

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2017

Public Authority: London Borough of Brent
Address: Brent Civic Centre
Engineers Way
Wembley
HA9 0FJ

Decision (including any steps ordered)

1. The complainant has requested the council to disclose the instructions given and the legal advice it received from a barrister in connection to an employment dispute with a former member of staff.
2. The council refused to disclose the requested information citing section 42 of the FOIA.
3. The Commissioner is satisfied that section 42 of the FOIA applies to the withheld information. She therefore does not require any further action to be taken.

Request and response

4. On 19 July 2016, the complainant wrote to the council and requested information in the following terms:

"1. Can I formally ask that my request for receipt of the legal advice in respect of the exit payment to [name redacted] is to be treated as an F.O.I.

2. Can I also request as a F.O.I. details of the instructions/ terms of reference given by the Council to the legal adviser in respect of the above advice...I am assuming that I will not be given this information!"

3. In respect of the time that [name redacted] worked for the Councilplease split between working as a self- employed person, as a limited company and as an employee .Please attach dates to this information. If this information cannot be given please take as an F.O.I. request.
4. In respect of the departure of [name redacted] from working for Brent Council please give details of her exit arrangements. If this information cannot be supplied please treat as an F.O.I request.”
5. The council responded on 10 August 2016. It stated that it is public knowledge that the council sought legal advice from a specialist and leading employment law barrister concerning legal rights, obligations and remedies in respect of its employment relationship with a former employee (the focus of questions one to three). It is also public knowledge that, pursuant to a settlement agreement, their contract of employment was terminated by mutual consent for which they were compensated. The council advised that the amount paid to this individual has already been published, as it was considered to be in the public interest to do so. However, in respect of all other requested information it considered it was exempt from disclosure under sections 40 and 42 of the FOIA. In relation to the question four, the council confirmed again that it is public knowledge that it terminated this employee’s employment by mutual consent pursuant to a settlement agreement and the amount paid to this individual. However, again, it considers any other information requested about this individual is exempt from disclosure under sections 40 and 42 of the FOIA.
6. The complainant requested an internal review on 17 August 2016. He stated that he considered the public interest test should be reconsidered and that he believes the public interest rests in disclosure. He also asked a series of other questions relating to his original request.
7. The council completed its internal review and notified the complainant of its findings on 17 September 2016. It upheld the application of sections 40 and 42 of the FOIA and, in respect of section 42, upheld its previous consideration of the public interest test. It also addressed other questions the complainant raised in his correspondence of 17 August 2016.

Scope of the case

8. The complainant contacted the Commissioner on 23 September 2016 to complain about the way his request for information had been handled. Specifically, the complainant remains dissatisfied with the application of the exemptions cited and believes it is in the public interest to disclose the requested information.
9. The Commissioner's investigation was limited to considering the four questions originally asked in the complainant's request of 19 July 2016. She cannot and therefore did not consider the other questions the complainant asked the council in his correspondence of 17 August 2016.
10. During the Commissioner's investigation further information was disclosed to the complainant in relation to questions three and four of his request. As these two questions were resolved, the Commissioner will only consider the application of the exemptions cited to questions one and two in the remainder of this notice.
11. The council is of the opinion that the withheld information falling within the scope of questions one and two is all exempt from disclosure under section 42 of the FOIA. It has only applied section 40 of the FOIA in the alternative.
12. The Commissioner will first consider the application of section 42 of the FOIA. She will only go on to consider the application of section 40 of the FOIA if section 42 does not apply to some or all the withheld information.

Reasons for decision

13. Section 42 of the FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information.
14. However, this exemption is subject to the public interest test. So, in addition to demonstrating that the withheld information is subject to LPP, the council must consider the public interest arguments for and against disclosure and demonstrate that in a given case the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
15. The Commissioner considers there are two forms of LPP. Advice privilege and litigation privilege. In this case the council has argued that the withheld information constitutes both.
16. The council stated that the withheld information comprises of email correspondence between council officers and the council's barrister

relating to the termination of a, now, former employee's contract of employment and associated file notes. Many emails are instructions to the council's barrister and the advice that barrister provided during this dispute. For those communications that do not constitute instructions or legal advice, the council has argued that they are covered by litigation privilege. It stated that these communications were brought together to inform the barrister of the circumstances of this particular dispute and it was clear and obvious at the time this information was created that litigation was at least contemplated. In particular, if a settlement could not be agreed between the council and its former employer. If a settlement could not be agreed, it is highly likely that litigation would follow through the Employment Tribunal procedure.

17. The Commissioner has reviewed the withheld information and she is satisfied that the majority of communications are either instructions to the barrister or the barrister's legal advice. She is therefore satisfied that these communications are subject to advice privilege and therefore LPP.
18. There are a number of other communications that do not constitute instructions to the barrister or the barrister's legal advice. These are mainly the communications the council received from the former employee during this dispute. The Commissioner considers these communications constitute evidence or information the barrister required in order to provide the legal advice they did. It is also information which would be required if litigation commenced. The Commissioner agrees that at the time this information was created there was a strong prospect of litigation. Had an agreement not been reached between the two parties the dispute would have likely ended up before the Employment Tribunal and so the Commissioner is satisfied that these communications are covered by litigation privilege.
19. As the Commissioner is satisfied that all the withheld information is subject to LPP, she has concluded that section 42 of the FOIA is engaged. She will now go on to consider the public interest test.
20. The council stated that it acknowledged the assumption built into FOIA that to disclose information is itself of value and in the public interest in order to promote transparency, accountability, knowledge, understanding and confidence in relation to the activities of public authorities.
21. It also acknowledged that there is a particular public interest in openness and accountability concerning decisions on how public money is spent and that the wider circumstances surrounding the departure of the former employee are of public interest.

22. However, it stated that LPP is a fundamental principle of law. The council believes there is a strong inherent public interest in maintaining the confidentiality of legally privileged information. This is due to the importance of the principle of LPP and safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
23. The council stated that it is in the public interest that the council's decision making is, wherever appropriate, informed by expert legal advice especially if the council's actions could give rise to costly, protracted and damaging litigation.
24. The council advised that the amount paid to the former employee has already been published voluntarily and the reasons for the settlement were also explained at a public meeting of the council's Audit Committee on 30 June 2016. It believes this information provides the necessary transparency and accountability and therefore the public interest has already been met. Disclosure of the withheld information in this case is unnecessary and would not add anything further of public interest.
25. The Commissioner accepts there are public interest arguments in favour of disclosure. Disclosure would provide further more detailed information relating to the employment dispute and the reasons behind the settlement that was agreed. The settlement itself represents a noticeable amount of public funds and there is a public interest in knowing how public funds are spent and that it is proportionate and fair in the particular circumstances of a case.
26. The Commissioner also notes the complainant and others have formally objected to the payment made to the former employee to the council's auditors. The complainant considers the disclosure of the withheld information would assist in this process and enable the decision making behind this payment to be more closely examined.
27. However, it is the Commissioner's view that there is a strong inherent public interest in maintaining the integrity of LPP and therefore in maintaining the application of this exemption in this case. LPP is a fundamental requirement of the English Legal system. The concept protects the communications between a lawyer and client and ensures fairness in legal proceedings. In terms of legal advice, there is a need to protect the ability of a client to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice. If disclosure took place it would hinder the free and frankness of such discussions, the quality of advice that is given and the interests of the client. With regards to litigation, there is a need to protect confidential communications, whether it is those relating to the provision of advice

or the requesting of it or, other confidential communications made or brought together for the purposes of litigation. At the time the withheld information was created there was a real prospect of litigation, as no settlement had been reached. It would not be possible to conduct fair and unbiased legal proceedings, if confidential information relating to the merits of a case and the advice received was disclosed into the public domain.

28. The Commissioner notes that a settlement had been reached by the time the request was made and this was fairly recent. It is accepted that the confidential communications between the council and its lawyer were still fresh and current. The contents will be relevant to other cases under consideration (if indeed there are any) and future employment disputes.
29. The Commissioner considers the timing of the request is a significant factor in deciding where the public interest lies. The withheld information is not old, relating to a matter that had been long resolved by the time of the request. Instead the withheld information relates to a fairly recent employment dispute, which had been settled within a year or so of the request. The council considers the contents are still fresh and current and touch on issues that are of relevance to other employment disputes now and in the future. The Commissioner therefore considers the public interest in this case rests in maintaining the confidentiality of the communications, the integrity of LPP and the ability of the council to seek and obtain free and frank legal advice; the contents of which may have been required for litigation had the matter not been resolved.
30. The Commissioner also notes that the council has already voluntarily published the amount paid in settlement and the reasons why. In her view such actions go a reasonable way to meeting the public interest in such information.
31. Although the Commissioner acknowledges the complainant's reasons for gaining access to this information, it is noted that his objections to the payment to the council's auditor were made via a completely different statutory process. The Commissioner agrees with the council that this separate statutory process is the appropriate process to consider such objections. The council confirmed that the complainant's objections to this payment have been accepted by its auditor. But this simply means that his objection meets a certain set of criteria laid out in section 27 of the Local Audit and Accountability Act 2014. The auditor's acceptance is no reflection on the merits of the objection or that the council's auditor agrees there are issues with the accounts relating to this exit payment.

32. For the above reasons, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption.

Right of appeal

33. 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

34. 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.
35. 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

Samantha Coward
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Information Commissioner's Office
Wycliffe House
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