclosure which needs to take place. These arguments have been outlined above.
53. The Commissioner has considered whether a disclosure is necessary for the purposes of the legitimate interests pursued by the parties to whom the data is to be disclosed, i.e. in this case the public. He notes that the contents of the emails themselves have been disclosed. This, to an extent, weakens any argument that it is 'necessary' for the public to know the names of the officers concerned in order to create greater transparency or accountability because the essential information necessary to make the actions of the council transparent and accountable has already been disclosed.
54. The Commissioner recognises however that the names and roles of the officers involved would provide a greater degree of transparency on the actions of the council as a whole. It would provide evidence of the level of the officers which dealt with the situation and provide greater clarity about which officers from which departments dealt with the situation.
55. The Commissioner is therefore satisfied that a disclosure of the withheld information is necessary in order to meet the legitimate interests of the public in being able to ascertain whether the issues with the parking zones were being dealt with at an appropriate level and by the appropriate officers within the council.
56. The Commissioner's decision is therefore that a disclosure of this information is necessary for the legitimate interests of the general public, and therefore that the council was not correct to apply section 40(2) in this instance.

Procedural Requirements

57. The Commissioner notes that the complainant made his request on 13 November 2010. The council's initial response was sent on 12 November 2010. This falls outside of the 20 working day deadline required under section 10(1) of the Act.

58. The Commissioner had also decided that the council breached section 1(1)(a) and 1(1)(b) in failing to provide information which the complainant was entitled to in response to his request.

The Decision

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

- It correctly applied section 42 to the information.

60. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It was not correct to apply section 40(2) to the information.

Steps Required

61. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose officer's names redacted from the bundle of correspondence which is not covered by legal professional privilege.

62. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

63. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

64. 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@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 21st day of September 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
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Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

The Data Protection Act 1998

Condition 6 (1) provides that –

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (c) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - 1. any of the data protection principles, or
 - 2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (d) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 40(5) provides that –

"The duty to confirm or deny-

(e) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(f) does not arise in relation to other information if or to the extent that either-

3. the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

4. by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –

"In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."

Legal Professional Privilege

Section 42(1) 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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”