

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2014

Public Authority: The London Borough of Bexley Council

Address: Civic Offices
2A Watling Street
Bexleyheath
Kent
DA6 7AT

Decision (including any steps ordered)

1. The complainant has requested a copy of legal advice that the London Borough of Bexley ("the Council") relied upon to determine whether its policies were in accordance with the Equality Act 2010.
2. The Commissioner's decision is that the Council has correctly applied the exemption set out at section 42 of FOIA.
3. The Commissioner requires the public authority to take no steps.

Request and response

4. On 12 May 2014, the complainant wrote to the Council and requested information in the following terms:

"As previously discussed my principal concerns is with regards to Bexley Council Civil Representatives and Council Administrators fully recognising my Human Rights and Equality Rights. Although it had been mentioned in correspondence, what Legal Advice has been obtained from the Council's Legal Officer. This has not been provided to me, as a Bexley Taxpayer..."

5. The Council responded on 13 May 2014 and explained the requested information was exempt from release under section 42 of FOIA.
6. Following an internal review the Council wrote to the complainant on 16 June 2014. It upheld its previous decision.

Scope of the case

7. The complainant contacted the Commissioner on 14 June 2014 to complain about the way his request for information had been handled.
8. The Commissioner has had to consider whether the Council was correct to apply section 42 of FOIA.

Reasons for decision

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 communication, where there is no pending or contemplated litigation. The information must be communication 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 questions 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. After reviewing the legal advice the Commissioner is satisfied that in this case the client was a member of the Council's library service and the advice was provided by the Council's in-house Legal Service. The request for legal advice concerned the client seeking an understanding of the Equality Act 2010. The withheld information contains a chain of correspondence in which legal advice is sought. The Commissioner has

therefore only considered the legal advice within the context of the correspondence. 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. The public interest test is set out at section 2 of FOIA. The test requires the balancing of all the public interest factors in favour of maintaining the exemption against all the public interest factors in favour of disclosing.
14. The information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
15. As stated in the Commissioner's guidance, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind the legal professional privilege i.e. safeguarding the confidentiality of communications between a lawyer and their client.

Public interest in favour of maintaining the exemption

16. The Council explained that it had considered whether the public interest in maintaining the exemption outweighed the public interest in disclosing the requested information.

17. The Council explained to the complainant that the requested information:

"does not demonstrate a compelling and/or specific justification that gives rise to a public interest for disclosure that equals or outweighs the public interest in maintain the section 42 exemption. Therefore, in all circumstances of this matter, I consider the public interest in maintaining the exemption outweighs the public interest in disclosing the Council's solicitors legal advice to you".

18. The Council concluded that the fundamental principle underpinning legal professional privilege was demonstrated in this case.

Public interest in favour of disclosing the information

19. The Commissioner understands that the complainant believes that if the legal advice is not disclosed to him, it would be against the Equality Act 2010 and against his Human Rights.

Balance of the public interest test

20. 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) was clear:

'The fact there is already 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)

21. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.

22. The complainant believes the Council's policies are not in accordance with the Equality Act 2010. Bearing in mind the need for accountability and transparency about public authorities, there is potential that the legal advice sought in this case would attract great public interest. Specifically, if there is a concern about whether its policies are in accordance with the Equality Act 2010.

23. However, the Commissioner considers that there is a very strong public interest in the Council being able to obtain or give full and through legal advice to enable it to make legally sound, well thought out and balanced decisions without the 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/given which would not be in the public interest. He further determines that at the time of the request, the Council was still relying on the advice and there is therefore no indication that its sensitivity was lost.

24. The Commissioner concludes that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. The Commissioner determines that the Council has correctly applied section 42(1).

Right of appeal

25. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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