

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2013

Public Authority: North East Lincolnshire Council
Address: Municipal Offices
Town Hall Square
Grimsby
DN31 1HU

Decision (including any steps ordered)

1. The complainant requested a copy of the legal advice North East Lincolnshire Council (the Council) had received from external Counsel regarding the administration of service charges at the Humberston Fitties chalet park. The Council argued that this information was exempt from disclosure on the basis of section 42 (legal advice) and section 43 (commercial interests) of FOIA. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of section 42 and that in all the circumstances of the case the public interest favours maintaining the exemption.

Request and response

2. Following an exchange of emails with the Council regarding ground rent and water charges for her property on the Humberston Fitties chalet park, the complainant submitted the following request to the Council on 10 May 2013:

'...thanks for your email confirming you can deduct from the water rebate the additional ground rent invoice, Can you please provide the previously gained Counsel advice referred to in your earlier email.'

3. The Council responded on 24 May 2013 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of section 42(1) of FOIA.

4. The complainant contacted the Council on 31 May 2013 and asked for an internal review of this decision to be conducted.
5. The Council informed her of the outcome of the internal review decision on 6 June 2013; the review upheld the application of section 42(1).

Scope of the case

6. The complainant contacted the Commissioner on 6 June 2013. She believed that there was a public interest in disclosure of the information she had requested and the Commissioner has referred to the complainant's arguments to support this position below.
7. During the course of the Commissioner's investigation, the Council informed him that in addition to section 42(1), it also believed that the requested information was exempt from disclosure on the basis of section 43(2) of FOIA as disclosure of the information would be likely to prejudice the Council's commercial interests.
8. The Commissioner has considered whether the withheld information is exempt from disclosure on the basis of either of these two exemptions.

Reasons for decision

Section 42 – legal professional privilege

9. 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.
10. There are two categories of legal professional privilege: advice privilege and litigation privilege.
11. In this case the category of privilege the Council 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; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the

communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.

12. The withheld information consists of Counsel's opinion to the Council concerning the calculation of water rates at the Humberston Fitties. The Commissioner is satisfied that the dominant purpose of the advice was clearly the provision of legal advice and the exemption contained at section 42(1) is engaged.

Public interest test

13. However section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour maintaining the exemption

14. The Council argued that disclosure of confidential legal advice would undermine its ability to make effective decisions in the future because future requests for legal advice, and the advice provided, would be less candid and robust.

Public interest in favour of disclosing the information

15. The complainant argued that she could not see how disclosure of the advice would harm the Council if the advice simply confirmed its position that *'they can offset disputed invoices for ground rent against past overpayments of water despite the lease prohibiting offset'*. The complainant noted that over 300 chalet owners are potentially affected by the Council's stance and she believed that disclosure was in the public interest in order to clear up any confusion in relation to this issue.

Balance of the public interest test

16. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of

disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

17. Consequently, although there will always be an initial weighting in terms of maintaining this exception, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:
 - how recent the advice is; and
 - whether it is still live.
18. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
 - the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
19. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. 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 any future decision making process.
20. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
21. The advice in question dates from approximately five years before the request was submitted. Nevertheless, despite this passage of time the Commissioner understands that the advice was still being relied upon by the Council in relation to its management of the chalet park and thus the advice could still be considered to be live at the time of the request.

In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.

22. In reaching this finding the Commissioner acknowledges the complainant's point that disclosure of the advice would be unlikely to be harmful if it simply confirmed its previously and publically stated position. However, the withheld legal advice includes more detail than simply a statement of the Council's position on this matter; rather it includes a detailed consideration of various legal points and discusses the potential courses of action open to the Council. Therefore in the Commissioner's view disclosure of the withheld advice would be likely to have a material effect on the Council's ability to secure free and frank legal advice in the future.
23. With regard to the public interest in disclosure of the advice the Commissioner recognises that there are several hundred chalet owners who may be affected by the actions taken by the Council as a result of the information contained in the advice and they obviously each have a personal financial interest in this subject. However, in the Commissioner's opinion in order for there to be a truly weighty public interest in disclosure of legal advice, the Commissioner would generally expect the advice to have an effect on a greater number of people and involve larger amounts of money than there is in this present case. For example, in the case *Mersey Tunnel Users' Association v Information Commissioner and Merseytravel* (EA/2007/0052), one of the reasons the Information Tribunal decided that the public interest favoured disclosure of the requested legal advice was because the sums of money involved extended to millions of pounds and decisions taken as a result of the advice potentially affected tens of thousands of individuals.
24. With regard to the transparency of the Council's actions, the Commissioner understands that although the Council has previously explained to tenants how it intends to levy and manage the service charges associated with the chalet park, the Commissioner accepts that disclosure of this withheld information could lead to a greater understanding of the legal basis of the Council's approach. However, in the Commissioner's opinion the extent to which this particular information would serve such a purpose, and specifically the extent to which it would address the complainant's concerns regarding the approach of offsetting disputed invoices for ground rent against refunds of past over payments of water charges is limited. This is because the advice simply concerns the calculation of water rates at the Humberston Fitties. It does not directly consider the deduction of the rebate from the ground rent. Rather the Counsel's advice was used to inform a separate piece of legal advice by the Council's legal team - advice which is not in

the scope of this request – and it is that subsequent legal advice which actually considers the deduction of the rebate from the ground rent.

25. Therefore in light of the strong inherent public interest in maintaining legal professional privilege and the fact that the advice is relatively recent and still being relied upon, the Commissioner has concluded that the public interest favours maintaining the exemption.
26. In light of the Commissioner's findings in relation to section 42(1), he has not gone on to consider the Council's reliance on section 43(2).

Right of appeal

27. 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

28. 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.
29. 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
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF