

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

Date: 28 February 2024

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant requested legal advice in relation to the handling of a previous request for information. Northumberland County Council (the Council) withheld the information requested under section 42 (legal professional privilege). The Commissioner's decision is that the Council correctly applied section 42 to the request. He does not require any steps to be taken.

Request and response

2. On 23 July 2023 the complainant wrote to the Council and requested information in the following terms:

"I note that in respect of the above matter and following my request of 29th April 2022 for information that you emailed me on 20th June 2022 informing me that legal advice was being taken by upon my request and that I would hear from you by 1st July 2022. Please let me have a copy of your instructions to the legal adviser and a copy of the advice given.

This information is requested under EIR and FOI for the avoidance of doubt.

This relates to requests 10799 and 11428”.

3. The Council responded on 21 August 2023 and stated that the information requested was exempt under section 42 of the FOIA. It upheld this position in its internal review dated 30 August 2023.

Scope of the case

4. The complainant contacted the Commissioner on 1 September 2023 to complain about the way their request for information had been handled.
5. The scope of the Commissioner’s investigation is to establish the whether the Council should disclose the information requested.

Reasons for decision

Correct access regime

6. The Commissioner has first considered whether the requested information is environmental information, as defined by regulation 2(1) of the EIR.
7. In this case, the complainant has requested legal advice sought by the Council relating to its handling of previous freedom of information requests. The Commissioner notes that some of the previous requests for information were for environmental information as they related to two planning applications. Other requests were for information on officers who had been involved in the planning applications in question. The Commissioner considers that the planning system is a measure that is likely to affect the elements and factors of the environment and information relating to planning applications would constitute environmental information as defined by regulation 2(1)(c).
8. However, the request under consideration in this notice relates to legal advice concerning the Council’s handling of previous information requests. The withheld information relates solely to the Council’s procedures for handling the requests concerned, as opposed to information on matters relating to the environment itself or information relating to the planning applications concerned. In light of this the Commissioner has determined that the Council correctly handed the request under the FOIA.

Section 42 – Legal professional privilege

9. Section 42(1) of 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. LPP protects the confidentiality of communications between a lawyer and client.
10. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
11. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the 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.”
12. 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 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.
13. The Commissioner has viewed the withheld information and based on this, and the wording of the request he is satisfied that the information is subject to legal professional privilege, specifically advice privilege. Furthermore, the Commissioner is aware of no evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

Public interest test

14. The Council has acknowledged that there is a public interest in transparency and accountability. Disclosure of the withheld information would facilitate this, and allow further understanding of its decision making processes around responding to freedom of information requests.
15. The complainant has referred to the subject matter associated with the request, ie the two planning applications which the original, earlier requests related to. The complainant alleges that the Council was incorrect in granting planning permission in respect of the two applications and believes that permission was granted in breach of planning policies, guidance and legislation. The complainant has raised various complaints with the Council about the planning permissions in question. They have concerns about the way these complaints were investigated, and believes that a conflict of interest occurred in the management of these complaints. The complainant has also raised a complaint with the Local Government Ombudsman about the planning applications in question.
16. In addition, the complainant referred to earlier information requests they submitted and the fact that there was a significant delay in the Council providing the outcome of its internal review in respect of one of the requests. The Council has advised that although the internal review was undertaken promptly, due to an error on its part, the response was erroneously marked as being sent. It was only when the complainant queried the delay did the Council become aware that its internal response had not actually been issued. The complainant believes that the delay in providing the outcome of its internal review was a deliberate attempt by the Council to frustrate the process of matters in relation to their complaint to the Ombudsman about the planning applications.
17. The complainant considers that disclosure of the withheld information is necessary in order to facilitate transparency and accountability into the handling of their requests for information which were submitted to identify failings in the way that planning permission was granted for the two applications.
18. In respect of the public interest in maintaining the exemption, the Council considers it to be of vital importance to maintain its ability to obtain confidential advice from its lawyers.
19. The Council referred to the strong public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. The Council considers it is important that any legal advice

given "is fully informed and reasoned". Full and frank advice ensures that the Council is able to make fully informed decisions.

20. Whilst the Council acknowledges that there is an inherent weight in favour of transparency and openness in its processes, it does not consider that this extends as far as undermining the concept of LPP. The Council also pointed out that even though it considered the legal advice itself to be exempt from disclosure, it confirmed that legal advice had been sought, the date it was sought, and explained why the legal advice itself was not disclosable.
21. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
22. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".
23. In this case, the withheld information relates solely to the Council's handling of previous requests for information submitted by the complainant. As such, the Commissioner accepts that they have a personal interest in accessing the information. However, the withheld information is only concerned with Council's obligations under information access regime in responding to the complainant's requests. As such, the Commissioner does not consider that disclosure would enhance the public's understanding of the Council's decision making process or its handling of associated complaints linked to the planning applications which were the focus of the earlier requests.

24. Having regard to all the facts of the case the Commissioner is not aware of any public interest arguments that are sufficient to outweigh or override the inbuilt public interest in the information remaining protected by LPP. The Commissioner considers that the balance of public interest lies in withholding the information and protecting the Council's ability to obtain free, frank and high-quality legal advice without the fear of premature disclosure
25. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, the Council has correctly applied section 42(1). The Commissioner requires no further action to be taken by the Council in relation to this request.

Right of appeal

26. 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

27. 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.
28. 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
Senior Case Officer
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