

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2012

Public Authority: London Borough of Camden
Address: Camden Town Hall
Judd Street
WC1H 9LP

Decision (including any steps ordered)

1. The complainant has requested legal advice provided in connection with the London Borough of Camden's (the council) mutual exchange policy as referred to in the Housing and Social Care Directorate Management Team Report (the report).
2. The Commissioner's decision is that the council was correct to withhold the information on the basis of the exemption at section 42(1) of the FOIA.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 2 November 2011 the complainant wrote to the council and requested information in relation to its mutual exchange policy:

"I wish to know the text of the legal advice that you state was incorporated in the report to the Housing and Social Care Directorate Management Team (HASC DMT)?"
5. The council responded on 24 November 2011. It stated that it held information within the scope of the request but that it was exempt from disclosure under section 42(1) of the FOIA as the information constituted legal advice and it was in the public interest to withhold it.

6. Following an internal review the council wrote to the complainant on 14 December 2011. It stated that it upheld its original decision to withhold the information on the basis of section 42(1).

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to rule on the council's refusal to provide him with the requested information.
8. During the course of the investigation, the council sought clarification from the complainant about the intention of his request. It considered that it may be that the complainant wanted to know where the text of the legal advice had been incorporated into the report, rather than access to the advice itself. If this was the case, then council considered that it may be able to resolve the complaint by providing a copy of the report with the extracts from the legal advice highlighted.
9. The complainant agreed to this but stated that if the legal advice contained in the report was different to the original advice, then he would seek disclosure of both versions.
10. The council therefore disclosed a copy of the report with the text of legal advice highlighted.
11. The complainant considered that the highlighted text was an extract of the legal advice, and not the legal advice in its entirety. He therefore asked the Commissioner to consider the council's decision to withhold the full text of the legal advice under section 42(1).
12. The Commissioner therefore considers that the scope of this case is concerned with the question of whether legal professional privilege applies to the requested information.

Reasons for decision

Section 42(1)

13. Information is exempt from disclosure by virtue of the exemption at section 42(1) if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
14. The council explained that the requested information consists of an email from a lawyer in the council's legal services in response to an

email from a manager in the Housing and Adult Social Care department. The email provided the council with the requested advice about the interpretation of a specific piece of legislation in relation to the council's allocation scheme regarding mutual exchange and under-occupation of Camden properties.

15. It submitted that legal advice privilege applies to information which relates to communications between a person and his lawyer provided they are confidential and written for the purpose of obtaining or providing legal advice or assistance in relation to rights and obligations.
16. The Commissioner notes that the council has disclosed part of the legal advice by publishing it in part in the report. Therefore it is clear that this specific information is no longer confidential and can no longer attract a claim of legal professional privilege. However, this disclosure does not contain all the information relating to the provision of legal advice in this case. The Commissioner has therefore considered whether the residual information could still attract privilege.
17. Having compared the disclosed information with the full legal advice, the Commissioner considers that it does not contain the full advice from the solicitor, nor does it give the full context in which the advice was sought and provided. Therefore, as the disclosure of part of the legal advice in the report does not amount to a substantial disclosure of the entirety of the legal advice, in line with previous Tribunal decisions (*EA/2007/0052 Mersey Tunnel Users Association/Mersey Travel and Foreign and EA/2007/0092 Commonwealth Office/Information Commissioner's Office*), the residual information retains a quality of confidence.
18. The Commissioner is therefore satisfied that a claim to legal advice privilege could be maintained in respect of the residual information and therefore finds that section 42 is engaged.

Public Interest Test

19. Section 42(1) is subject to a public interest test. The Commissioner must therefore also decide whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.
20. In favour of disclosure, the council 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.
21. The complainant has also put forward arguments that the public interest is in the disclosure of the information as the conclusions of the legal advice have been incorporated in the report which has been disclosed.

22. Against disclosure, the council has acknowledged the complainant's point but argues that the legal advice information incorporated into the report did not contain the full details of the response from the solicitor or describe the background to, or the full context of, the advice given. Consequently, the council maintains that in including some legal advice information in the report it has not forgone its capability to consider the remainder of email as legally privileged. It has argued that if it were to release the response from the solicitor in full, the essence of what signifies the confidential nature of discussion between a solicitor and client and the knowledge that this confidence encourages clients to seek legal advice and allows for full and frank exchanges will be lost.
23. The council has also submitted that case law has established that there is a strong element of public interest inbuilt in maintaining legal professional privilege and at least equally strong counter considerations need to be offered to override that inbuilt public interest. According to the council this inbuilt public interest in maintaining legal professional privilege promotes respect for the law, encourages clients to seek legal advice and allows for full and frank exchanges. The council maintains that this is a compelling reason that the information should not be disclosed. It argued that disclosing the residual information could prejudice the council's ability to defend its legal interests, particularly as the legal advice is still live and the council's housing policy is potentially subject to challenge by Judicial Review.

Balance of Public Interest

24. Legal professional privilege is rarely overturned because of the tradition that communications between a lawyer and a client should not be disclosed. This concept underpins our legal system. Despite this, legal professional privilege is not an absolute exemption.
25. The Commissioner acknowledges the complainant's argument that as part of the legal advice has been disclosed within the report, the public interest consideration is now in favour of disclosure. However, he gives more weight to the council's argument that the as report did not contain the full details of the response from the solicitor or describe the full context of the advice given it remains important to maintain the confidentiality of discussions between solicitor and client.
26. Further factors in favour of maintaining the exemption are present. The legal advice given could be considered a 'live' issue which might be the subject of legal action. The Commissioner has also taken into account the fact that there is no reason to suppose that the legal advice sought has been misrepresented.

27. The Commissioner considers that there is a very strong public interest in the council being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent that legal advice is sought which would not be in the public interest.
28. The Commissioner concludes that the council correctly withheld the residual information under the exemption at section 42(1).

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: 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

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

Andrew White
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