

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 December 2009

Public Authority: Bolton Council
Address: Chief Executive's Department
1st Floor
Bolton Town Hall
Bolton
BL1 1RU

Summary

On 18 May 2009 the complainant submitted a Freedom of Information request to Bolton Council (the 'council') for a copy of the legal advice documents it received in 2007 regarding its current parking regulations. Certain sections of this advice had been discussed at a public meeting. The council concluded that legal privilege had been waived in relation to these sections, and therefore disclosed them to the complainant. However, the council claimed that the rest of the legal advice was exempt from disclosure under section 42 of the Freedom of Information Act. At internal review, the council upheld its refusal to supply the withheld information on the basis of section 42(1). The Commissioner considers that the council was correct to cite section 42(1) and that the public interest favours maintaining the exemption.

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.

Background

2. The complainant has informed the Commissioner that Bolton Council has been operating a Decriminalised Parking Enforcement System (DPE) since September 2000. In 2007, it was alleged that the council had been operating most of the system contrary to law. The information sought by the complainant is legal advice that the Council obtained regarding matters arising from the operation of the DPE.

The Request

3. On 18 May 2009 the complainant requested that Bolton Council (the 'council') provide him with the following information:

'a copy of the legal advice document you received from a barrister at Kings Chambers between May 07 and November 07, this was legal advice you undertook over the current parking regulations.'

4. On 17 June 2009 the council provided the complainant with two extracts of the legal advice. These sections of the legal advice had been discussed at a public meeting and the council therefore considered that legal privilege had been waived in respect of those parts. However, the council refused to disclose the remaining parts of the advice as they were subject to legal professional privilege and therefore exempt under section 42 of the Freedom of Information Act 2000 (the 'Act'). The council provided some public interest arguments to justify its refusal to supply the withheld information. It conceded that there is a public interest in informing discussions about parking enforcement in Bolton. However it also argued that there is a strong public interest in maintaining the confidentiality of communications between a client (in this case, the council) and their legal advisors. It therefore believed that the balance of public interest lay in withholding the remainder of the advice.

5. On 2 July 2009, the complainant requested an internal review of the decision.

6. On 20 July 2009 the complainant made a further request for:

'a section of the legal advice document which contains the two date issue (sic), you received from a barrister at Kings Chambers between May 07 and November 07, this was legal advice you undertook over the current parking regulations'.

7. The internal review was completed on 29 July 2009. It upheld the refusal of the initial request on the basis of section 42(1). The internal review confirmed that some of the advice had been referred to in a report to a meeting of the Executive on 26 November 2007, when the meeting was open to the public. As the report summarised some parts of the advice, the council concluded that legal professional privilege had been waived for those sections and released them to the complainant. The council repeated its earlier public interest arguments and

concluded that the balance of public interest lay in withholding the remainder of the advice. It also responded to the request dated 20 July 2009 and confirmed that it understood the complainant to be seeking withheld sections of the advice. The council confirmed that the requested information was exempt under section 42(1) of the Act.

The Investigation

Scope of the case

8. On 9 August 2009 the complainant contacted the Commissioner to complain about the way his request of 18 May 2009 had been handled. The complainant specifically asked the Commissioner to consider the refusal of the council to disclose the whole of the requested document. He considered there was a huge public interest in Bolton over parking issues. In view of this the Commissioner has investigated and made a decision about the sections of the information that were withheld in response to the request dated 18 May 2009. As the complainant did not complain about his request made on 20 July 2009 the Commissioner has not considered it further.

Chronology

9. Between 7 August 2009 and 7 September 2009 the complainant clarified with the Commissioner that it was only the advice obtained between the dates provided in his request in paragraph 3 which was of concern. This clarification was required due to some confusion that had arisen because of another related but separate complaint the complainant had lodged with the Commissioner. The complainant also provided the Commissioner with his public interest arguments in favour of disclosure.
10. On 16 September 2009 the council provided its public interest arguments to the Commissioner. It also provided copies of the complete legal advice documents that had been withheld together with copies of the redacted versions that were released to the complainant.

Analysis

Exemptions

Section 42

11. The full text of section 42 is available in the Legal Annex at the end of this Notice.
12. Legal Professional Privilege (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; 4 April 2006)* 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 [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (Paragraph 9).

13. There are two types of privilege – litigation privilege and legal advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated. In 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 attract privilege.

14. For the avoidance of doubt, the Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/013)* also confirmed that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.
15. In this case the legal advice was sought by the council regarding its policy in relation to current parking regulations. The advice was provided in two documents: one dated 19 August 2007 and one dated 2 November 2007.
16. A member of the council (the client) sought legal advice from a barrister at King’s Chambers (the professional legal adviser) in connection with this policy. The advice sought was confidential and the sole purpose of the communications was to obtain and provide legal advice. The advice meets all three conditions and the Commissioner is therefore satisfied that it is subject to advice privilege.
17. The complainant has argued that legal professional privilege has been waived in respect of the remaining information in the advice dated 19 August 2007. He asserts that the full version of that advice was shown to an Inspector working for Bolton Police and that this means that privilege has been waived and therefore the exemption in section 42(1) of the Act is no longer applicable to that information. The Commissioner notes that the complainant has no evidence to support this view. The council has categorically stated that the documents were not shown to the police. It has checked with council officers and with the police superintendent himself.
18. Irrespective of whether the police were shown the advice the Commissioner is satisfied that LPP has not been waived in relation to the remaining withheld information. He notes that, in concluding that it had waived privilege in relation to the sections of the advice disclosed to the complainant, the council followed the approach of the Information Tribunal in the case of *Kirkaldie v Thanet District Council (EA/2006/001)*. However when considering the issue of waiver the Commissioner has opted to adopt the approach of a differently constituted Tribunal in the case of the *Foreign and Commonwealth Office v the Information Commissioner (EA/2007/0092)*. In that case the Tribunal argued that LPP is not

waived if legal advice has been partially disclosed outside the context of litigation.

19. In this case the redacted versions of the advice released by the public authority were disclosed outside of a litigation context. Moreover, any disclosure to the police that may or may not have occurred would also have been outside of a litigation context. Therefore, in the Commissioner's view, LPP has not been waived in relation to the remaining withheld information.
20. Since section 42 is a qualified exemption it is subject to the public interest test under section (2)(2)(b) of the Act. This states that the duty to provide information in section 1(1)(b) does not apply, if or to the extent that

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

The Commissioner has therefore considered the public interest arguments in favour of maintaining the exemption and in favour of disclosing the information below.

Public interest arguments in favour of disclosing the requested information

21. The Commissioner considers that there is a public interest in the council being accountable and transparent about the decisions it has made regarding its parking enforcement policy. In this case disclosure of the legal advice would inform the public about the legal basis for those decisions. In the Commissioner's view disclosure would demonstrate the thoroughness of the advice and would likely increase public confidence in the council's decisions.
22. There is also a public interest in members of the community being able to challenge the decisions that affect them from a more informed standpoint. The Commissioner considers that disclosure of the withheld information would assist people who are seeking to challenge the council's decisions in relation to its parking enforcement policy.
23. The Commissioner notes that there has been a considerable amount of public debate and concern regarding the public authority's parking enforcement policy. The public authority has accepted that the public interest in informing that ongoing debate is a relevant argument in favour of disclosure in this case.
24. Finally the public authority has acknowledged that different local authorities have taken various approaches to decriminalised parking enforcement. It has argued that disclosure of its legal advice would not substantially aid public understanding because the facts and issues relevant to Bolton Council will be different to other authorities. Whilst the Commissioner accepts that the issues relevant to the council will not be pertinent to all other local authorities, he nevertheless considers that the advice would to some degree inform the wider debate about decriminalised parking enforcement.

Public interest arguments in favour of maintaining the exemption

25. The council argued, and the Commissioner agrees, that there is a strong public interest in protecting the established principle of confidentiality in communications between legal advisors and their clients. In dealing with controversial matters the council needs to be able to take legal advice in confidential circumstances in order to inform its decisions. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.
26. The above argument is supported by the comments made by the Tribunal in the *Bellamy* case in which it stated that disclosure was unlikely to be justified in most cases as:
- '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 cut case...'*
27. In this particular case there is a public interest in preserving the council's ability to seek and obtain full and frank advice regarding its parking enforcement policy. This ensures that it can take decisions regarding this contentious issue that are compliant with the law and that are based on fully informed and thorough legal advice.

Balance of the public interest arguments

28. Having established that the arguments above are relevant to the circumstances of this particular case the Commissioner has considered whether those in favour of disclosure are outweighed by those in favour of maintaining the exemption. In carrying out the balancing exercise he has borne in mind that there is an assumption in favour of disclosure in the Act.
29. In this case, the complainant believes that the council has been involved in illegal activity and is guilty of corrupt parking enforcement. He has informed the Commissioner that the District Auditor is investigating the "extensive illegalities of Bolton's parking enforcement". He believes there is a "substantial amount of evidence that proves fraud, deception and corruption by Bolton council officers in the parking and legal services department" which has been provided to the auditor. He also believes that the requested legal advice will provide further "damning information harmful to the council".
30. The complainant has informed the Commissioner that car park signage on the conditions of use signs in all off-street car parks in Bolton were not in accord with the Traffic Regulation Orders. The complainant has explained that appeals were made against the council and more than one tribunal adjudicator found that the signs did not convey to a motorist the clear intention of what a driver should do or what would happen to them if they caused a contravention in the car park. The complainant believes the council disregarded the findings of these appeals.

31. The complainant has pointed out that there is great public resentment towards the council in relation to its parking enforcement policy and argues that parking issues have been regular front page news in The Bolton News since 2007.
32. The Commissioner considers that the complainant's assertions above lend some weight to the argument regarding greater accountability and transparency. When considering the significance of this argument he has also noted the Information Tribunal's comments in the case of the *Foreign and Commonwealth Office v the Information Commissioner (EA/2007/0092)*. In that case the Tribunal stated that the public interest in favour of disclosure must be "more than curiosity as to what advice the public authority has received". The cases where transparency and accountability were significant factors must be those where "there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice".
33. The Commissioner notes the level of public concern regarding parking enforcement in Bolton. Having reviewed the withheld information he considers that, if disclosed it would ensure greater transparency and accountability on the council's part. As previously indicated he also considers that it would give the public greater confidence in the council's decisions and allay some of the concerns that have been expressed. In view of this he has attributed some weight to the accountability and transparency argument.
34. The complainant believes that there are other similar cases where councils have followed unlawful parking enforcement activities and the local police have failed to act against them. He implies that the police investigation in Bolton ended without a proper conclusion because it was not conducted effectively. However he has not supplied any evidence to support this assertion and therefore the Commissioner has not given this point any weight.
35. Whilst he has attributed some weight to the argument regarding accountability and transparency above in view of the ongoing public concern, the Commissioner notes that the police investigation into the conduct of the council did not result in any proceedings against it. Furthermore the District Auditor has also conducted an examination of the council's 2007/08 accounts and they were signed off with an unqualified opinion.
36. The complainant also suggested that the Department of Transport found that all of the parking bays in Bolton were unlawful hybrid bays that were not compliant with road marking requirements prescribed by the Traffic Signs Regulations and Directions 2002. He indicated that despite being advised to cease enforcement pending the correction of the markings, the council continued to carry out enforcement activity. However the Commissioner notes that the executive meeting minutes dated 26 November 2007 indicate that enforcement was to be suspended whilst the road markings were corrected. In the absence of evidence to the contrary the Commissioner does not consider that this gives any further weight to the arguments in favour of disclosure.

37. There have been relatively few occasions in cases where LPP has been claimed when the Commissioner or Tribunal have considered that in all the circumstances, the public interest in disclosure was strong enough to outweigh the public interest in maintaining the exemption; however one such case was that of the *Mersey Tunnel Users Association v Information Commissioner and Merseytravel (EA/2007/0052)*. In that case, the Information Tribunal outlined some of the factors which weighed in favour of disclosing the information. The Tribunal judged that the number of people affected in that case was significant as the advice affected 80,000 drivers every weekday and could also affect around 1.5 million residents. There was also a large amount of money at stake: around £70 million.
38. In this case, the complainant has argued that a large number of people in Bolton are affected. The population of Bolton in 2005 was about 250,000 people and by 2008, more than 220,000 parking tickets had been issued. The complainant alleges that all but a very small minority of these tickets have been issued illegally. There is also a substantial amount of money involved: by the end of 2008 this amount was in excess of £7.5 million. The Commissioner is satisfied that the number of people affected and the amount of money involved adds some weight to the arguments in favour of disclosure.
39. Although the Commissioner has attributed some significance to the arguments in favour of releasing the withheld information he has also taken into account the comments of the Information Tribunal in the case of *Bellamy v Information Commissioner and the DTI (EA2005/0023)* in which it stated that:
- '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 public interest'*.
40. The Commissioner agrees with the Tribunal's comments and in this case has attributed considerable weight to the argument that there is a public interest in preserving the concept of legal professional privilege. This preserves the ability of people and organisations to obtain full and frank legal advice.
41. Given that there appear to be ongoing issues about the council's parking enforcement policy, there is also a particular public interest in ensuring that it can obtain full and informed legal advice so that it can make decisions that are compliant with its legal obligations. The Commissioner also considers that the argument about the number of people affected by decisions cuts both ways. Therefore where decisions impact upon a lot of people there is a considerable interest in ensuring that the council can make decisions with the benefit of full and frank legal advice.
42. In the *Merseytravel* case mentioned above, the Tribunal judged that the countervailing considerations in favour of disclosure were strong enough to override the strong public interest arguments in favour of maintaining the exemption. In giving less weight to the arguments inherent in the exemption the Tribunal noted that the advice received was not recent (it was over 10 years old).

43. However in this case the Commissioner notes that at the time of the request the advice was both recent and 'live'. The advice was only 19 months old when the request was made. It was also taken in the context of an impending investigation by Bolton Police into the conduct of the council. In the Commissioner's view the fact that the advice was recent means that it is more likely that both lawyer and client would feel inhibited from providing the full circumstances of a case and from giving frank legal advice in future if the withheld information were released. He considers that the fact that the advice was recent adds further weight to the arguments in favour of maintaining the exemption in this case.
44. The Commissioner acknowledges that in the *Merseytravel* case the Tribunal also afforded less weight to protecting LPP because the advice was concerned with matters of public administration rather than "significant private interests". However in his view there is still a public interest in preserving the ability of public authorities to obtain legal advice in connection with their duties and responsibilities. He believes that support for this approach can be taken from the Tribunal's findings in the case of *Fuller v the Ministry of Justice (EA/2008/005)* which stated that the principles behind legal professional privilege "are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law..."
45. Finally the Commissioner notes that the advice was still 'live' at the time of the request. In his view this adds even more weight to the arguments in favour of maintaining the exemption.
46. The council has highlighted that there was an ongoing possibility of challenge and legal action at the time of the request. As previously mentioned, local parking campaigners challenged the council's 2007/2008 accounts because they considered that their parking enforcement did not comply with the relevant regulations and the 2008/2009 accounts were still open to objection. The Commissioner understands that there was also the potential for further objections and appeals against various aspects of the council's parking enforcement policy. In this context the Commissioner has attributed significant weight to the argument that it is necessary to preserve the confidentiality of the legal advice to ensure that the council is in a position to defend its decisions in the event of challenge.

Conclusion

47. In view of the all the above the Commissioner is satisfied that in this case that the arguments in favour of maintaining the exemption outweigh those in favour of disclosure. In reaching this conclusion the Commissioner has been particularly mindful of the fact that the legal advice remained live at the time of the request.

The Decision

48. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act. It correctly concluded that the withheld information was exempt by virtue of section 42(1) and therefore the duty to supply the information under section 1(1)(b) did not apply.

Steps Required

49. The Commissioner requires no steps to be taken.

Right of Appeal

50. 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 2nd day of December 2009

Signed

**Jo Pedder
Senior FOI Policy Manager**

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Legal Annex

Section 42 (Legal Professional Privilege) provides that -

- (1) “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.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings”