

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2018

Public Authority: Ealing Council
Address: Perceval House
14-16 Uxbridge Road
London.
W5 2HL

Decision (including any steps ordered)

1. The complainant has requested various information from Ealing Council regarding an application and a hearing for a Sexual Entertainment Venue (SEV) licence and Ealing Council's subsequent decision to rehear it at a later date.
2. Ealing Council applied sections 40(2) (personal information) and 42(1) (legal professional privilege) of the FOIA to entirety of the information.
3. The Commissioner's decision is that Ealing Council has correctly applied section 42(1) to the entirety of the requested information and does not require any steps.

Background information

4. On 28 January 2015 Blazes Club Limited's application for a Sexual Entertainment Licence (SEV) for Blazes Gentleman's Club was refused by the Council's Licencing Sub-Committee¹. The 'draft' minutes for the meeting were published on the Council's website².

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<http://ealing.cmis.uk.com/ealing/Meetings/tabid/70/ctl/ViewMeetingPublic/mid/397/Meeting/1266/Committee/16/Default.aspx>

2

<http://ealing.cmis.uk.com/Ealing/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=ICMSCX%2fKqrwjQLFRI5UbHAJdj7skdkcF2MM7jMwNsezMiy%2fi8TZSVg%3d%3d&rUzwRPf%2bZ3zd4E7Ikn8Lyw%3d%3d=pwRE6AGJFLDNlh225F5QMaQWCtPHwdhUfCZ%2fLUQzgA2uL5jN>

5. Following the hearing and before its formal decision notice had been issued, the Council received an email from the applicant's solicitors raising a number of issues regarding the soundness of the Council's decision making process regarding the SEV licence application. This was following an informal discussion between the applicant's solicitor and the Sub-Committee's clerk after the hearing.
6. Following an investigation into the issues raised, the Council stated it was satisfied there was no evidence that its decision making process relating to the SEV application was unsound³. In fact, it stated it was satisfied that the decision was entirely properly and lawfully made.
7. However, the Council accepted that the discussion between the applicant's solicitor and its officer (the Sub-Committee's clerk) was ill advised on the part of the officer. It said this was because it may have given rise to legitimate concerns about the process, albeit it had been shown to be unfounded, following an investigation.
8. As a result of this and given that its decision notice had not been issued, the Council decided that it would be appropriate for there to be a rehearing of the SEV application with a different sub-committee.
9. Accordingly, the Council notified the applicant's solicitors and the parties who had objected to the application, that a new hearing date would be arranged⁴.
10. In its letter to the applicant's solicitors dated 6 March 2015 (a copy of which has been disclosed in response to a previous FOIA request) the

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3

https://www.whatdotheyknow.com/request/299957/response/802994/attach/4/Response%20Part%201%20Redacted.pdf?cookie_passthrough=1

4

https://www.whatdotheyknow.com/request/299957/response/802994/attach/5/Response%20Part%202%20Redacted.pdf?cookie_passthrough=1

Council made the following points at the conclusion of its thorough investigation;

- a. Officers do not and did not make recommendations to the sub-committee on the merits of the application.
 - b. As with all decisions of the sub-committee, the reasons publicly announced by the Chair represent a summary of the reasons of the decision. The written reasons properly set out the full reasons for the decision including the advice given to the sub-committee by the sub-committee's legal advisor.
 - c. There is no evidence to suggest that concerns had been raised by officers.
 - d. There is no evidence whatsoever to suggest that two members of the sub-committee had closed minds or that the decision was predetermined.
 - e. Although indications may have been received that the decision was 'wrong' there is no evidence to support the view that any other officers had the same opinion.
 - f. Although the investigation concluded that the decision of the sub-committee was proper and lawful, the Council said in view of the applicant's concerns about the decision, it would reconsider the application at a new hearing.
11. In the event the applicant never proceeded with the new hearing.

Request and response

12. On 18 May 2016, the complainant wrote to Ealing Council (the Council) and requested information in the following terms:

'Based on the information provided in response to the Previous FOIA request, please provide the following information-

1. *The steps taken in "thoroughly" investigating the allegations that the SEV application had been predetermined, including-*
 - (a) *Interviews and details of all those interviewed during the course of the investigation;*
 - (b) *Reports, briefings and any other documents prepared in connection with the investigation;*

- (c) *Any written conclusions and/or correspondence relating to the investigation, including any findings and/or recommendations; and*
 - (d) *Any disciplinary investigations and proceedings taken as a result of the investigation.*
 - 2. *Who made the decision that the SEV application should be reheard?*
 - 3. *What authority that person has to decide that the application should be reheard; and*
 - 4. *What legal authority was there to rehear the SEV application when –*
 - (a) *“The decision was made entirely properly and lawfully”; and*
 - (b) *The Chair of the Sub Committee, Cllr Lauren Wall, “as is the case with all decisions of the sub-committee...[had] publically announced...a summary of the reasons for the decision”?*
- 13. The Council responded on 13 June 2016. In relation to question 1, it stated that the information was exempt from disclosure under sections 40(1), 40(2) and 42(1) of the FOIA. In relation to question 2, it stated that the decision to grant a re-hearing was made by the Director of Legal and Democratic Services. In relation to question 3, it said that the decision-maker had the authority to make this decision in accordance with the Council’s constitution which was available on its website. In relation to question 4, it stated that, to the extent that it was a request for it to provide a new opinion, this was not a request for information in accordance with the FOIA. To the extent that it was a request for an existing opinion, this was covered by legal professional privilege and therefore exempt under section 42(1) of the FOIA.

Scope of the case

- 14. The complainant contacted the Commissioner on 2 December 2016 to complain about the way his request for information had been handled.
- 15. Following discussions with the Council it confirmed that it had disclosed all of the information requested by the complainant with the exception of 25 emails with attachments all of which had been withheld under sections 40(2) and 42(1) of the FOIA. It clarified that this information fell within the scope of question 1(b) of the complainant’s request.
- 16. The scope of the Commissioner’s investigation is therefore limited to the Council’s decision to withhold the 25 emails (plus attachments).

Chronology

17. The Commissioner contacted the Council on 30 January 2017 to confirm the scope of the complainant's complaint and to request details of all the recorded information held, including that which had already been disclosed. The Commissioner also invited the Council to provide any additional arguments it wished in support of the FOIA exemptions it had cited.
18. The Council responded on 3 and 4 May 2017 with copies of all the information falling within the scope of the complainant's request (divided between that which had been disclosed and that which had been withheld) together with its further arguments in relation to sections 40(2) and 42(1) of the FOIA.
19. After some difficulty opening the electronic copies of the information sent by the Council, the Commissioner was able to discuss the matter further with the complainant in June 2017.
20. Having discussed the matter further with the complainant she wrote to the Council again on 4 July 2017 and invited it to complete a schedule detailing all the information falling within the scope of the request, identifying that which had been disclosed and in relation to that which had been withheld, the FOIA exemptions applied. She also asked the Council to provide copies of the attachments to the emails previous sent comprising the entirety of the requested information.
21. The Council responded on 27 July 2017 with the schedule duly completed and copies of the attachments to the requested information.
22. On 18 August 2017 the Council confirmed that it had disclosed all the recorded information it held falling within the scope of the complainant's request with the exception of 25 emails and attachments which it had withheld under sections 40(2) and 42(1) of the FOIA.
23. Between August and November 2017 the Commissioner exchanged further correspondence with the Council to clarify the reasons for the FOIA exemptions applied and to enquire whether there was any possibility of some of the information being disclosed in full or with redactions. At the conclusion of this further correspondence the Council stated that it was maintaining its position and withholding the entirety of the requested information under sections 42(1) and 40(2) of the FOIA.

Reasons for decision

Section 42 – legal professional privilege

24. Section 42(1) of the FOIA states 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".

25. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) as:

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation".

26. There are two types of privilege: 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal 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. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

27. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.

28. The withheld information in this case consists of 25 emails some of which have attachments. These emails comprise 9 communications between two of the Council's solicitors, 7 between the Council's solicitor(s) and its officers, 2 between the Council's solicitor and the applicant's solicitor and 7 between the Council's Councillors and its solicitors.

The Council's arguments

29. The Council has confirmed that the entirety of the information is being withheld on the basis of both legal advice privilege and litigation privilege. It has stated that the items are each privileged in their own right as individual items. Furthermore, it has argued that the whole set of emails are privileged as they consist entirely of client officers and lawyers communicating with each other for the purposes of the preparation of legal advice and the preparation of a response by the Council to a threat of litigation. It has also stated that it has not waived any privilege in relation to the actions it took in response to the threat of legal proceedings.
30. In relation to legal advice privilege, the Council has pointed out that when judging any given item, it is important to see them in context. Referring to the Court of Appeal's decision in *Balabel v Air India 1998* the Council stated that legal advice privilege can attach to a particular document even if that document is giving tactical advice, or else is simply keeping the other party informed. Furthermore, a particular document might still be privileged even if it does not expressly say 'please advise' or 'my advice is'.
31. In relation to litigation privilege, the Council has stated that there is some overlap with legal advice privilege. This is because the Council's lawyers were involved in the investigation from an early stage necessitated by the threat of litigation. However, the Council has pointed out that the involvement of lawyers is not an essential feature of litigation privilege. Documents prepared in relation to contemplated legal proceedings, whether at the request of a lawyer or not, and whether ultimately laid before the lawyer or not, are privileged if prepared with a bona fide intention of being laid before the lawyer for the purpose of taking legal advice. See *Southwark and Vauxhall Water Company v Quick 1878*.
32. In relation to each of the four email categories, the Council has commented as follows;
 - a. **Communications between the Council's solicitors.** The Council has objected to disclosure on the grounds of both legal advice and litigation privilege. This is because the communications are between two lawyers conferring about the appropriate advice to be given to, and the action to be taken by, the Council, including the preparation of correspondence in responding to the threat of legal action. The Council has pointed out that communications between lawyers acting for the same client can be covered by legal advice privilege. See *Mostyn v West Mostyn Coal Co 1876*.

- b. **Communications between the Council's solicitors and its officers.** The Council has objected to disclosure on the basis that the communications relate to legal advice to its officers regarding the threat of legal action.
- c. **Communications between the Council's solicitors and the applicant's solicitors.** The Council has objected to disclosure as the communications are between solicitors regarding potential legal proceedings. Alternatively, the Council has argued that the communications do not fall within the scope of the complainant's request.
- d. **Communications between the Council's solicitors and its Councillors.** The Council has objected to disclosure as the communications relate to its legal position in relation to the threat of legal proceedings. The threat of a legal challenge was explained to the Councillors and information was sought from them in relation to the factual assertions made by the potential claimant. Furthermore, Councillors' views were sought in relation to the possible steps that could be taken to resolve the litigation and the reasons as to why such steps might be appropriate. The Council has also claimed legal advice privilege in relation to the legal advice given to its members (as potential decision-makers on behalf of the Council) about the appropriate decision-making procedures, in relation to the current case and generally.

The complainant's arguments

- 33. The complainant recognises that the various communications between the Council's solicitors may possibly fall within the scope of advice privilege under the category of legal professional privilege. However, he does not believe that litigation privilege is applicable, as in his opinion there was no real prospect or likelihood of litigation. This is because the Council's motivation in rehearing the application was to avoid litigation.

The Commissioner's view

- 34. The Commissioner has viewed the withheld information and is satisfied that it is between the various parties stated.
- 35. The Commissioner accepts that the two communications between the Council's solicitor and the applicant's solicitor are outside the scope of the complainant's request. Even if the Commissioner is wrong in this respect the communications would be covered by legal professional privilege.
- 36. In respect of the remainder of the information comprising of 23 emails plus some attachments, the Commissioner is satisfied that it represents

legal advice provided to a client by their legal adviser(s) in response to a threat of legal action. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently the Commissioner finds that the withheld information attracts legal professional privilege on the grounds cited, and that on this basis section 42(1) is engaged.

The public interest test

37. As a qualified exemption, Section 42(1) is subject to a public interest test. The information must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.
38. Both the Council and the complainant have submitted arguments in relation to legal professional privilege which the Commissioner has considered below.

Public interest arguments in favour of disclosure

39. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

The Council's arguments

40. The Council recognises that there is a general public interest in transparency and accountability in relation to its decision making. It might be argued that this has been satisfied by the fact that it has published the draft minutes for the Council's Licencing Sub-Committee⁵ hearing on its website⁶. Furthermore, it has disclosed information in

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<http://ealing.cmis.uk.com/ealing/Meetings/tabid/70/ctl/ViewMeetingPublic/mid/397/Meeting/1266/Committee/16/Default.aspx>

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<http://ealing.cmis.uk.com/Ealing/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=ICMSCX%2fKqrwjQLFRI5UbHAJdj7skdkcF2MM7jMwNsezMiy%2fi8TZSVg%3d%3d&rUzwRPf%2bZ3zd4E7Ikn8Lyu%3d%3d=pwRE6AGJFLDNlh225F5QMaQWctPHwdhUfCZ%2fLUQzgA2uL5jNRG4jdQ%3d%3d&mCTIbCubSFfXsDGW9IXnlq%3d%3d=hFflUdN3100%3d&kCx1AnS9%2fpWZQ40DXFvdEw%3d%3d=hFflUdN3100%3d&uJovDxwdjMPoYv%2bAJvYtyA%3d%3d=ctNJFf55vVA%3d&FgPIEJYlotS%2bYGoBi5oIA%3d%3d=NHdUROburHA%3d&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJFf55vVA%3d&WGewmoAfeNR9xqBux0r1Q8Za60lavYmz=ctNJFf55vVA%3d&WGewmoAfeNQ16B2MHuCPMRKZMwaG1PaO=ctNJFf55vVA%3d>

response to an earlier FOIA request which explains the sub committee's decision and the reasons for proposing a new hearing⁷. See the 'background information' above.

The Complainant's arguments

41. The complainant acknowledges that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process.
42. The complainant is aware that the Council has already made public information in relation to the sub-committee's meeting and the reasons given for its proposal to rehear the original application.
43. The complainant does not believe that the information disclosed by the Council so far gives the 'full picture' regarding its proposal to rehear the original application and the 'legal basis' for its decision. He believes the Council's decision to rehear the application on the pretext that its decision notice had not been issued was ultra vires. By offering to rehear the original application the complainant believes that the Council effectively pre-empted any action the applicant's solicitor might make to challenge its decision. He believes this would have been the appropriate course of action in view of the fact that the Council believed its decision was sound. Any such action would reveal whether the Council's decision was in fact sound and intra vires.
44. The complainant has argued that there is a public interest in the requested information being disclosed in full as it will allow the public an opportunity to make up its own mind on the effectiveness of the Council's decision making. See *Cabinet Office and Christopher Lamb and Information Commissioner EA/2008/0024* and 0029⁸.

Public interest arguments in favour of maintaining the exemption

45. The Council has argued:

"It is important that officers and councillors are able to speak frankly to lawyers so that lawyers are able to properly give advice. In relation to litigation, it is important for the Council's legal advisors to know, at the outset, if there are any facts, or if there is

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[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20\(EA-2008-0024,29\)%20-%20Decision%2027-01-09.pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20(EA-2008-0024,29)%20-%20Decision%2027-01-09.pdf)

any evidence, which might potentially assist the opponent in litigation. If the people who were aware of relevant facts or evidence were inhibited from sharing that information with lawyers, then that would not be in the public interest. It would mean that the Council would not necessarily get accurate advice. It may mean that the Council became unnecessarily embroiled in litigation, rather than conceding and/or seeking a compromise. The public interest is adversely affected if the Council spends money unnecessarily on litigation, and/or the courts are clogged up unnecessarily on litigation, and/or the courts are clogged up unnecessarily by litigation, and/or the opponent has to wait for a longer period of time before obtaining a resolution”.

46. It has added that:

“It is important to note that, while the legal professional privilege arose out of a dispute between the applicant and the Council, the Council could rely on the privilege which protects these communication even if a different person brought a claim against the Council. Such litigation could be, for example, if another applicant for a licence wished to bring a challenge against the Council, or alternatively, if, for example, (redacted) sought to bring some legal claim or other against the Council.....Regardless of whether any of the (requested information is) relevant or not to such a hypothetical future claim by (redacted), the documents would be exempt from disclosure in such litigation due to the fact that they are privileged. Given the active and live, threat of litigation by (redacted), it would not be in the public interest to disclose such documents to (redacted), under the FOIA, which (redacted) would not otherwise have the right to see.”

Balance of the public interest test

47. The Commissioner has considered the arguments put forward by both the Council and the complainant, and her prior findings and those of the Information Tribunal in relation to legal professional privilege.
48. The Commissioner appreciates that there is a general public interest in public authorities being as accountable and transparent as possible in relation to their decisions.
49. The Commissioner believes that this public interest in accountability and transparency has been satisfied to a large extent by the information placed in the public domain by the Council. This includes the minutes of the sub-committee on its website and the information subsequently disclosed in response to a FOIA request.

50. However, there is also a strong opposing public interest in maintaining the right of the Council's legal advisors to communicate with and provide legal advice to its officers and members in confidence. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
51. Following an inspection of the withheld information and consideration of all the circumstances in this case, the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in this exemption. It is clear that the legal advice is relatively recent and it has not been waived by disclosure. It is also evident that advice is still 'live' to the extent that it could be relied upon in the future, should a similar set of circumstances arise to those in the present case.
52. The complainant does not believe that the information disclosed by the Council so far gives the 'full picture' regarding its proposal to rehear the original application and the 'legal basis' for its decision. He believes the Council's decision to rehear the application on the pretext that its decision notice had not been issued was ultra vires.
53. The Council believes it acted entirely properly and lawfully by following its own legal advice. The Commissioner takes the view that if there was any dispute regarding the lawfulness sub-committee's decision it was up to the applicant's solicitors to take the appropriate legal action as it had threatened to do. In the event, no such action was taken and the applicant decided not to proceed with the proposed rehearing.
54. The Commissioner has considered the views expressed by both the Council and the complainant and has concluded that the arguments for disclosure are not stronger than those for maintaining the exemption. Therefore she finds that the exemption provided by section 42(1) has been correctly applied.

Section 40(2) – Personal data

55. As the Commissioner has decided that section 42(1) of the FOIA has been correctly applied to the entirety of the requested information she has not gone on to consider section 40(2).

Right of appeal

56. 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

57. 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.
58. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF