

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2016

Public Authority: Derbyshire Dales District Council
Address: Town Hall
Matlock
Derbyshire
DE4 3NN

Decision (including any steps ordered)

1. The complainant has requested recorded information from Derbyshire Dales District Council. The requested information concerns a public house, owned by the complainant, which has been listed by the Council as an asset of community value ("ACV") under the Localism Act 2011. The Council's decision to list the public house as an ACV is subject to an appeal to the First-Tier Tribunal (General Regulatory Chamber).
2. The Commissioner has decided that Derbyshire Dales District Council has properly applied section 42 to email correspondence it holds where a claim of legal professional privilege can be maintained. She has also decided that the Council does not hold any further email correspondence concerning the Council's decision to list the named public house as an ACV and consequently the Council has complied with section 1 of the FOIA.
3. The Commissioner requires the Council to take no further action in this matter.

Request and response

4. On 22 February 2016, the complainant submitted the following request for information to Derbyshire Dales District Council:

"I am writing to you to request a copy of the emails regarding [a named public house at a named location]. These emails will be from or to the following accounts:

[named person 1]

[named person 2]

[named person 3]

[named person 4]"

5. The Council responded to the complainant's request by email on 8 March 2016. The Council sent the complainant a number of documents attached to its response.
6. The complainant reviewed the information which was disclosed to him. He wrote back to the Council – also on 8 March, to express his concern that the disclosed information was incomplete. The complainant pointed out that there were no emails between the parties named in his request and he therefore asked the Council to conduct an internal review.
7. The Council responded to the complainant's email immediately, informing him that the emails were reviewed before they were sent to him and confirming that some emails between the persons named in his request had been withheld in reliance on section 42 of the FOIA, being subject to Legal Professional Privilege.
8. Having received the above response, the complainant wrote back to the Council – also on 8 March, to challenge its application of section 42. He stated that, "should they [the emails] contain specific legal advice these lines can be blacked out". He also asked the Council to confirm that a copy of all the emails will be sent to him.
9. The Council immediately replied to the complainant's email. It disclosed further information which the Council decided was 'not confidential in nature'.
10. The complainant wrote a further email to the Council on 8 March, asking the Council to confirm that it holds no other emails between the parties named in his request which concern the [named public house]. He also expressed his belief that the Council had deleted certain emails.
11. The complainant also wrote to the Council on 9 March asking for the same confirmation. Additionally, the complainant asked the Council to confirm "who else, apart from [named person 3] can an appeal be addressed to, since she will be the subject of the appeal".
12. On 16 March 2016, the Council provided the complainant with an additional email in response to his request. This email was from [named person 3] and concerned the [named public house]: It was an email which the Council had been able to retrieve from its IT system. The Council also confirmed that there were no other emails from [named person 3].

13. The complainant immediately replied to the Council following its latest disclosure. He asserted that he knows there are more emails and pointed to the recent appearance of the email disclosed on 16 March which had not previously been sent to him. The complainant then asked the Council to confirm the identity of the officer who will be able to retrieve the delated/not declared information.
14. The Council responded to the complainant's latest email on 16 March. The Council advised the complainant that it had raised a new query with the named officer about deleted emails. It advised the complainant that [named person 3] had remembered deleting the recently discovered email. That email was no longer stored in the email account of [named person 3]. The Council advised the complainant that it had followed up the recollection of [named person 3] with the recipient of that email and it was through this enquiry that the recently discovered email was found. The Council also advised the complainant that it had no designated officer who deals with deleted information.
15. The complainant replied to the Council's latest email later the same day. He asserted that there are more emails which concern the [named public house], sent or received by [named person 3]. He also pointed out that he had requested copies of emails sent by the Council's Senior Solicitor.
16. On 22 March the Council wrote again to the complainant. The Council confirmed to him that "all emails have been provided to you on 8 March 2016 as per your FOI request". The Council advised the complainant that once emails are deleted and 'emptied' from its IT system, they cannot be retrieved.
17. On 22 March the complainant asked the Council to extend his request for information to include; copies "of all emails sent or received by you regarding my freedom of information request or the [named public house], or me".
18. The Council responded to the complainant's refined or extended request on 29 March. The Council advised the complainant that, "a copy of the information, which can be disclosed is attached to this email" and "there are several emails that you requested which are exempt under section 42 of the Freedom of Information Act 2000 and is therefore withheld".
19. On 4 April the complainant wrote to the Council to request an internal review.
20. The Council conducted its internal review of both of the complainant's requests – that of 22 February 2016 and that 16 March 2016 and on 19 April it advised him of its outcome. The Council asserted that it has been comprehensive in its attempts to collate the information which he had requested and that its investigation indicates he has been given

everything the Council holds, other than that which is withheld in reliance on section 42 of the FOIA.

Scope of the case

21. The complainant contacted the Commissioner on 12 May 2016 to complain about the way his request for information had been handled.
22. The Commissioner has investigated the Council's reliance on section 42 of the FOIA in respect of information which it considers attracts legal professional privilege. She has also investigated whether the Council holds additional information it has not disclosed to the complainant.

Background information

23. The complainant is the owner of a public house which is identified in his request for information. The public house is the subject of a decision made by Derbyshire Dales District Council to list it as an asset of community value ("ACV") under the provisions of the Localism Act 2011.
24. At the time when the complainant made his requests for information, he had issued a claim at the First-Tier Tribunal (General Regulatory Chamber) against the Council's decision to list his property as an ACV.
25. A hearing of the First-Tier Tribunal took place on 27 July 2016 which identified a number of matters to be resolved between the parties and which the Council is currently considering.

Reasons for decision

26. Section 1 of FOIA states that –

“(1) 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.

27. The Commissioner has sought to determine the extent to which the Council holds information falling within the scope of the complainant's requests. To make this determination, the Commissioner applies the civil test of the balance of probabilities, which is in line with the approach

taken by the Information Rights Tribunal when it has considered whether information is held in past cases.

28. The Commissioner has investigated this complaint by asking the Council a number of questions about the searches it has made to locate the information sought by the complainant. The Commissioner's investigation also included questions about the possible deletion/destruction of this information.

The Council's representations

29. The officers named in the complainant's initial request were asked to search their individual email accounts for any emails sent or received regarding the [named public house]. The searches included the 'deleted items' and the 'recover deleted items' facilities in the officer's accounts.
30. Two of the officers work in the Council's Business Support Unit ("the BSU"), where information concerning AVC nominations is held in an electronic file and manual file. The electronic file is stored on a central drive on the Council's central computer network. Some of the information contained in the electronic file is held in duplication in the manual file and searches were made of both files to locate emails relating to the [named public house].
31. The Council also searched the ACV Outlook account which is managed by the Council's Business Support unit. This is an address open to members of the public to send in nomination forms. All emails relating to the [named public house] which were sent to individual accounts would have been transferred to the BSU ACV account.
32. In addition to the above, the Council's Legal Department holds two case files relating to the [named public house]. One of these files concerns the nomination of the public house as an ACV. The second file concerns the Tribunal proceedings referred to above.
33. Searches were carried out in the electronic case files which are stored on a central drive and also the Legal Department's manual files. The manual files were found to contain duplicates of documents held on the electronic case files.
34. The Legal Department does not have a case management system. This is because all correspondence and emails are saved in the Council's electronic case files.
35. When the complainant asserted his belief that the Council may have deleted emails, the officers named in his request were asked to search their deleted emails. These searches led to the discovery of one email held by the Council's Head of Corporate Services and this was provided

to the complainant on 16 March. This email has since been saved in the electronic case file for the [named public house].

36. The complainant was specific in the terms of his information requests and the searches undertaken by the Council have been relevant to the scope of his requests and the officers he named.
37. It was not necessary to search individual iPads, mobile phones or desktop computers for the information which the complainant seeks. This is because the officer's email accounts are on a single network which can be accessed only through the officer's desktop computer.
38. The Council does not hold a record of the search terms it used to locate the emails which the complainant seeks. That said however, the Council assures the Commissioner that it is likely it has used appropriate search terms using the name of the [named public house] or the complainant's name and/or surname], including variants of the spelling of these terms.
39. The Council acknowledges that one email had been deleted by its Head of Corporate Services. This email, referred to in paragraph 36 above, was sent to the Council's Communications and Marketing Manager.
40. The Council acknowledges the possibility that some emails containing administrative instructions may have been deleted. This is because its BSU provides administrative support to all of the Council's departments and consequently the BSU receives a significant number of emails requests for assistance on a daily basis. Once an instruction has been actioned by the BSU, the emails would have been deleted as there is no requirement for them to be saved. These instructional emails are solely of facilitative value and it is necessary to delete them to free up storage space within the individual email accounts of BSU officers.
41. The deletion of BSU email is not recorded. Where emails are retained, this is done in accordance with the Council's document and retention management policy which is available at:

<http://www.derbyshiredales.gov.uk/your-council/policies-plans-a-strategies/document-retention-management-policy>
42. Emails held by the Council's Legal Department which relate to the [named public house] are retained for seven years from the date of the last action on the files. After this period, the file is destroyed in accordance with the Council's policy.
43. The ACV files held by the Council's BSU are kept for six years after the file is closed.

44. The Council has a business need to hold information relating to properties nominated as ACVs under the Localism Act 2011. However, there is no legal requirement for the Council to retain emails.
45. The Commissioner asked the Council to explain what happens to emails once they have been deleted or emptied from the Council's IT system.
46. The Council explained that, when an individual deletes an email from their Outlook account, it is moved to the Deleted Items folder within the same account and remains there until the individual officer 'empties' it. The deleted emails are then transferred to the Recover Deleted Items folder, also within the same Outlook account, where it stays for fourteen days.
47. When an officer closes his or her account an on-screen prompt appears. This asks the officer to empty his/her deleted items folder if this has not already been done. Up to this point, an individual officer may personally recover their deleted emails provided that fourteen day period has not passed.
48. After fourteen days, deleted emails are moved to an 'Exchange' server backup database for a further thirty days. After this period has expired the deleted emails are no longer recoverable. This is because the Exchange Server database will be overwritten and therefore it no longer exists.
49. It is possible to recover emails from the backup database within the thirty day period. This would require the Council to prepare and submit a business case, to identify the date of deletion, to restore the database for that particular day – to create a 'Recovery Partition', to create storage space to hold the Recovery Partition and to search through all of the items found. This process would take the Council three days to perform and would likely exceed the 18 hours and £450 costs limit provided by section 12 of the FOIA.
50. The Commissioner has considered the Council's representations. On the basis of the assurances and information provided by the Council, the Commissioner has decided that, on the balance of probabilities, the Council holds no further emails other than those which it has withheld in reliance on section 42 of the FOIA. The Commissioner will now go on to consider the withheld emails and determine whether the Council is entitled to withhold them from the complainant.

Section 42 – Legal professional privilege

51. The Council has clarified its position in respect of an email it sent to the complainant on 8 March 2016. In that email the Council used the term 'not confidential in nature' which it believes is likely to have led the complainant to believe that the Council is relying on section 41 of the

FOIA – where information is withheld because it was provided in confidence. The Council has assured the Commissioner that it is not making a claim that section 41 applies to any of the withheld emails, however it does maintain a claim that section 42 does apply.

52. Section 42 provides that information is exempt from disclosure if the information is protected by legal professional privilege and where the claim to privilege could be maintained in legal proceedings.
53. There are two categories of legal professional privilege: advice privilege and litigation privilege.
54. In this case the Council provided the Commissioner with copies of the withheld emails and it has informed her that the Council is relying on both legal advice privilege and litigation privilege.
55. The Council asserts that the withheld emails contain legal advice. The Council points out that the emails are between the Council's senior solicitor and officers and other relevant parties seeking that advice.
56. The purpose of the emails from the Council's officers and relevant parties is to seek legal advice concerning the [named public house] as an ACV. The requests for legal advice were made to the Council's legal adviser.
57. The emails from the legal adviser contain legal advice given to officers and relevant parties.
58. The claim that litigation privilege applies to the email is founded on the fact that the complainant made his information request at the time he had made his claim to the First-Tier Tribunal and therefore legal proceedings were under way. The email correspondence was therefore between a client and its solicitor whereby the solicitor was providing legal advice relating to the proceedings and with the preparation of the Council's case.
59. The Commissioner has examined the withheld email correspondence. She is content that the contents of the withheld emails attract legal professional privilege. She accepts the Council's assertion that the emails attract advice privilege in respect the listing of the [named public house] as an ACV, and also that the emails attract litigation privilege on the grounds of on-going litigation. The Commissioner accepts the Council's assurance that confidence has been neither waived nor lost.
60. The Commissioner is now required to consider the public interest arguments which favour disclosing the withheld emails and those arguments which favour their continued withholding.

The public interest

Arguments in favour of disclosing the requested information

61. The Commissioner considers that some weight must always be given to the general principle that disclosure of publicly held information will generally promote accountability and transparency.
62. Disclosure of publicly held information may assist the public in its understanding of how public authorities make their decisions. This in turn may help foster greater trust in public authorities and allow greater public participation in the decision making process.
63. Here, the Commissioner acknowledges that disclosure of the withheld emails would assist the complainant in gaining a better understanding of the ACV process and of the decisions taken by the Council.

Arguments in favour of maintaining the exception

64. 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.
65. It is very important that individuals and public authorities – including Derbyshire Dales District Council, are able to consult with lawyers in confidence and be able to obtain confidential legal advice.
66. Should the 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.
67. In this case, the withheld emails relate to the Council's ACV functions which it derives from the Localism Act 2011. There is certainly a case to be made against disclosure of the emails on the grounds that it may impede future ACV nominations and objections. The Commissioner accepts that there is a need to safeguard the ACV process to ensure that future nominations and/or objections can be determined fairly. This need is greater than the complainant's more limited need to have disclosure of the Council's legal advice.
68. The Commissioner has published guidance on legal professional privilege. This guidance states that:

"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."

69. 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 his own position or legal advice beforehand.
70. 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..."
71. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
72. The Commissioner considers that it is fundamental to the legal process and justice that clients, including public authorities, are entitled to consult freely with their lawyers in confidence.

Balance of the public interest arguments

73. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
74. However, having considered the content of the withheld information and having noted that the matter to which the withheld information relates is still live, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure.
75. She 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.
76. 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. The Commissioner finds none of these circumstances present in this case. Having considered this case, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.

77. The Commissioner has decided that the council has properly applied section 42 to the withheld information

Right of appeal

78. 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

- 79. 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.
- 80. 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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