

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2015

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested recorded information held by Birmingham City Council. The requested information relates to a complaint made by the complainant to Moor Hall Primary School which concerns the school's charging policy for the Moorhens before and after-school club. The Council determined that the requested information was subject to legal professional privilege and refused the complainant's request in reliance on section 42 of the FOIA.
2. The Commissioner's decision is that Birmingham City Council has appropriately applied section 42 to the information it is withholding.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 10 May 2015, the complainant wrote to Birmingham City Council and requested information in the following terms:

"On 13th April 2015 I logged a formal complaint¹ with Moor Hall School. In order to reply to my complaint the School sort [sic] advice from Birmingham City Council [...]. Please can you forward all correspondence both within the council and between the council and the maintained school relating to my complaint."

5. The Council acknowledged its receipt of the complainant's request on 11 May 2015.
6. On 10 June 2015, the Council made its formal response to the complainant's request. The Council withheld some recorded information from the complainant in reliance on section 42 of the FOIA – where the information is subject to legal professional privilege.
7. The Council's refusal notice prompted the complainant to request an internal review. The complainant made this request on 10 June.
8. On 30 June the Council wrote to the complainant to advise him that it had upheld his appeal on the grounds that the appropriate service area had failed to consider the public interest required by section 42. The Council informed the complainant that his request had been referred back to the service area for it to reconsider its decision.
9. On 1 July the Council's Information Governance Manager wrote to the complainant to inform him of its final decision. Having considered the public interest factors associated with the request, the Council advised the complainant that it was maintaining its decision to apply section 42 to the withheld information.

Scope of the case

10. The complainant contacted the Commissioner on 1 July 2015 to complain about the way his request for information had been handled.
 11. The Commissioner has investigated whether the Council is entitled to rely on section 42 of the FOIA to withhold the information which the complainant seeks. This notice is the Commissioner's decision.
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¹ The Commissioner understands that the complainant's complaint concerns the increase in costs for children to attend the Moorhens before and after-school Club which is provided by Moor Hall Primary School. The complainant asserts that the increase in fees takes into account costs which are not permitted to be included under Department for Education rules, and in particular, under sections 449 – 462 of the Education Act 1996.

Reasons for decision

12. Section 42 provides an exemption from the duty to disclose information where the information is subject to a claim of legal professional privilege.
13. There are two types of legal professional privilege: Advice privilege which can attach to information in circumstances where there is no contemplated or pending litigation and where the information concerns the seeking or provision of legal advice. Litigation privilege may attach to information which concerns contemplated or pending litigation.
14. The Council has confirmed that it is relying on the fact that the withheld information is subject to advice privilege.
15. The information which the Council is withholding consists of a pro-forma document entitled 'Request for Legal Advice for use by Education and Commissioning (59)'. This document was completed by one of the Council's School Support Managers, following an approach made to the Council by the Head Teacher of Moor Hall Primary School, before being submitted to and completed by the Council's Legal Department. The document sets out a number of questions which the Legal Department is asked to comment on.
16. In addition to the request for legal advice, the withheld information comprises a number of emails which have passed internally within the Council: They include some emails sent to the Council by the School in respect of the matter raised by the complainant.
17. The withheld emails outline and comment on the legal advice given by the Council's lawyers as a basis for advising the School.
18. As such, the document and the associated communications are entirely internal to the Council: The withheld information was created by and for the Council, with the sole purpose of advising Moor Hall Primary School.
19. Having reviewed the withheld information the Commissioner is satisfied that it attracts legal professional privilege. The information constitutes requests for legal advice made to properly qualified persons within the Council's Legal Department and communications which discuss issues associated with that legal advice given.
20. In view of the above, the Commissioner has decided that section 42(1) is properly engaged.
21. The Council has assured the Commissioner that the withheld information has not been shared with any third party to the extent that the

confidential character of the withheld information has been lost. The Commissioner has seen no evidence to indicate the contrary and therefore he accepts the Council's assurance.

The Public Interest

22. Section 42(1) of the FOIA is a qualified exemption. The Commissioner is therefore required to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the requested information

23. The Commissioner considers that some weight must always be given to the general principles of accountability and transparency which are achieved through the disclosure of information held by public authorities. He recognises that disclosure of publicly held information can assist the public in understanding the basis and how public authorities make their decisions. In turn, this can foster greater trust in public authorities and may allow greater public participation in the decision making process.
24. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the council in respect of the advice it has given to one of the schools it provides services to.
25. Disclosure of the withheld information would also allow the public to consider the quality of the legal advice given by the Council's Legal Department and also how officers within the Council acted on the advice they received.

Arguments in favour of maintaining the exception

26. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
27. The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
28. Here, the Commissioner considers that disclosure of the withheld information would affect the Council's ability to defend itself should it be faced with a legal challenge. Similarly, he considers that disclosure of

the withheld information could have a detrimental effect on the School's ability to defend its position regarding the charges it makes for the Moorhens before and after school provision.

29. The Commissioner considers that the Council and School should be able to defend their position against any claim made against it without having to reveal its position in advance. This is particularly important where challenges may be made by persons who themselves are not required to disclose their positions. In the Commissioner's opinion that would be unfair.
30. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
31. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."
32. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
33. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into 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..."

34. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

35. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
36. However, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure.
37. The Commissioner is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.
38. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
39. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that equal or would outweigh the particularly strong public interest inherent in this exception.
40. The Commissioner is assured by the Council that it is open for the complainant to challenge the school's charging policy by submitting a complaint to the Department for Education ("the DfE").
41. In the Commissioner's opinion it is not a necessary prerequisite for the complainant to obtain the Council's legal position before doing this. The ability for the complainant to make a complaint to the DfE and to receive adjudication must surely provide appropriate scrutiny of the School's decision to increase its Moorhens charges. The Commissioner considers that the ability of the complainant to take this matter to the DfE augments the public interest in maintaining the section 42 exemption.

42. The Commissioner's decision is that the council has properly applied section 42 of the FOIA to the information it has withheld.

Right of appeal

43. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

44. 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.
45. 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

Andrew White
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