

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2013

Public Authority: City of London Corporation
Address: PO Box 270
Guildhall
London EC2P 2EJ

Decision (including any steps ordered)

1. The complainant requested information from the City of London Corporation (the CoL) relating to assessment centre paperwork. The CoL withheld the information it holds, citing section 42 of FOIA (legal professional privilege).
2. The Commissioner's decision is that the public interest favours the maintenance of the exemption and therefore the CoL correctly withheld the information.
3. The Commissioner requires no steps to be taken.

Request and response

4. Further to earlier correspondence with the CoL, on 24 December 2012 the complainant made the following request for information under FOIA:
"It therefore appears necessary for me to make a Freedom of Information request to find out who made the decision to withhold or destroy the Assessment Centre paperwork; when this happened and why".
5. The CoL responded on 29 January 2013. It told him that it considered that the request was a continuation of his original subject access request and not an FOI application.
6. The complainant wrote to the CoL on 31 January 2013 and complained about the way this request had been managed. Subsequently he wrote

to the CoL on 11 February 2013 clarifying that he was not requesting information about himself. He said:

"I wish to know who made the decision to withhold or destroy the paperwork that related to those Information Officers involved in the Assessment Centre of June/July 2011 at London Metropolitan Archives; when the decision was made and why".

7. The CoL responded on 14 February 2013. It denied holding the requested information.
8. Further to that correspondence, the complainant wrote to the COL on 20 February 2013 and requested information in the following terms:

"I would be grateful if you would clarify one point from your answer. It appears that you are saying that the Assessment Centre paperwork was destroyed at some point before 18 September 2012; but you have no record of who destroyed it, who authorised this or why this happened. Is this correct?"

9. The CoL treated that as a new request for information. It responded on 22 March 2013 and stated:

"I can advise that information is held but that this information is exempt from disclosure pursuant to section 42 (legal professional privilege)".

10. When requesting an internal review, the complainant told the CoL:

"You appear to be claiming that you have no record of who authorised the withholding or destruction of the Assessment centre paperwork; but that you do know that this person received legal advice. This does not make sense".

11. Following an internal review the CoL wrote to the complainant on 3 May 2013 upholding its position regarding section 42.

Scope of the case

12. Following earlier correspondence, on 7 May 2013 the complainant provided the Commissioner with sufficient information to progress his complaint about the way his request for information had been handled.
13. With respect to his email to the CoL of 20 February 2013, he told the Commissioner:

"I did not regard it as a fresh FOI request. I was merely asking for clarification because I found the initial response rather ambiguous..."

14. The Commissioner notes that the CoL addressed the apparent ambiguity in its internal review correspondence. It told the complainant:

"By way of clarification, I can inform you that the data referred to was created following your original request of 24 December 2012 but prior to your new request of 20 February 2013"

15. The CoL also confirmed to the Commissioner

"that [the complainant] was informed on 14 February 2013, erroneously at it turned out, that the information requested, namely information concerning 'who made the decision to withhold or destroy the Assessment Centre paperwork, when this happened and why' was not held"

16. In bringing his complaint to the Commissioner the complainant said:

"As you will see they have never apologised for any of these mistakes. In fact their replies have usually been so ambiguous that I have been unsure whether a complaint is being upheld or not. I also do not accept that it is the public interest for this information to be suppressed"

17. With respect to the concerns raised by the complainant which are the subject matter of this decision notice the Commissioner considers the scope of his investigation to be the CoL's application of section 42.

Reasons for decision

Section 42 legal professional privilege

18. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.

19. The CoL told the complainant:

"The purpose of legal professional privilege is to serve the administration of justice and to safeguard the right of any person to obtain entirely frank and realistic legal advice. The City Corporation's departments require and receive advice which directly affects the City of London's decision making. Without that advice the quality of the decisions themselves would be reduced"

20. In support of its citing of section 42(1), the CoL told the Commissioner that it considers that the information attracts legal professional privilege on the basis that the withheld information in this case was recorded:

"by one of this Department's solicitors in the course of taking instructions and advising the client department".

21. The Commissioner understands that the category of privilege the CoL is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity, that is, by a legal professional retained to provide legal services to their client.
22. Furthermore, the communication in question also needs to have been made for the dominant purpose of seeking or giving advice.
23. The Commissioner has had the opportunity to consider the withheld information that falls within the scope of the request in this case. He has also considered the context in which it was recorded.
24. The Commissioner is satisfied that it is subject to LPP in that it records legal advice. It follows that he considers that the withheld information engages the exemption provided by section 42(1).

The public interest test

25. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

26. The complainant did not make specific arguments about the legal professional privilege exemption.
27. The CoL acknowledged the public interest in understanding how decisions are made by public authorities.
28. When applying the public interest test in a case involving section 42, the Commissioner recognises the presumption in favour of disclosure and the rationale behind that assumption – accountability, transparency and furthering public debate.

Public interest arguments in favour of maintaining the exemption

29. In favour of maintaining the exemption, the CoL told the complainant:

"However, it is in the public interest that a public authority be allowed, without fear of intrusion, to conduct a free exchange of views as to their legal rights and obligations with their legal advisors and be able to take decisions in light of such disinterested and frank legal advice based on full disclosure to their legal advisors of relevant facts".

30. In the Commissioner's view, and in line with his guidance¹ on the section 42 exemption, additional weight may be added to the above factor if the advice is:

- recent;
- live;
- protects the rights of individuals.

Balance of the public interest arguments

31. In considering the balance of the public interest in connection with section 42(1), the Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* which gave considerable weight to the public interest in withholding information which attracts legal professional privilege.

32. While the Commissioner remains mindful that this should not mean that this exemption becomes effectively absolute, in his view it is the case that there will need to be very clear and specific public interest grounds for the public interest in the maintenance of LPP to be overridden.

33. The Commissioner considers that in order to equal or outweigh that inherently strong public interest usually involves factors such as decisions that will affect a large number of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.

34. The Commissioner accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.pdf

sound advice. He also recognises the genuine interest of the complainant in the subject matter of the advice in this case.

35. In line with the relevant case law, the Commissioner accords significant weight to the maintenance of LPP. He also considers that the advice in this case was both recent and live at the time of the request.
36. In balancing the opposing public interest arguments in this case, the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question. In that respect, the Commissioner has taken into account that the public interest concerns whether disclosure would be of benefit to all.
37. The Commissioner recognises the complainant's personal interest in seeing the withheld information in this case. He also accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice. However, in his view, notwithstanding the complainants' personal interest in the information and the general principle of transparency, there are not sufficiently clear and specific grounds in favour of disclosure in this case to overturn the public interest in protecting the confidentiality of legal advice.
38. The Commissioner's decision is that the public interest in maintaining the section 42 exemption in this case outweighs the public interest in disclosure. It follows that the CoL is not required to disclose the information at issue.

Right of appeal

39. 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

40. 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.
41. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF