

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2018

Public Authority: London Borough of Camden
Address: Old Town Hall
Judd Street
London
WC1H 9JE

Decision (including any steps ordered)

1. The complainant has requested information on advice given by the London Borough of Camden's ('the Council') Borough Solicitor to a named councillor.
2. The Commissioner's decision is that the Council has appropriately relied on the exemption at section 42(1) FOIA (Legal professional privilege) to refuse the request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The complainant initially requested information on 30 September 2017 regarding a councillor's application for a post with a planning consultancy and his contacts with or involvement with the practice prior to his application.
5. The Council responded promptly explaining that although the councillor was under no obligation to do so, he had sought and followed the advice he was given. He voluntarily stepped down from Planning Committee and Cabinet. This resulted in further requests from the complainant. The Council responded with information including advising that legal advice was given to the Councillor. This statement resulted in the request which is the subject of this decision notice.

Request and response

6. On 31 October 2017 the complainant wrote to the Council requesting an internal review of his earlier request and at the same time requested information in the following terms:

"I would therefore request that this advice or advices as the case may be, along with any accompanying correspondence passing between the parties be now disclosed in the overall public interest.

I would contend that in view of [the councillor's] position as a former member of the planning committee at which [the consultancy's] representatives appeared including 100 Avenue Road London NW3 on 15 June 2017, it is in the overall public interest that the date of the giving of such advice be made public, along with that advice."

On the same day the complainant submitted the request separately in the following terms:

- "1. What was the date of the date of the written advice given by the Borough Solicitor to Councillor [named]?
2. On the footing that the exact date is withheld, was it on or before or after 15 June 2017?
3. What are the contents of the advice given to Councillor [Named] and any related and surrounding emails, memos and correspondence?"
7. The Council responded on 14 November 2017. It responded to question 1 which rendered question 2 not applicable. It refused question 3 in reliance of section 42(1) with the public interest favouring maintaining the exemption.
8. Following an internal review the Council wrote to the complainant on 11 December 2017. It stated that it upheld the initial response.

Scope of the case

9. The complainant contacted the Commissioner on 23 December 2017 to complain about the way his request for information had been handled. The complainant advised the Commissioner:

"I consider that the fact that legal advice was proffered at all was subject itself to 'legal professional privilege' and as a result of these disclosures, it has been partly waived, leading to it being completely disclosable according to the case law.

I consider that [named person's] provision of the date of 10 July 2017 [date of the legal advice] was also privileged information and the date was clearly part of the written advice. If there were any doubt about this, I would invite you to request that the council send the advice to the Information Commissioner for consideration. It must be right that the date of any legal document forms an integral part of that document, and as a result, both of these partial waivers of 'legal professional privilege' constitutes a waiver to the whole advice given."

The complainant went on to query whether a solicitor/client relationship could exist between a councillor and the Borough Solicitor. The complainant also queried whether the request should have been considered under the Environmental Information Regulations ('EIRs') rather than the FOIA.

10. The Commissioner considers that the scope of her investigation is to determine whether the requested legal advice was appropriately considered under the FOIA and the exemption at section 42(1) was correctly relied on to refuse the request.

Reasons for decision

Regulation 2(1): is the requested information environmental information?

11. The Commissioner has first considered whether the requested information is environmental information. Regulation 2(1) of the EIR defines environmental information as:

"any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity

and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
(d) reports on the implementation of environmental legislation;
(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

12. The Commissioner has viewed the withheld information and is satisfied that it is not environmental information falling within any of the above definitions. She will therefore proceed to consider the Council's response under the FOIA legislation.
13. Section 42 of FOIA states:

“(1) Information in respect of which a claim to legal professional privilege ('LPP') or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”
14. LPP protects the confidentiality of communications between a lawyer and client. The complainant has questioned whether the Borough Solicitor and Councillor may be categorised as lawyer and client.
15. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both 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.

16. The Council explained to the Commissioner that the Borough Solicitor's client is the Council as a whole with individual officers and elected members forming part of that client base who can seek advice on matters as required. The Commissioner accepts that there was a professional legal advisor and client relationship.
17. The Council explained that elected members have duties as Members and a role of the Borough Solicitor is to give advice to assist them to undertake these duties lawfully and properly. This includes advising them on personal interests that they may have and whether these would conflict with or adversely affect their duties as councillors.
18. The Commissioner has seen the advice and considers it to be legal advice. She does not consider that the Council has waived LLP by informing the complainant of the presence of advice and the date of the advice. Both details do not comprise the content of the advice.
19. The Council explained that the information had not been shared outside the Council, no unrestricted disclosures, no disclosure to the world at large. It confirmed that at no point had the information been lost or compromised.
20. The Commissioner is satisfied that the requested information attracts LPP and therefore finds that section 42(1) is engaged. She will now progress to consider the public interest as set out in section 2(2)(b).

The public interest

21. In accordance with section 2(2)(b) the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
22. The Council provided details of its public interest deliberations to the complainant and repeated the same to the Commissioner. It explained that it recognised that disclosure would improve the transparency of the decision making process, allow public knowledge of the content of the advice allowing the Council's decisions to be held to account.
23. In favour of maintaining the exemption the Council cited the strong inherent public interest in maintaining LPP and allowing the Council to take legal advice confidentially. The Council advised that the advice was "prepared in the context of it being confidential legal advice."
24. The Council considers that it is in the public interest for councillors to be able to seek and obtain legal advice in a free, frank and open way in regard to their personal circumstances and any potential conflict of interest they may create for their role as a councillor.

25. In the Council's view the weight of the public interest in favour of maintaining the exemption is greater than the weight of the factors in favour of disclosure.
26. The complainant explained to the Commissioner his contention that, in view of the Councillor's position as a former member of the Council's planning committee, at which representatives of his future employer appeared, including on 15 June 2017:

"It is in the overall public interest that the date of the giving of such advice be made public, along with that advice.

It may be that Councillor [named] applied for his post with [the consultancy] whilst still on the Planning Committee in respect of a number of contentious planning applications, at which [the consultancy] sent a representative on behalf of the applicant, who addressed the Committee..."

27. The Commissioner understands that the complainant is concerned that the Councillor did not disclose that he had applied for a position at a consultancy which represents applicants at planning committees. As such he suggests that a conflict of interests may not have been declared.
28. The Council explained that the Councillor had orally informed the Borough Solicitor of his potential job opportunity, although the date was unknown. The Borough Solicitor indicated that the Councillor was under no obligation to do so or to seek advice. However, since that initial notification the Councillor sought and followed the Borough Solicitor's advice. The Borough Solicitor wrote to the complainant on 2 October 2017 advising:

"I remain extremely confident that he will and has to date successfully avoided any conflict of interest or any impropriety whatsoever and has dealt with this change in employment in an exemplary manner."

29. The Commissioner does not have a remit to consider whether or not an individual at a public authority acted appropriately in declaring any conflict of interests. Notwithstanding this, in any event, she has seen no evidence to contradict the Council's assertions of the Councillor's exemplary behaviour.

Balance of the public interest arguments

30. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the

principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

31. The Commissioner recognises the public interest in openness and transparency and she acknowledges the value in providing access to information to enable the public to understand more fully the conduct of public authorities and to encourage public debate and scrutiny.
32. She notes the complainant's concerns detailed above, however, having seen the content of the withheld information the Commissioner is aware that disclosure of the specific advice will not address his speculation.
33. In order to outweigh the inherent public interest in maintaining the exemption the Commissioner considers that there must be a compelling argument for disclosure. In this case the Commissioner has not been presented with any such argument and therefore considers the public interest is in favour of maintaining the exemption.
34. The Commissioner's decision is that in the circumstances of this case the Council correctly applied the section 42(1) exemption.

Right of appeal

35. 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

36. 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.
37. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**