

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 22 June 2021

Public Authority: Caerphilly County Borough Council
Address: foi@caerphilly.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about non disclosure/settlement agreements. Caerphilly County Borough Council ("the Council") provided the majority of information but withheld a blank copy of the agreement under section 42 (legal professional privilege) of the FOIA. The Commissioner's decision is that the Council has correctly applied section 42 to the withheld information. She does not require any steps to be taken.

Request and response

2. On 1 September 2019, the complainant wrote to the Council and requested information in the following terms:

"How much has CCBC spent on issuing confidentiality clauses/non disclosure agreements (including any legal fees) broken down in each financial year from 2014-15 to the end of 2018-19?"

In relation to the 32 staff who left in 2018-19 after signing confidentiality clauses/non disclosure, what was the total paid in agreement/exit costs?

Were any of the staff who signed agreements under investigation or facing potential disciplinary action? If so, how many? Were any of the 32 on sick leave? If so, how many?

Who has permission to sign off the above agreements?

Can you provide a blank copy of the confidentiality clauses/non disclosure agreement form?".

3. The Council responded on 10 October 2019 and provided the majority of information requested but withheld a blank copy of the non disclosure agreement form (part 5 of the request) under section 42 of the FOIA.
4. On 11 October 2019 the complainant requested an internal review of the Council's refusal to provide information relating to part 5 of the request.
5. The Council provided the outcome of its internal review on 15 November 2019 and upheld its position that section 42 had been applied correctly to the blank copy of the non disclosure agreement form.

Scope of the case

6. The complainant contacted the Commissioner on 19 November 2019 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation is to determine whether the Council correctly applied section 42 of the FOIA to the withheld information.

Reasons for decision

Section 42 – Legal professional privilege

8. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
9. LPP 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 DTI (EA/2005/0023)* ("Bellamy") 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 communications or exchanges come into being for the purposes of preparing for litigation."

10. There are two categories of 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 where 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. In this case, the Council considers advice privilege applies.
11. The withheld information in this matter comprises a blank copy of a non disclosure/settlement agreement which is used by the Council in cases involving a dispute with a member of staff which cannot be resolved and results in the termination of their contract. The Council confirmed that the content of the settlement agreement was developed by its Legal Services Department at the request of its HR Department. It considers the document to be a *"custom-built legal agreement, unique to Caerphilly Borough Council which was the result of the legal advice given to HR by the Council's legal services, based on the Council's individual requirements"*.
12. The Council explained that the settlement agreement concludes a dispute between it and an employee and is a legally binding contract. It pointed out that the settlement agreement *"clearly sets out the rights, liabilities, obligations and remedies of both the employer i.e. the Council and the employee"* and is based entirely on legal advice provided by its Legal Services Department.
13. Having considered the withheld information the Commissioner is satisfied that the information records and reflects legal advice that was confidential; was imparted within communications made between a client and professional legal advisers acting in their professional capacity; and made for the sole or dominant purpose of obtaining legal advice.
14. Information will only be privileged so long as it is held confidentially. The Council confirmed that settlement agreements are not disclosed to anyone other than an employee who is subject to such an agreement. As such the information has only been shared with a restricted number of people, including employees who leave via a settlement agreement and their legal advisors, in circumstances where that employee's employment has been terminated. The settlement agreement also contains a confidentiality clause which is binding on both the individual employee and the Council which prohibits the disclosure or communication to any third party the fact of, or terms of the agreement.

15. Whilst the Commissioner notes that the settlement agreement is shared with former employees who are subject to it and are outside the Council, those individuals are bound by a duty of confidentiality. In light of this and based on the Council's representations, as far as the Commissioner has been able to establish, the information was not publicly known at the time of the request and there is therefore no suggestion that confidence has been lost.
16. As the Commissioner is satisfied that 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.

Public Interest test

Public interest arguments in favour of disclosing the requested information

17. The complainant considers that, as public money is paid out to employees when they leave via a settlement agreement, there is a public interest in the form that those individuals have to sign being made publicly available. He pointed out that the Council is not unique in its use of such agreements as they appear to be used across the public sector. He therefore does not see any logical argument as to why the public interest is not served through disclosure of a blank copy of the agreement.
18. The Commissioner agrees that there is a significant public interest in the detail of how the Council is settling employment disputes, including in the level of public funds that are spent on this. She is also of the view that there is a legitimate public interest in understanding more about situations in which the Council may have been subject to a claim by a former employee had the matter not been settled.
19. The Council accepts that there is a public interest in openness, transparency and accountability and furthering the public debate in relation to settlement agreements. However, the Council argues that the public interest in this case has been largely met through disclosure of other information relating to the subject matter including the number of staff subject to settlement agreements and the amounts paid out each year in respect of settlement agreements.
20. The Council does not consider there is a significant public interest in releasing a blank copy of the agreement as it would not have any significant impact on the wider general public as it is used to settle employment disputes between itself and individual employees.

Public interest in favour of maintaining the exemption

21. The Council referred to the significant inbuilt weight of public interest in maintaining the principle behind LPP in enabling the Council to obtain

full, frank legal advice from its advisors in confidence. LPP is intended to provide confidentiality between clients and professional legal advisors to ensure openness and frankness between them. This confidentiality safeguards access to fully informed, realistic and frank legal advice, including weaknesses and counter arguments. The Council considers that this in turn serves the wider administration of justice because its legal advisors need to present the full picture to the client. If a legal advisor is unable to provide comprehensive legal advice to their client, for fear of disclosure, the quality of decision making is likely to be adversely affected. This would not be in the public interest.

22. The Council accepts that it should be accountable for the quality of its decision making. Ensuring that decisions are made based on good quality legal advice is a part of that accountability and it is in the public interest to know whether the Council followed, or went against any legal advice when it comes to decision making which will affect the public.
23. The Council considers that disclosure of the withheld information could prejudice its interests through exposing its legal position in the resolution of future employee/employer disputes. This would have a negative impact on the quality of decisions made and the Council does not believe this would be in the public interest.

Balance of the public interest

24. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*¹, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
25. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in a previous case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need

¹ Appeal number EA/2005/0023

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..."

26. The Commissioner considers that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. This is in addition to the particular public interest that the Commissioner believes applies in this case and is referred to above at paragraph 18. However, in this case, the Commissioner considers that the public interest has been served to some extent through disclosure of information relating to the numbers of settlement agreements it has entered into and the annual costs to the Council.
27. In reaching a view on where the public interest lies in this case, the Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, she accepts that the withheld information is "live" in that the document is currently being used by the Council to settle employment disputes. It is clear to the Commissioner in this case that the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure.
28. The Commissioner's conclusion is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. This means that the Council was not obliged to disclose the information in question.

Right of appeal

29. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.

31. 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

Joanne Edwards
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