

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 March 2014

**Public Authority:** Newbury Town Council  
**Address:** Town Hall  
Market Place  
Newbury  
RG14 5AA

**Complainant:** Mr S Kirby  
**Address:** simon@emilyware.co.uk

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Newbury Town Council ("the Council") consisting of the minutes of an urgency sub-committee meeting held on 10 February 2011 and details of requests for and legal advice given in respect of a dispute concerning an allotment tenancy. The Council refused to disclose the requested information relying upon section 42(1) of the FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 42 of the FOIA in this case. He therefore requires no steps to be taken.

## Background

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3. The complainant held an allotment tenancy with the Council over a number of years. For the year 2010/11 the Council sought to raise the rent for an allotment by a significant percentage. The complainant objected to the increase alleging that the allotment contract itself contained an unfair clause that required 12 months' notice to quit on the part of the tenant. He also withheld the additional amount of the rent that was required.
4. As a consequence the Council issued a forfeiture notice in respect of the tenancy which it subsequently withdrew. The tenancy was terminated by the Council by way of Notice to Quit on 1 April 2012.

## Request and Response

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5. On 29 August 2013 the complainant requested information of the following description:

*"Please may I have the following information:*

*1. A copy of the minutes of the Urgency Sub-committee held on 10<sup>th</sup> February 2011.*

*2. Copies of the requests for legal advice and the advice received on the associated questions of the fairness of the rent review term of the allotment tenancy agreement, and the enforceability of the forfeiture for arrears of the associated individual's tenancy."*

6. On 24 September 2013 the Council responded and advised that it had identified information within the scope of the request but sought to rely on section 42 of the FOIA which provided for an exemption in respect of information which is considered to come within the scope of Legal Professional Privilege. ("LPP")
7. On the same date the complainant asked the Council to conduct an internal review of its response to his request dated 29 August 2013.
8. On 16 October 2013 the Council provided its internal review upholding its original response to the request. It stated that it would be relying upon section 42 of the FOIA in that it considered the information was still subject to LPP.

## Scope of the case

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9. The complainant contacted the Commissioner on 16 October 2013 to advise that he was not satisfied with the response he had received to his request as he maintained the use of LPP was not warranted in this case. Therefore the scope of this case has been to consider whether the Council was correct in relying upon section 42 of the FOIA as a basis for refusing to provide the requested information and that, in all the circumstances of this case, the public interest favours maintaining the exemption.
10. The complainant has also suggested that the appropriate regime for consideration of this request should have been the Environmental Information Regulations 2004 ("EIR"). The Commissioner will therefore also give consideration as to which is the appropriate statutory regime in this case.

## Reasons for decision

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### **Is any of the requested information, if held, "environmental"?**

11. "Environmental Information" is defined at regulation 2 of the EIR. In order for it to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) to (f) of the EIR – constituting "information on" any of the subjects covered by those six sub-sections.
12. The complainant has requested information from the Council consisting of the minutes of an urgency sub-committee meeting held on 10 February 2011 and details of requests for and legal advice given in respect of a dispute concerning an allotment tenancy. The requested information concerns a tenancy agreement and the fairness of a rent clause and proposed forfeiture of the tenancy. It is not a request for information about the allotment but about the tenancy agreement in relation to it.
13. Having considered the withheld information the Commissioner is satisfied that the requested information is not "Environmental Information" as defined by regulation 2 (1)(a) to (f) of the EIR and the scope of the case is therefore to consider whether the Council is entitled to rely upon section 42 of the FOIA as a basis for not providing the requested information.

## Section 42

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. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal<sup>1</sup> 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 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.

18. In this case the Council has advised the Commissioner that it seeks to rely upon litigation privilege. It has advised that the information sought consists of documents which record the Council's approaches to its legal advisor to seek advice about the best way forward in a dispute between itself and the complainant in relation to rent issues and termination of an allotment tenancy. As part of this communication the Council advised that possible outcomes could include litigation of some type and that this remained a real possibility in spite of the passage of time.

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<sup>1</sup> Bellamy v the Information Commissioner and the DTI EA/2005/0023

19. When considering LPP it must be clear as to who the "client" is and who the "legal advisor" is. From the information provided to the Commissioner in the course of his investigations it is apparent that the Council is the client and legal advice has been sought and obtained from a firm of Solicitors who provide legal advice when required to do so.
20. The Commissioner has viewed the withheld information which comprises of the Minutes of the Urgency sub-committee of Newbury Town Council dated 10 February 2011 and has concluded that the withheld information is information falling within the definition of "communications between lawyer and client" in anticipation of potential legal proceedings and therefore would attract legal privilege.
21. Similar arguments apply in respect of part 2 of the request in relation to copies of requests for legal advice and advice received on the questions of the fairness of the rent review term of the allotment tenancy agreement and the enforceability of the forfeiture for arrears. By the nature of the information requested such would consist of "communications between lawyer and client" in anticipation of potential legal action.
22. However, as part of the arguments in support of his claim that the information should be released, the complainant states that LPP has been lost as he believes sufficient information has come into the public domain by way of press releases and public statements that the Council has issued so that it could no longer be considered to be confidential.
23. The Council has stated that its own legal advisors have confirmed that the requested information still retains solicitor/client confidentiality and that there has not been a disclosure to the world at large as the information remains within the control of the legal advisor and the Council. Further that a summary by way of press release to keep the public advised as to issues could not be considered an unrestricted disclosure of all the advice sought and obtained on this particular issue.
24. The Commissioner has had sight of the relevant public statements and press releases. These provide a summary of legal advice given that, whilst providing a brief overview of the issues, does not reveal the substance of the legal advice given or all of the options available to the Council.
25. In these circumstances the Commissioner is satisfied that the Council could be reasonably expected to keep its council taxpayers advised as to issues which may impact upon the Council's expenditure by way of press statement whilst not revealing the substance of any legal advice given. In these circumstances the Commissioner is satisfied that LPP has not been lost by way of disclosure.

26. Having reviewed the withheld information the Commissioner is satisfied that it is communications between a client (the Council) and its legal adviser for the dominant purpose of obtaining legal advice. The section 42 exemption is therefore engaged.
27. However, the exemption given at section 42 is a qualified exemption. This means that even where the exemption is engaged, information is only exempt from release if the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

### **Public interest in favour of disclosing the requested information**

28. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in decisions made by public bodies. This argument is stronger if information is already in the public domain and particularly if there are issues about the advice given, allegations of misrepresentation or the issue of litigation is not a "live" one.
29. However the general public interest in maintaining the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

### **Complainant's arguments in favour of disclosure**

30. The complainant has argued that the issue is no longer a "live" one as he has lost his allotment tenancy and therefore litigation is not an issue. He also alleges that the press statements released and subsequent minutes of the Council within the public domain overstate the strength of the advice given and do not make it clear why, subsequent to his complaint, the rent review clause in the Council's allotment tenancy document was amended.

### **Public interest arguments in favour of maintaining the exemption**

31. The Council has argued that the general public interest in the exemption will always be strong due to the importance of the principle behind LPP. Further that if the argument is for transparency of council decision making including all legal advice given then it would apply to any advice the Council ever took and therefore it would never be able to rely upon LPP.

32. The Council has maintained that the purpose of the Urgency Sub-committee meeting of 10 February 2011 was to establish the appropriate legal way forward in dealing with one individual who had not paid his allotment rent. Because of the nature of the legal advice discussed the press and public were formally excluded from this meeting as it was felt that publicity would be prejudicial to the public interest.
33. In relation to all other legal advice requested and received it maintains that such were solicitor/client communications. Further that this issue did not extend to other individuals or the wider public or relate to issues of public policy.
34. It also advised that, in the interests of transparency, a public statement was issued within 7 working days of the committee meeting and included a summary of the situation. In addition further information was provided in subsequent press releases and Council minutes including the decision to alter a term within the allotment tenancy agreement.
35. It maintains that whilst there are no current proceedings it believes litigation privilege still applies as it still continues to receive correspondence from the complainant about this issue and has previously been the subject of three separate sets of legal proceedings from this individual. In the circumstances it maintains that it considers the issue still to be "live" as it clearly remains a "live" issue for the complainant as demonstrated by his FOIA request.

### **Balancing the public interest arguments**

36. In reaching a view on this the Commissioner has had to bear in mind that the FOIA is applicant blind, except in a few limited scenarios none of which are applicable in this case. In other words, the potential disclosure of information under the FOIA has to be considered as a potential disclosure to the world at large.
37. Factors which may be relevant in balancing public interest arguments may include whether a large amount of money is involved, whether a large number of people are affected, lack of transparency in the public authority's actions and misrepresentation of any advice given.
38. In these circumstances the issue relates to one individual who chose to dispute the decision by the Council to increase the amount payable in respect of the rent for his allotment. From the evidence provided by the Council other individual allotment holders paid the increase in rent and did not challenge the increase. The withheld amount in this case related to £22.30 being the difference between the new rent of £69.40 and the previous rent of £47.10.

39. The Council has also provided evidence on the steps it took to advise council tax payers of its decisions and actions in respect of this issue and the reasons behind the allotment rent increase. The issue of the "unfairness" or otherwise of the rent review term in the allotment tenancy agreement was also the subject of a County Court claim by the complainant against the Council which was withdrawn by him prior to hearing.
40. In this particular case the Commissioner is of the view that the general public interest in maintaining the exemption remains paramount due to the importance of the principle behind LPP.
41. From the information provided it is clear the Council faced a situation where it was essential legal advice was sought as to the most appropriate way to deal with a situation where an allotment tenant disputed a rent increase and had withheld the additional amount of rent payable. From the evidence provided it is clear advice was sought and obtained both within a committee meeting where all councillors were made aware of the situation and in subsequent communications between legal advisors and Council.
42. The Commissioner is of the view that safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice was required in this case. Further that the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested in these particular circumstances. Factors considered include the fact that the financial amounts concerned were very small, only concerned non-payment by one individual who refused to pay a rent increase and the Council had taken reasonable steps to ensure that its council tax payers were aware of the issue and the steps the Council was taking to resolve the issue.
43. The Commissioner therefore considers that the Council has acted appropriately in relying upon section 42 of the FOIA and that the public interest favours the maintenance of the exemption in this case. He requires no further action to be taken.



## Right of appeal

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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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**