

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2012

Public Authority: Walsall Council

Address: Civic Centre
Darwall Street
Walsall
WS1 1TP

Decision (including any steps ordered)

1. The complainant has requested a legal opinion held by the local authority. The local authority relied on the exemption at section 42 of the FOIA not to communicate it to the complainant.
2. The Commissioner's decision is that the exemption was engaged and that the public interest favoured maintaining the exemption.

Request and response

3. On 15 March 2012, the complainant wrote to Walsall Council ("the Council") and requested to see a report from counsel it had hired to give his opinion on a specified planning matter
4. The Council responded on 15 March 2012. It stated that though it held the requested information it relied on section 42 (legal professional privilege) to withhold it from him.

Scope of the case

5. On 17 May 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled by the Council.
6. During the course of his investigation the Commissioner obtained and considered a copy of the requested information.

Reasons for decision

7. The Council maintains that the information that has been withheld is subject to legal advice privilege, not litigation privilege. It was an opinion from a professional legal adviser made for the sole purpose of obtaining legal advice and was communicated in the legal adviser's professional capacity. The Council explained that the opinion was taken to committee in private session and has not been made publicly available. It had been shared on a very limited basis internally and also with the Local Government Ombudsman, as part of their investigation into matters connected to those that the opinion advises on. However it was shared only on the clear understanding that the Council considered it to be subject to legal privilege. The Council is therefore satisfied that privilege has not been waived.
8. Section 42 states that:

“(1) Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information.”
9. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) 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 their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph. 9)
10. There are two types of privilege: litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
11. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.

12. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. Advice from professional legal advisers in this context can still be regarded as privileged if the normal criteria are met.
13. The Commissioner has obtained and considered a copy of the requested information. It is a counsel opinion obtained by the Council to provide legal advice on an on-going planning matter and therefore is as described by the Council. The exemption is therefore engaged.
14. Though the exemption is engaged the requested information should still be communicated to the complainant unless in all the circumstances of the case the public interest in maintaining the exemption outweighs that in its release.
15. The Council states that there is a very strong inherent public interest in protecting the long established principle of legal professional privilege. This promotes respect for the law, encourages clients to seek legal advice and allows for full and frank exchanges. This is, in itself, a compelling reason that the information should not be disclosed.
16. The Council also states that there is a strong argument that there must be reasonable certainty in advance of seeking legal advice that this rule will be maintained. If the Council were to disclose this information after the event, and against the express wishes of the legal advisor, it would severely undermine its working relationship with them and other legal professionals and have a detrimental effect on the Council's ability to obtain such advice in the future.
17. The Council further contends that legal advice must, by its very nature, be fair, frank and reasoned; it will inevitably highlight both strengths and weaknesses. If such advice were to become routinely disclosed it would negatively impact on the Council's willingness to seek legal advice in the future and subsequently be detrimental to the quality of decision making.
18. Conversely the Council also noted that there was a general public interest in transparency within the decision making process as this should improve the quality of future decisions and also help public understanding of and participation in current issues. The Council further noted that there is also a strong public interest in disclosing information where to do so would help determine whether the Council is acting appropriately.

19. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, laid out with clarity (at paragraph 60 of their decision) the following public interest factors in favour of maintaining the exemption at section 42:

"a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.

b. If legal advice were routinely disclosed, there would be disincentive to such advice being sought and/or as a disincentive to seeking advice based on full and frank instructions.

c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between government and its legal advisers.

d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.

e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.

f. There is a significant risk that the value placed on legal advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed".

20. Having regard to the application of the public interest test the Commissioner notes that the legal advice is routine in type and is concerned with a matter local to the Council. There are no overriding issues that affect a large section of the public and thus would strengthen the public interest factors in favour of the advice being publically disseminated. The Commissioner considers that the public is better served by local authorities being able to obtain legal advice that is not inhibited or constrained by the knowledge or fear that there is a likelihood that it will not remain private between the lawyer and those that s/he advises. In the circumstances of this case, outside the generic arguments for releasing the advice there is little to suggest that the public interest is better served by releasing the information. Those strong factors for maintaining the exemption prevail in this matter and

accordingly the Commissioner finds that the Council dealt with the complainant's request in accordance with the Act.

21. The complainant has made the Commissioner aware that he believes that there has been impropriety conduct by the Council and/or its councillors in or connected to the subject matter that the legal opinion advises upon. The Commissioner understands that these allegations are currently being investigated by the Local Government Ombudsman and he does not wish to encroach upon that investigation. It may be that following the Local Government Ombudsman's decision new public interest factors arise that would warrant re-considering releasing the legal advice. This decision notice does not prevent further requests for the legal advice being made in the light of future factors.

Right of appeal

22. 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

23. 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.
24. 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

Alexander Ganotis
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