

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2015

Public Authority: Thanet District Council
Address: PO Box 9
Cecil Street
Margate
CT9 1XZ

Decision (including any steps ordered)

1. The complainant has requested legal advice received by Thanet District Council (the "Council") regarding Ramsgate Royal Sands/Pleasureama development. The Council initially refused this citing section 31 (law enforcement) but revised this at internal review, citing section 31, section 42 (legal professional privilege) and section 43 (commercial interests).
2. The Commissioner's decision is that the Council is entitled to rely on section 42 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 20 October 2014 the complainant requested information of the following description:

"Please provide me with copies of

1) The Pincent Mason [sic] Legal Advice document regarding the Ramsgate Royal Sands/ Pleasureama development presented to the Overview and Scrutiny Panel on 15 October 2015.

2) The Pincent Mason Advice Note to Thanet Council dated 13 December 2013 referred to in 1 above

- 3) The Pincent Mason Advice Note to Thanet Council dated 18 December 2013 referred to in 1 above
- 4) The Strutt and Parker letter and attachments dated 9 October to Edwina Crowley concerning the valuation of the Royal Sands development site, which was presented to the Council's Overview and Scrutiny Panel on 15 October
5. On 13 November 2014, the Council responded. It refused to provide the requested information. It cited section 31(1) (law enforcement exemption) as its basis for doing so.
6. The complainant requested an internal review on 13 November 2014. The Council sent him the outcome of its internal review on 19 November 2014. It revised its position. It upheld its use of section 31 but also introduced reliance on section 42 (legal professional privilege) and section 43 (prejudice to commercial interests).
7. For ease of future reference, the Commissioner will refer to the 4 requests as Request 1, Request 2, Request 3 and Request 4. Although all four requests were made on the same day in the same item of correspondence, they are each individual requests.

Scope of the case

8. The complainant contacted the Commissioner on 9 March 2015 to complain about the way his request for information had been handled. He disputed the use of the exemptions cited and argued that the negotiations to which the information related would soon be at an end. As such, the public interest in maintaining the exemptions would be significantly diminished. He also argued in his request for internal review that much of the information was in the public domain.
9. During the course of the Commissioner's investigation, the Council explained that it would revisit the matter once any negotiations were resolved and would consider what information should be disclosed. It cited section 22 (information intended for future publication) as an additional exemption that it sought to rely on but was not specific about which information this would apply to.
10. The Commissioner has looked first at the application of section 42 given that it has been applied to the information described in all four requests. Where that exemption is not applicable, he will look at the application of section 31, section 43 and 22.

Background

11. The redevelopment of the site to which the request refers has been subject to a number of delays. There have been disagreements about the way forward for the site and the best use of public funds to achieve that. Further information about it is on the BBC website.¹
12. Some information about the matter has been published in the local paper (the Commissioner takes this as being the information which is, according to the complainant, in the public domain). However, both the local paper and another party are subject to a High Court injunction about making public some of the withheld information.

Reasons for decision

Is the requested information environmental?

13. Information which relates to the redevelopment of a site could, in many circumstances, be considered environmental information that is subject to the access provisions of the Environmental Information Regulations ("EIR") rather than FOIA. The Commissioner therefore considered whether any of the withheld information was environmental information.
14. Regulation 2(1) of the EIR states:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and

¹ <http://www.bbc.co.uk/news/uk-england-kent-29171031>

activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

15. The Commissioner considered the withheld information and concluded that it was one step removed from environmental information. The withheld information is broadly about the Council's legal position in respect of a development rather than about the development itself. He has considered the definition of environmental information, in particular, 2(1)(c) but, having regard to the information itself, he has concluded that it is not environmental within the definition set out in Regulation 2 of the EIR.

Section 42

16. In a section 50 complaint, the Commissioner must consider matters as they stood at the time of the request (or, at least, the time for response to that request). The passage of time may allow for informal resolution of an information access dispute where information which was sensitive at the time of the request loses its sensitivity in whole or in part. However, where the Commissioner is required to make a decision under section 50 of the FOIA, he can only consider the circumstances prevailing at the time of the request.
17. The Council cited the exemption provided by section 42(1) of the FOIA in relation to the information described in Requests 1, 2 and 3, that is, where it includes advice from Pinsent Mason. It also explained that it obtained the information described in Request 4 under advice from its legal advisers and also relied on section 42(1) in respect of the information described in Request 4.
18. Section 42 provides an exemption for information subject to legal professional privilege. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information being subject to legal professional privilege. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

19. Covering first whether the exemption is engaged, there are two types of legal professional privilege (LPP); advice privilege and litigation privilege. In this case, litigation privilege is claimed, which is described in the Commissioner's published guidance on this exemption² as follows:

"Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation."

20. The Commissioner's guidance goes on to say: "Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports. "
21. The Council explained that the valuation report (mentioned in Request 4) was obtained as part of the process for obtaining litigation advice and argued that it, too, attracted legal professional privilege because of this. It also explained how, at the time the advice was obtained, there was a real prospect of litigation.
22. The Commissioner is satisfied that the information described in all four requests attract legal professional privilege. The information described at Requests 1, 2, and 3 is advice provided from a lawyer namely, Pinsent Masons, to a client (the Council) on the subject of Ramsgate Royal Sands/ Pleasurama development. Pinsent Masons is a well-known legal firm. Clearly this information is subject to LPP and, therefore, the exemption provided by section 42(1) is engaged in relation to the first three pieces of information described in the request. The Commissioner is also satisfied with the Council's explanation that the information is litigation advice.
23. The Commissioner accepts the Council's explanation as to the circumstances in which the information described in Request 4 was obtained. Having reference to his own guidance as to what information may attract litigation privilege, he is satisfied, too, that the information described at the fourth point of the request is subject to LPP. It was

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

obtained for the purpose of litigation advice on the instructions of the Council's legal advisers.

24. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness and transparency at the Council and the public interest in the maintenance of LPP, as well as those factors that apply in relation to the specific information in question here.
25. Dealing first with factors in favour of disclosure, the complainant argued that the public interest favoured disclosure in order to enable the public to understand more about a development that has given rise to considerable controversy (see note 1).
26. Having viewed the information in question, the Commissioner agrees that there is public interest in its disclosure; this would result in the public being better informed as to the actions of the Council regarding the development.
27. However, the Commissioner also believes that there is public interest in allowing the Council to obtain legal advice regarding its position where litigation is a realistic possibility. A key reason for the existence of LPP is to enable a client to obtain confidential advice. It is also necessary to take into account the inbuilt public interest in this exemption; that is the public interest in the maintenance of LPP. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (paragraph 35).
28. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
29. The public interest arguments advanced by the Council in this case related to the inbuilt public interest in the maintenance of LPP. It also

referred to the legal advice relating to a matter which was a live issue at the time of the request.

30. The complainant's arguments focus on the information's sensitivity being likely to diminish rapidly, particularly the valuation information described in Request 4. He has also made reference to information being in the public domain. The Commissioner is aware of the High Court injunction referred to in paragraph 12 and wishes to make clear that information access rights under FOIA do not override the requirements of a High Court injunction.
31. The view of the Commissioner is that the public interest inbuilt into this exemption is particularly weighty in this case as the legal advice relates to a matter was live at the time of the request.
32. The Commissioner concludes that the public interest in the maintenance of LPP, and, therefore, in upholding the exemption provided by section 42(1), outweighs the public interest in disclosure. The Council is not, therefore, required to disclose the information in question.
33. He has not gone on to consider the application of the other exemptions cited by the Council because of the conclusion he has reached with regard to section 42 and its application in respect of all the withheld information.

Right of appeal

34. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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