

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 November 2009

Public Authority: St. Helens Council
Address: Town Hall
Victoria Square
St. Helens
Merseyside
WA10 1HP

Summary

The complainant requested all material held by St Helens Council (the 'Council') relating to protected pay for Council employees. The Council provided a series of information to the complainant but withheld some information because it was protected by legal professional privilege. During the course of the Commissioner's investigation the Council voluntarily disclosed further information to the complainant, but maintained that legal advice it had obtained was exempt from disclosure. The Commissioner's decision is that Council was entitled to withhold the legal advice under section 42(1) and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner also finds that the Council breached section 17(1) (b) of the Act by failing to specify the exemption in its response to the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 5 November 2007 the complainant wrote to the Council and requested the following information relating to protected pay and Council employees:

"I would now like to formally request under Freedom of Information legislation that I be given access to all material including e-mails, covering letters, any notes from

telephone conversations, briefing documents, reports and minutes from Chief Officers Group, notes to the Policy Executive and Leaders and any Departmental Correspondence that relate to the matter...

I would also like a copy of the contract of employment served to our employees at the commencement of the protection. I would further like a copy of the Cot 3 agreement although I can understand to protect an individual's details their names could be withdrawn from the document."

3. The Council responded on 3 December 2007 and disclosed a series of information falling within the scope of the request. However, it stated that it held further information which it was withholding because it was protected by legal professional privilege. The Council stated that it considered the public interest in withholding the information outweighed the public interest in disclosure.
4. The complainant wrote to the Council on 18 December 2007 and requested an internal review of the Council's response to the request.

The Investigation

Scope of the case

5. On 22 January 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - the Council's decision to withhold information under section 42(1);
 - her belief that legal professional privilege had been waived by the Council;
 - additional information withheld by the Council in response to the request; and
 - the Council's failure to respond to her request for an internal review.
6. Having been contacted by the Commissioner about the failure to provide an internal review, the Council wrote to the complainant via email on 21 February 2008 and waived its right to conduct an internal review of its response to the request. The Council also informed the Commissioner of this via email on 22 February 2008.
7. During the course of the Commissioner's investigation the Council voluntarily disclosed further information relevant to the request to the complainant.
8. On 11 September 2008 the Commissioner wrote to the complainant to outline the findings of his investigation into her complaint and establish whether she would be prepared to informally resolve the complaint.
9. On 25 September 2008 the complainant responded to the Commissioner and stated that she believed the public interest favoured the disclosure of the information withheld under section 42(1) of the Act. As the outstanding element of

her complaint to the Commissioner, this Decision Notice only addresses the aspects of the Commissioner's investigation which relate to information withheld by the Council under section 42(1).

Chronology

10. The Commissioner wrote to the Council on 18 November 2008 with a series of enquiries regarding its handling of the request. These included a request for a copy of the information withheld under section 42(1) of the Act.
11. The Council provided a substantive response to the Commissioner's enquiries on 22 December 2008 and provided him with a copy of the information it had withheld under section 42(1).

Findings of fact

12. The information withheld by the Council is instructions to Counsel and legal advice received regarding the issue of pay protection and equal pay claims settlements.

Analysis

Exemptions

13. Section 42(1) provides 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.”
14. The principle is based on the need to protect a client's confidence that any communication with his/her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is contemplated or pending).
15. The Commissioner inspected the withheld information and was satisfied that it was communications between an external solicitor and the Council for the clear purpose of obtaining professional legal advice. The Commissioner was therefore satisfied that the information was covered by legal advice privilege.
16. The Commissioner went on to consider whether legal professional privilege may have been waived in this case. The Commissioner's approach is that privilege will be waived where there has been a partial disclosure of the contents of legal advice within the context of litigation. However, partial disclosure outside litigation will not constitute waiver of privilege. During the course of the Commissioner's investigation, the Council confirmed that the contents of the withheld legal advice had not been disclosed in the context of litigation. The Commissioner is satisfied

that there is no indication legal professional privilege had been waived by the Council in relation to the withheld information.

Public interest arguments in favour of disclosing the requested information

17. The complainant has argued that it is in the public interest that the Council should be open, transparent and accountable in its decision-making. The Commissioner accepts that some weight must be attached to the principles of accountability and transparency in the decisions and actions of public authorities, in addition to the assumption in favour of disclosure within the Act.
18. The Commissioner also recognises the public interest in there being transparency of the Council's decisions and actions regarding protected pay, particularly in the wider context of equal pay claims. Equal pay is an ongoing issue for all employers and one which attracts a significant degree of campaigning activity and media interest nationally. There is a public interest in understanding the legal basis and rationale for the Council's approach to an issue affecting the terms of a group of its own staff, in addition to understanding the approach of public authorities to an issue of wider relevance to employment law.
19. In *Pugh v the Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people". The Commissioner notes that the contents of the requested legal advice could affect the terms and conditions of certain groups of the Council's employees affected by pay protection issues, in addition to being of interest to a larger group of people in the wider legal context of equal pay issues. However, in this case the Commissioner does not consider that the number of people likely to be affected by the request legal advice is significant enough to represent a strong public interest in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

20. The Commissioner recognises that there is a strong inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that clients are able to receive advice from their legal advisers in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice is based upon a full exchange of information pertinent to the case. Eroding the principle of legal professional privilege could therefore harm the ability of parties to effectively determine their legal opinions, or to defend or seek legal restitution against other parties in accordance with their rights. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*:

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

21. The conclusion reached in *Pugh v the Information Commissioner and Ministry of Defence (EA/2007/0055)* was that the public interest in favour of disclosure would have to be 'exceptional' where legal professional privilege is engaged. However the Tribunal did not require 'exceptional' factors in favour of disclosure, "...just as or more weighty than those in favour of maintaining the exemption."
22. The Council has argued that the public interest favours the maintenance of the exemption because disclosure would undermine the lawyer-client relationship in addition to prejudicing its legal position regarding the subject of protected pay and equal pay claims. The Council considered that these factors outweighed the public interest arguments in favour of disclosure at the time of the request.
23. The Commissioner recognises that passage of time can be a factor in favour of disclosing privileged information. However, the Commissioner has taken into account the fact that the legal advice was recent at the time of the request and there was a possibility of claims and legal challenges against the Council's position.
24. The Commissioner considers that the principle of legal professional privilege is one that should only be overturned for compelling reasons. Whilst there is clearly public interest in understanding the Council's legal position in relation to protected pay, the public interest in the principles underpinning legal professional privilege is considered to be strong.

Balance of the public interest arguments

25. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities. Disclosure of the legal advice in this case may assist the public's understanding of the approach of the Council to protected pay for its employees. However, the Commissioner does not consider that the legal advice would affect a significant number of people.
26. The Commissioner also accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court Case of *DBERR v Dermod O'Brien* who said:

"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)...The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53)
27. The Commissioner has taken into account the public interest in transparency of the Council's actions and in understanding the Council's approach to protected pay for its employees. However, due to the limited impact of the legal advice he

does not consider that the public interest in disclosure is particularly strong in this case. The Commissioner has concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosing the information.

Procedural Requirements

28. In its response to the request dated 3 December 2007, the Council stated that it had withheld the information because it was protected by legal professional privilege. However, it breached section 17(1)(b) of the Act because it did not specify that the information was being withheld by virtue of section 42(1) of the Act.

The Decision

29. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Council correctly relied upon the exemption under section 42(1) of the Act; and
 - It correctly determined that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
30. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Council breached section 17(1)(b) of the Act because it referred to the subject matter of the exemption but failed to specify the section 42(1) exemption when it refused the request.

Steps Required

31. The Commissioner requires no steps to be taken.

Other matters

32. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Paragraph 38 of the section 45 Code of Practice (the "Code") states:

"Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint..."

Paragraph 40 of the Code states:

“Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable.”

In this instance, the Council failed to inform the complainant that it would not be conducting an internal review until following the intervention of the Commissioner.

In an email to the complainant of 21 February 2008 the Council stated that it did not conduct an internal review of the request on the basis that the initial response had been provided by the Council's most senior legal officer. The Commissioner notes that the Council has acknowledged a need to revise its procedures to avoid a repeat of the circumstances of this request and he expects that its future practice will conform to the recommendations of the Code.

Right of Appeal

33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of November 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Refusal of Request

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Legal Professional Privilege

Section 42(1) provides 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.”