

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 February 2016

Public Authority: Kent County Council
Address: Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information on a property which the council has a legal interest in due to a loan which it had previously provided to a third party. The council responded applying section 42, (legal professional privilege), 43 (commercial interests), 41 (information provided in confidence), 40 (personal data) and section 21 (information available by other means). During the course of the Commissioner's investigation it disclosed a large amount of information to the complainant, however it maintained the application of sections 42, 43(2) and section 41.
2. The Commissioner's decision is that the council correctly applied the exemptions to the information. He considers however that the late disclosure of some of the information during his investigation was a failure to comply with section 10(1) of the Act.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 15 February 2015 the complainant wrote to the council and requested information in the following terms:

"On 22/04/14 I wrote to you in reference to both [name redacted] and [name redacted]. I asked that you do not take any action as I was owed monies (in relation to my beneficial interest) and that my interest

was far greater than yours.

I now ask that you provide me with full disclosure pertaining to the property known as [address redacted]."

5. On 13 March 2015 the council responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:

section 21 (reasonably accessible by other means)
section 42 (legal professional privilege)
section 43 (commercial interests)
section 41 (duty of confidence)
section 40 (personal data)

The complainant requested an internal review on 14 March 2015. The council sent the outcome of its internal review on 9 April 2015. It upheld its original position.

Scope of the case

6. The complainant initially contacted the Commissioner on 4 May 2015 to complain about the way her request for information had been handled. She forwarded the documentation for the Commissioner to begin fully considering the complaint on 1 September 2015.
7. The complaint is that the council has wrongly applied exemptions to exempt the information from disclosure to her.
8. During the course of the Commissioner's investigation the council reconsidered its response to the request. It disclosed the information subject to section 21 to the complainant, and after consulting with a third party who consented to the disclosure of his personal data, it also disclosed the information which it had previously applied section 40(2) to on the basis of a consent to disclose the information to her alone (i.e. outside of the FOI Act). The Commissioner has not therefore considered these exemptions further in this decision notice.
9. He has noted however that in failing to provide the information to the complainant within 20 working days of receiving the request the council has failed to comply with the requirements of section 10(1). This is outlined further below.

Reasons for decision

Background to the decision

10. The withheld information relates to the financial dealings of a private third party individual. At the time of the request a number of parties were considering taking legal action against the individual to recover funds owed to them by him or his business. These include a bank, and Dover District Council.
11. The council considers that the complainant may be acting on behalf of, or in conjunction with the individual to protect his ownership of the property in question, primarily because she also has an interest the property which the council considers may not be met if the parties manage to force a sale in order to repay the debts which the individual owes to them.

Section 42

12. Section 42 relates to information which is subject to 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.”
13. The council has claimed section 42 to a large section of the withheld information, and has provided a letter from the bank involved demonstrating that it too considered part of its information to be covered by legal professional privilege. Section 42 was therefore applied to this information by the county council.
14. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege (“LPP”) could be maintained in legal proceedings. This exemption is subject to a public interest test.
15. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both 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. Litigation privilege is slightly wider in scope however as this can also cover some correspondence between parties when litigation is contemplated.

16. The information which the Council has withheld under section 42 in this case consists of legal discussions between lawyers, and between lawyers and officers within the council relating to the ongoing issue with a third party's debt owed to the council. There is also communications with lawyers from other parties relating to the issue.
17. Having considered the withheld information the Commissioner is satisfied that the exemption is engaged. He considers that the withheld information contains a mixture of information subject to either litigation privilege or advice privilege. The Commissioner has therefore considered the public interest test as required by section 2.

The public interest in the information being disclosed

18. The main public interest in the information being disclosed relates to creating greater clarity and transparency on issues relating to the spending, management and recovery of public funds. It would also allow greater scrutiny of the council's decision making, and its financial decision making.
19. A disclosure of the information would shed light on a situation which might potentially result in a loss of public money to the council, how that came about and explain the steps which the council was taking to rectify that situation.

The public interest in the exemption being maintained

20. 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 important principle of legal professional privilege. This view has also been supported by the Information Tribunal.
21. 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*".
22. The Commissioner therefore considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, 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..."

23. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, laid out (at paragraph 60 of its judgement) the following public interest factors in favour of maintaining the exemption at section 42 of FOIA.

"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. Were legal advice disclosed routinely, there would be disincentive to such advice being sought and/or 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 a public authority 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. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed."

24. 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.
25. Referring to the information withheld under section 42 specifically within this case the Commissioner notes that the issue was an ongoing issue at the time of the request. A disclosure of the information at this stage of the proceedings may in effect undermine the legal position of the council by disclosing information which it may need to rely upon in future litigation to recover the funds which the individual owes to it. There is a strong public interest in protecting the council's right to obtain legal

advice and take legal action to retrieve public funds which are owed to it.

26. The Commissioner therefore considers that the public interest rests in maintaining the exemption. The council was therefore correct to apply section 42 in this case.

Section 43(2)

27. Section 43(2) provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

28. The council argues that a disclosure of the information would be detrimental to its commercial interests in seeking to recover public money from a development loan agreement it has entered into which has defaulted.
29. The Commissioner has firstly considered whether the recovery of loans is a commercial interest rather than simply a financial interest. He considers that the provision of the loans by banks is a commercial activity. He also considers that in some circumstances the provision of loans by local authorities is also a commercial activity, even when the benefit being sought by the council through the provision of the loan is not necessarily to achieve a direct monetary profit from it. The recovery of unpaid loans is an activity which is intrinsically tied to the provision of loans, and therefore this also amounts to a commercial interest of the council.
30. The council argues that a disclosure might adversely affect the potential of it recovering those funds.
31. In seeking to recover the monies the council has had dealings with the district council and a bank who are also owed money by the third party. They may also have legal claims to any funds which can be recovered from him through the sale of a property.
32. Additionally the information relates to the financial position of the third party, details of his debts to others, and of the circumstances of the case. Whilst some of that information relates to issues relating to his companies, some also relates to him as a private individual. In his role either as the owner/director of companies, or as a sole trader, there would be likely to be a detriment to his commercial activities if this information were to be disclosed.

33. Although it is clear that the individual might agree to the disclosure of his personal information to the complainant outside of the Act, it seems unlikely that he would agree to such detailed information on his debts being disclosed to the whole world via an FOI disclosure were he to be asked. Such details would be likely to cause his commercial damage as other businesses and creditors would be likely to reconsider their position with him in negotiations, or begin reconsidering entering into contracts with him.
34. At the time the issue was an ongoing issue, and the council has provided correspondence it has had with the bank and the district council. Both parties clarified that in their view a disclosure of the information would be detrimental to their commercial interests and explained their reasons for this.
35. As stated, at the time of the request the issue was ongoing, with the potential of litigation still in prospect. The council has argued that a disclosure of the withheld information would highlight its consideration in respect of the debt and, together with the information subject to legal professional privilege, would provide a substantial overview of its legal case to retrieve the money owed to it. The district council has outlined similar concerns to the county council.
36. The bank has outlined that information held within the correspondence relates to the dealings it was having with the individual and its claim for the recovery of funds. It considers that a disclosure of this information via an FOI request, (rather than through the laws relating to the provision of evidence which will be relied upon in court) could significantly affect its business and the confidence which its clients have in its ability to retain client information in confidence. Again it needs to be borne in mind that a disclosure of the information under FOI would be to the whole world.
37. Having considered the above, the Commissioner is satisfied that at the time of the request, with the ongoing prospect of litigation over the issue, a disclosure of the information which was withheld under section 43 would be prejudicial to the commercial interests of both councils and the bank. The Commissioner is therefore satisfied that the exemption in section 43 of the Act is engaged. He has therefore gone on to consider the public interest test required by section 2 of the Act.

The public interest in the information being disclosed

38. The central public interest in the disclosure of the information is the same as that detailed within the consideration of section 42 as outlined above.

The public interest in the information being maintained

39. The public interest in the exemption being maintained relates primarily to the purpose behind the exemption in the first instance. They relate to the protection of the commercial interests of the three parties. A disclosure of information which would undermine the ability of the parties to retrieve a commercial loan if it is not repaid will therefore be prejudicial to the parties' commercial interests.
40. The council is seeking the recovery of a substantial amount of public money, as are both the district council and the bank. All have legal claims on any funds able to be recovered from the debtor, and the council has pointed out that there is an administrative process for determining who will take priority in such cases as the sale of property to recover funds.
41. The complainant has also outlined that she has an interest in the property in question. The council considers that it has a stronger legal claim than the complainant's, and other parties have made similar claims over any funds which can be recovered.
42. The Commissioner notes that in such situations there is a very strong onus on parties to recover funds via negotiation or via the administrative/legal processes set out to deal with such matters. In the case of litigation, all parties who have a legal interest will have the opportunity to present their case, and potentially to receive the evidence to be presented as a counter claim by the other parties via the disclosure rules. The council argues that there is a set procedure in law for such cases to be administered and for retrieved funds to be returned or shared between creditors. It argues that it is not therefore in the public interest for it to disclose this information more widely via a response to a request under the Act, particularly given the subsequent prejudice to the parties' commercial interests which would be likely to occur as identified above.
43. In the case of the bank the Commissioner recognises that a failure to keep private financial information of a client from public view would create significant doubts about its ability to hold detailed information about its client's confidential information. This would damage its commercial reputation and has the potential undermine the public's trust in banks as a whole. There is therefore a strong public interest in protecting such information from disclosure until such time as court proceedings occur (which may bring relevant information in to the public domain).

44. The Commissioner has considered the above. Whilst he recognises the public interest in greater transparency, he is satisfied that the public interest rests in the exception being maintained in this instance.

Section 41(1)

45. Section 41(1) provides that –

“Information is exempt information if-

it was obtained by the public authority from any other person (including another public authority), and

the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

46. As section 41 is an absolute exemption, it is not subject to the public interest under the FOIA.
47. The council initially argued that it owed a duty of confidence on sections of the withheld information to both the bank and to Dover District Council. However during the course of the Commissioner's investigation it wrote to both parties asking for their view on whether the information could be disclosed. The bank stated that in its view the information was not subject to a duty of confidence but confirmed that its view was that it should be withheld under section 43(2). The district council confirmed its view that the information was subject to a duty of confidence.
48. The Commissioner has therefore considered the application of this exemption to withheld information identified by the council as being held under a duty of confidence owed to Dover District Council. The amount of information withheld under this exemption is relatively small.

Was the information provided to the council by Dover District Council

49. The council argues that the information withheld under this exemption relates to correspondence passing between the county council and the district council. It wrote to the district council to ask its view on the information. It argues that it was under a duty to hold the information in confidence due to the nature of the relationship between it and the third party. It further argues that the information was only shared on the basis of the potential of litigation to seek to retrieve funds from the third party, owed to both the county council and the district council. Information passed to the county council which discusses the issue is therefore held under a similar duty of confidence.

50. The Commissioner is therefore satisfied that in respect of information provided to the county council from the district council this information was provided to the council by a third party.

Would an actionable breach of a duty of confidence arise?

51. In his analysis of whether disclosure of the information constitutes an actionable breach of confidence the Commissioner must consider:

- 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 and to the detriment of the confider.

Quality of confidence

52. 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.

53. The Commissioner is satisfied that the information is not otherwise accessible and that the information is not trivial in nature. It is commercial and financial information, together with personal details relating to the third party individual.

Obligation of confidence

54. The council has outlined that the correspondence relates to the issue of the third parties debts, how these might be retrieved and the legal situation as regards the creditors of the third party. The discussions were held on a confidential basis, with each party having the expectation that the information they were imparting would be held in confidence and used only for the purpose of establishing and defending their legal rights to retrieve monies owed to them by the third party and establish how best to go about doing so.

55. The Commissioner considers that it was clear from both the nature of the information and the issues at hand that the intention of the parties was that the information was shared in confidence. In effect, even without the debts owed to the councils, the discussions relate to the financial position of a private individual. It would have been clear to both parties that the expectation was that the information should be retained in confidence, subject to any information becoming public during court proceedings.

56. The Commissioner is further satisfied that a disclosure of the information would be detrimental to the district council. It would reveal information on its financial position in relation to the third party, together with information on the discussions it was having with the county council as to how to retrieve that money.
57. In effect a disclosure of the information beyond that limited to seek to retrieve the funds would be likely to breach a duty of confidentiality owed to the third party in addition to the district council. This would have been clearly detrimental to the third party if that had occurred.
58. The Commissioner is therefore satisfied that a duty of confidence would have been formed by the provision of the information from the district council to the county council. The next question is therefore whether there any disclosure would be actionable or whether there would be a defence to such a disclosure.

Would a breach of confidence be actionable?

59. The complainant argues that the district council would have no grounds to take legal action against the county council were the confidential information to be disclosed. The test whether a disclosure of the information *"would constitute a breach of confidence actionable by that or any other person"*.
60. As stated, as regards the district council the information which it has shared with the county council was provided on the basis that it was confidential, and a disclosure of that would create the legal basis for action should the district council decide to do so. The Commissioner therefore considers that the complainant is not correct in this assertion.
61. The district council would also hold information under a duty of confidence owed to the third party. This duty of confidence would extend to any information provided to the county council from that confidential information. The county council would then also owe a duty of confidence to the third party in respect of that information. A disclosure of that information would therefore be actionable by the individual in addition to the district council.
62. Although there is no direct public interest test as regards the application of section 41, there is a public interest test inherent within the duty of confidence to decide whether a breach would be actionable. Essentially, where a strong public interest exists in the information being disclosed this can act as a defence to the disclosure of the confidential information. It would effectively prevent a disclosure from being actionable and the exemption could not therefore apply.

63. The test must take into account the strong public interest in confidences being maintained. Hence the test which must be considered is whether the public interest in disclosure outweighs that in confidences being maintained. If it is then the defence is applicable and any breach of the duty will not be actionable.

The public interest in confidences being maintained

64. The Commissioner has outlined above the detriment which could occur to some of the parties if the information were to be disclosed. Effectively details of the third parties debts and of his finances would be disclosed to the whole world. Additionally details of the attempts by the district council to retrieve monies owed to it would also be disclosed, and the request was at a time when these issues were ongoing. The Commissioner recognises a strong public interest in the duty of confidence being maintained in this case.

The public interest in the information being disclosed

65. The Commissioner has outlined above that there is a public interest in information being disclosed which relates to public finances, debts owed to public authorities and what steps authorities are taking to retrieve the monies owed to them. The money is public money, and its loss would be a loss to the public purse.

Balance of the public interest

66. Having considered the above, the Commissioner considers that the public interest in the information being disclosed does not outweigh that in confidence being maintained. Although there is a public interest in the council being transparent on its management of public money, in this case the issue was a live issue and the information relates in part to a particular individual, his company his finances and by default his personal reputation. A disclosure would also be likely to engender a lack of trust in the council's ability to retain private information in confidence in other potential clients of the council.
67. The Commissioner considers that these factors outweigh the benefits of greater transparency in this case. The council was therefore correct to apply section 41 to the information.

Section 10

68. The complainant made her request for information on 15 February 2015. The council initially responded on 13 March 2015 applying exemptions to the information.

69. During the course of the Commissioner's investigation however it disclosed information to the complainant on 27 November 2015. This falls outside of the 20 day period required by section 10(1) of the Act. The Commissioner therefore considers that the council failed to comply with section 10(1) of the Act in this respect.

Right of appeal

70. 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

71. 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.
72. 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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