

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2013

Public Authority: Brent Council
Address: Brent Town Hall
Forty Lane
Wembley
Middlesex
HA9 9HD

Decision (including any steps ordered)

1. The complainant requested information between Brent Council and All Souls College Oxford, or internal to Brent Council, that concerned specified libraries. Brent Council relied on, amongst other exemptions, section 42(1) to withhold the requested information. The Commissioner finds that section 42(1) is engaged and the public interest test favours the maintenance of the exemption.

Background

2. Cricklewood Library and Kensal Rise Library, in North West London, were two relevant libraries when Brent Council (the Council) considered the provision of libraries in its area. There were issues concerning the legal and beneficial ownership of these two libraries.

Request and response

3. On 23 April 2012, the complainant requested from the Council information of the following description:

Part 1

- Any and all correspondence from January 1, 2010 to date, between Brent Council, including but not limited to its employees, contractors, advisors, agents, etc. and All Souls College, Oxford

University, pertaining to the site of the Cricklewood Library, the Kensal Rise Library, or both.

- This request includes but is not limited to correspondence pertaining to the legal and beneficial ownership of said sites and the buildings thereon, the transfer of title to those sites, assertions of legal rights to the sites and the buildings thereon, requests that the land be returned to All Souls College, and proposals for community-run libraries.

Part 2

- Any internal documents, records, and correspondence within Brent relating to, referring to, or commenting on those items retrieved in response to Part 1, above.

Part 3

- Any internal documents, records, and correspondence within Brent pertaining to the proposal submitted by the Friends of Kensal Rise Library in December 2011 for the operation of a community-run library at the Kensal Rise site. This to include, but not limited to documents commenting on, evaluating or assessing said proposal.

4. On 21 May 2012 the Council responded. It denied holding some of the requested information (as requested at "part 3" above) but confirmed it held the remainder. However, it refused to provide the remainder citing the following exemptions –
 - Legal professional privilege - Section 42
 - Information provided in confidence - Section 41
 - Prejudice to effective conduct of public affairs - Section 36(2)(c)
 - Inhibition of free and frank provision of advice and exchange of views - Section 36(2)(b)(i) and (ii)
5. The complainant requested an internal review on 8 June 2012; however the Council declined to undertake the same.

Scope of the case

6. The complainant contacted the Information Commissioner (the Commissioner) on or about 24 August 2012 to complain about the way his request for information had been handled. In particular he

challenged the Council's reliance on exemptions to withhold information from him.

7. During the Commissioner's investigation the Council (in a letter dated 25 January 2013) informed him that as regards part 3 of the request it now considered that it did hold relevant information. The Council advised the Commissioner that some of it would be released to the complainant but the remainder was being withheld under section 42.
8. The Council also informed the Commissioner that as regards information originally withheld in two documents (dated 8 February 1904 and 29 June 1926 respectively) they would now be released to the complainant.
9. On 18 March 2013 the Council confirmed to the Commissioner that, as stated, the aforementioned information had been released to the complainant.
10. Regarding the remaining information caught by the request, in its letter of 25 January 2013, the Council confirmed to the Commissioner as follows -

Part 1 of the Request

That information caught by this part of the request was withheld by reference to sections 42, 36 and 41.

Part 2 of the Request

That information caught by this part of the request was withheld by reference to sections 42, 36 and 41.

Part 3

That information caught by this part of the request was withheld by reference to section 42.

11. The Council also provided the Commissioner with a copy of the withheld information and a schedule of that information which identified the exemptions relied upon.
12. Arguments for releasing the withheld information were put forward to the Commissioner by the complainant and the Commissioner has taken cognisance of these arguments.

Reasons for decision

13. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:

- the duty to inform the applicant whether or not requested information is held and, if so,
- the duty to communicate that information to the applicant.

14. 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.'

15. 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*) 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 communication or exchanges come into being for the purpose of preparing for litigation." (paragraph. 9)

16. There are two types of privilege: litigation privilege and legal advice privilege. Litigation privilege will be 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 sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.

17. The Information Tribunal in the case of *Calland and the Financial Services Authority (EA/2007/0136)* noted that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.

18. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
19. 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 legal professional privilege. This is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
20. Part 1 of the request seeks –

“Any and all Correspondence from 1 January 2010 to date (23 April 2012) between Brent Council and All Souls College, Oxford University, pertaining to the site of the Cricklewood Library, the Kensal Rise Library or both.”
21. The Council's position is that the information “caught” by this request is withheld information by virtue of section 42 of the Act. It maintains that the relevant type of privilege is litigation privilege. It explained to the complainant that the documentation he sought in relation to point 1 fell within litigation privilege in that they are communications with a third party for lawyers to use in preparing a case where there was legal action underway and/or a reasonable prospect of litigation.
22. The Commissioner has viewed the Part 1 withheld information and is satisfied that it is as described by the Council. That is, it is correspondence between its solicitors (in its legal department) and solicitors acting for All Souls College. The correspondence is about the title to land and the exchange of correspondence takes place in the context of potential litigation. Having regard to this, the Commissioner finds that the exemption is engaged.
23. Part 2 of the request seeks -

“Any internal documents, records, and correspondence within Brent relating to, referring to, or commenting on those items retrieved in response to Part 1, above.”
24. The Council explained to the Commissioner that information falling within the scope of this request was readily dividable into two parts.
25. The first part concerns internal documents, records and correspondence between the Council's in-house legal advisors and officers and members. The Council maintains that this withheld information is subject to both

legal advice and litigation privilege under section 42(1). As regards the information attracting litigation privilege the Council maintains that there was actual litigation conducted until February 2012. Additionally, thereafter, there was a probability that further litigation may have ensued to determine revisionary property interests in the libraries.

26. The second part of the information falling within this part of the request consists of information exchanged between the Council's in-house legal team and external counsel. Various barristers advised and/or appeared on behalf of the Council in judicial review proceedings and/or advised the Council as to its legal and beneficial rights in the land.
27. The Commissioner has viewed the withheld information and is satisfied that it is as the Council has described it above. Accordingly the Commissioner finds that the withheld information attracts legal privilege (both litigation and/or advice privilege) and the exemption afforded by section 42(1) is engaged.
28. Part 3 of the request seeks -

"Any internal documents, records, and correspondence within Brent pertaining to the proposal submitted by the Friends of Kensal Rise Library in December 2011 for the operation of a community-run library at the Kensal Rise site. This to include, but not limited to documents commenting on, evaluating or assessing said proposal."
29. The Council, in a letter to the Commissioner dated 25 January 2013, explained that it had re-considered this part of the request and now considered it did hold information that fell within this part of the request. This information comprised of four email chains. These email chains forward emails from the Friends of Kensal Rise to relevant officers within the Council. Parts of these email chains seek legal advice on appropriate responses from an in-house solicitor. As regard these emails seeking legal advice the Council informed the Commissioner that it is relying on section 42 to withhold them but it will release the remainder to the complainant.
30. The Commissioner has viewed the parts of the information which the Council wishes to withhold and is satisfied that it is as the Council has described it above. Accordingly the Commissioner finds that the withheld information attracts legal advice privilege and the exemption afforded by section 42(1) is engaged.
31. Regarding the withheld information that engages section 42 the Commissioner next considered the public interest test.
32. Section 42 is a qualified exemption so the public interest test set out in section 2(2)(b) must be applied. That is, though the exemption is

engaged, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

33. The Council identified the public interest in favour of disclosure as including the desirability of transparency in its dealings with All Souls College in respect of public assets, particularly public assets that were the subject of a sustained campaign in support of community run libraries.
34. The complainant (in a letter to the Council dated 3 July 2012) said that in addition to the general principles of transparency and accountability that underpin the Act, the following public interest factors are relevant:
 - In support of their actions, Council and Council leaders have repeatedly relied on communications received from All Souls College and advice from legal advisors, yet those statements have been contradicted in public statements made by the College.
 - The Friends of Kensal Rise Library proposal described in Point 3 of the request is a proposal to operate the library at no cost to Council. As appears from the attached articles, All Souls College was supportive of such a proposal but the Council refused to consider it. The Council's refusal to even consider such a proposal is, prima facie, irrational and ought to be fully investigated.
 - By cherry-picking statements alleged to have been made by All Souls College and by claiming to rely on legal advice, Brent Councillors have, in effect, tried to shield themselves from being brought to account on the basis that their hands are tied, while simultaneously refusing to disclose the documents and advice that could potentially explain their actions. This behaviour is entirely inconsistent with democratic values and the objectives of the Act
 - While the land on which the Kensal Rise Library was built was gifted by All Souls College, the local community and local taxes financed the construction of the building itself. It is believed that by transferring title to the property to All Souls College, Brent Council has also handed over this valuable asset, likely for no compensation whatsoever. The Council's actions warrant public scrutiny. It is important that the terms of this most extraordinary transfer be investigated and that Council's actions be subject to close scrutiny.
35. The Commissioner is also mindful of the comments of Mr Justice Wyn Williams in the High Court decision of the Department for Business Enterprise and Regulatory Reform and Dermot O'Brien and the Information Commissioner (EWHC 164 (QB)) when he observed that:

'The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight'. (See paragraph 53)

36. The Information Tribunal, in *James Kessler QC v Information Commissioner* (EA/2007/0043), laid out with clarity (at paragraph 60) the following public interest factors in favour of maintaining the exemption at section 42 FOIA:

"a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.

b. Were legal advice disclosed routinely, there would be disincentive to such advice being sought and/or a disincentive to seeking advice based on full and frank instructions.

c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between a public authority and its legal advisers.

d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.

e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed."

37. Differently constituted Information Tribunals, with one exception, have said that the principle of legal professional privilege diminishes with age. The Commissioner accepts this principle on the basis that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes (i.e. allowing the client to determine a course of action/issue court proceedings/raise challenges through other channels, e.g. ombudsman). The Commissioner recognises that these processes would be likely to be affected by disclosure.

38. However, the older the advice, the more likely it is to have served its purpose and the less likely it is to be used as part of a decision making process. This may mean that any harm to the privilege holder is slight and gives weight to arguments in favour of disclosure. On the facts of

this matter though, the information that attracts legal professional privilege had been generated a relatively short time before the information request. Accordingly the "harm" to the privilege holder is not particularly diminished.

39. The complainant has forcefully explained why the public interest test favours the release of the information. He explains that the Council adopted one course of action when it, he believes, should have adopted another. However it appears to the Commissioner that whichever course of action was to be adopted by the Council it could only properly be adopted after taking legal advice on a relatively complex property manner. In the absence of such legal advice any decisions taken by the Council may be invalid and subject to costly legal proceedings as a result of not taking legal advice.
40. The complainant also asserted that seeing the withheld information will allow the public to gauge the veracity of statements made by the Council or individual councillors. This is of course true and is a generic argument that releasing information contributes to the transparency of public authorities' decisions. However, as regards the particular facts of this matter, particularly in considering the withheld information against the said statements as highlighted by the complainant, the Commissioner has not been able to discern any particular reason (other than that of general transparency) that warrants the release of the withheld information.
41. To some degree this matter examples why Legal Professional Privilege benefits a public authority; it allows it to seek and obtain legal advice that is not tainted or swayed by the fear or suspicion that it will be soon be publically disseminated. It also facilitates its staff to seek legal advice from their in-house lawyer colleagues.
42. Premature public dissemination of legally professional privilege material would no doubt lead to diverse people (lawyers and non-lawyers) seeking to place alternative views on the law and facts before the public authority. Some of those queries will no doubt descend into lengthy correspondence exchanges about increasingly esoteric points of law and its interpretation. Such queries would likely place a heavy and unfair burden on the Council to deal with them.
43. The complainant is of course right that disclosing the withheld information would allow the public to adjudicate on the Council's conduct regarding the library issue. Whilst this cannot be solely determinative of whether information is to be released it remains an important factor. In the context of adjudicating upon the conduct of councillors and/or councils the Commissioner notes that there are others empowered to investigate such matters.

44. On balance the Commissioner's decision, for the reason given above, is that the public interest test favours the maintenance of the exemption afforded by section 42.
45. Having found that the withheld information was properly withheld, by reference to section 42 read together with section 2, the Commissioner did not go on to consider the applicability of the other exemptions relied upon by the Council.

Other matters

46. Regarding the Council's failure to conduct an internal review, the FOIA does not require an authority to have a review procedure in place or indeed to conduct a review. However both the Code of Practice made under section 45 of the FOIA and the Commissioner recommend that it is good practice to have one. Section 17(7) of the FOIA provides that, in a refusal notice, an authority must give details of any review procedures, as well as details of the right of appeal to the Commissioner.
47. Significant failures, or repeated unreasonable delays, in dealing with internal reviews, or other failures to conform to the codes of practice are monitored by the Commissioner and, in some instances, may lead to regulatory intervention; for example, the issuing of a Practice Recommendation.

Right of appeal

48. 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

49. 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.
50. 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

Alexander Ganotis
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