

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2012

Public Authority: South Eastern Education and Library Board
Address: Grahamsbridge Road
Dundonald
Belfast
BT16 2HS

Decision (including any steps ordered)

1. The complainant requested information relating to the Grant of a Lease of lands between the South Eastern Education and Library Board (the SEELB) and a developer.
2. The Information Commissioner's decision is that the SEELB was correct to withhold the information within the scope of the request on the basis of the exemption at section 42(1) (legal professional privilege) of the FOIA.
3. The Information Commissioner (the Commissioner) does not require the SEELB to take any steps.

Request and response

4. The complainant requested the following information from the SEELB:

Request 1

"We should be grateful if you would let us have details of any information in your possession relating to: -

(a) the title of SEELB to the property

(b) the marketing of the property by SEELB or any person on behalf of SEELB

(c) any agreements between SEELB and any person relating to the sale, letting or any other disposal of the property; and

(d) any documents, plans etc. relating to applications for planning permission contemplated or made by or for the benefit of SEELB".

Request 2

"I refer to our letter of 7 February 2011. In addition to the information set out in that letter we should be grateful if you would let us have:

- 1. All contracts, documents and memoranda relating to the Grant of a Lease dated 7th March 2007 between (1) South Eastern Education and Library Board and (2) JHT Newtownards Limited.*
 - 2. Information relating to the grant of a consent by the Department of Education to the creation of that Lease.*
 - 3. Information relating to any other applications made by the Board to the Department of Education in respect of approvals or consents under Article 106 of the Education and Libraries (Northern Ireland) Order 1986 in respect of this property."*
5. The SEELB responded on 3 March 2011. It disclosed the information requested in parts (a) (b) and (d) of Request 1 and parts 2 and 3 of Request 2. It refused to disclose the remainder, citing the exemptions under sections 42(1) (legal professional privilege) and 43(2) (commercial interests).
6. Following an internal review the SEELB wrote to the complainant on 21 April 2011. It stated that two documents, falling under part (c) of Request 1 which were previously withheld under section 43(2), were publicly available at the Land Registry, so that exemption no longer applied. However, the reviewer upheld the initial application of section 42(1) to the remaining information, i.e. that in part 1 of Request 2.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled, in particular the SEELB's application of section 42(1) to the remaining withheld information.
8. The Commissioner has inspected the information and, following discussions with the SEELB, the SEELB agreed to disclose two further documents to the complainant. Therefore this notice is concerned with the remaining information withheld under section 42(1), which is

information relating to the transaction, ie the Grant of Lease of lands by the SEELB to a developer ("the withheld information").

Reasons for decision

Section 42(1) – legal professional privilege

9. Section 42(1) of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt from disclosure.
10. Legal professional privilege (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*¹ 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" (para 9).

11. There are two types of privilege: litigation privilege and legal advice privilege.
 - Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
 - 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 principal or dominant purpose of obtaining legal advice.

¹ EA/2005/0023 - 4 April 2006

12. The category of privilege upon which the SEELB is relying as a basis for non-disclosure of the withheld information is advice privilege. It argues that the withheld information attracts advice privilege as it consists of documents containing legal advice regarding the grant of a lease of land owned by the SEELB.
13. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is capable of attracting LPP. This is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
14. The withheld information clearly consists of legal advice as it is made up of communications from the SEELB lawyers to their colleagues, communications between the SEELB lawyers and the prospective purchasers' lawyers and information seeking or discussing that advice. The Commissioner finds that the withheld information attracts legal advice privilege.
15. The SEELB has told the Commissioner that none of the withheld information has been shared with any third party, other than one set of advice which was shared with the Department of Education, the SEELB's sponsoring body. This was shared as statute (the Education and Libraries (NI) Order 1986) requires the Department of Education to approve any disposal of land by the SEELB. As sharing the information with the Department of Education was a statutory imperative, the Commissioner considers that privilege has not been waived and that a claim to LPP in respect of all the withheld information can still be maintained. Therefore, the exemption under section 42(1) is engaged.
16. As section 42(1) is a qualified exemption it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest test

17. Section 2 of the FOIA sets out the circumstances under which a public authority may refuse a request for information. Where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest arguments in favour of disclosing the information

18. The SEELB recognised the general public interest in accountability for its decision making. It further recognised the public interest in the

transparency of its decision making process and accepted that there is a presumption in FOIA in favour of disclosure. The Commissioner agrees that these are strong arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

19. The SEELB also, made the point that there is a strong element of public interest inbuilt in maintaining LPP. This position was endorsed in the High Court case of *DBERR v Dermod O'Brien*².

".....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).

20. The Commissioner accepts this and considers that, as stated by the Tribunal in the case of *Bellamy* (cited in paragraph 10 above), at least equally strong countervailing considerations need to be adduced to override that in-built public interest. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above. The SEELB argued that disclosing the withheld information could prejudice its ability to communicate freely with its legal advisers and to discuss openly and frankly in confidence the strengths and weaknesses of the SEELB's position in any given matter. The Commissioner agrees that this would not be in the public interest and is a strong argument in favour of maintaining the exemption.
21. The SEELB informed the Commissioner that whilst the Lease itself was executed over four years ago, the SEELB and JHT Newtownards Limited are actively involved in ongoing negotiations, arising from the transaction itself and on other associated matters. Disclosure of the withheld information would place the SEELB at a disadvantage in the negotiations as JHT Newtownards Limited could not be compelled to disclose the advice it has received on these matters. The Commissioner accepts that it would not be in the public interest to prejudice ongoing live negotiations in which the best use of public funds is at stake. This is also a strong argument in favour of maintaining the exemption.

² EWHC 164 (QB) – 10 February 2009

Balance of the public interest arguments

22. The Commissioner considers that it is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

23. In light of the above, there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance attached to it as a long-standing common law concept.
24. The Commissioner observes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as substantial amounts of money, decisions that will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no obvious sign of unlawful activity, evidence that the SEELB had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. Therefore, he has no evidence of any specific factors which would tip the balance of public interest factors towards disclosure. The Commissioner also notes that in this case, the SEELB is still involved in negotiations arising out of the transaction to which the advice relates, so the advice is still live and relevant.
25. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is the Commissioner's view that, on balance in this case, the strong public interest in maintaining the SEELB's right to consult with its lawyers in confidence is not equalled or outweighed by the public interest in disclosing the withheld information.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

**Rachael Cragg
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