

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 February 2018

**Public Authority:** Surrey County Council  
**Address:** County Hall  
Penhryn Road  
Kingston Upon Thames  
Surrey  
KT 1 2DN

### Decision (including any steps ordered)

---

1. The complainant has requested the information in an email chain relating to Surrey Council Council's Home to School Transport policy. The Council disclosed the first email in this chain but considered the remaining information was exempt from disclosure under section 42(1) of the FOIA as it attracted legal professional privilege.
2. The Commissioner's decision is that the Council has correctly applied section 42(1) to the emails and the public interest favours maintaining the exemption and withholding the information.

### Request and response

---

3. On 11 May 2017, the complainant wrote to Surrey County Council ("the Council") for information from the Special Educational Needs (SEN) and Transport Coordination Centre (TCC) in the following terms:
  - 1) *"Copies of Surrey County Council's Home to School Transport policies for the academic years 2007-8 through to 2012-13 inclusive.*
  - 2) *Any Equality Impact Assessment documents, or equivalent, regarding Surrey County Council's Home to School Transport policies for the academic years 2011-12 to 2016-17 inclusive.*

3) *Any internal guidance documents intended for employees of the SEN or TCC departments regarding the implementation of Surrey County Council's Home to School Transport policies for the academic years 2011-12 to 2016-17 inclusive.*

*In all 3 cases, I need information that relates to or affects both mainstream and special needs pupils, but only those aged 16 or under.*

4. The Council responded on 8 June 2017. For parts 1 and 2 it attached the information. For part 3 the Council explained that staff would follow policy rather than having specific guidance documents.
5. The complainant responded on the same day and for part 1 stated that the policy for the 2011-12 academic year had not been provided. For part 3 the complainant argued the response given did not answer the question of whether such documents existed.
6. The Council provided further clarification on 12 June 2017, explaining that electronic copies of transport policies prior to 2011 were not held and that guidance that had been in place historically had already been provided and was no longer used.
7. The complainant again wrote to the Council to clarify that the FOIA covered manual records as well as electronic records so it should be confirmed whether policies prior to 2011 were held in any form. Similarly, for part 3 the complainant asked the Council to confirm that other than historical guidance there were no further documents, electronic or manual, held.
8. The Council responded on 19 June 2017 confirming no mainstream policy prior to 2011 was held but a SEN transport policy from March 2007 had been located and was provided. For part 3 the Council identified a system processing document it considered may be relevant to the request.
9. In a further email of 19 June the complainant explained to the Council it had received a complaint response the year before which referred to an email which would fall within the scope of part 3 of the request. The complainant referred to a report produced by *[named redacted]* in which page 4 discussed emails between TCC and SEN which may be relevant to part 3 of the request. The complainant asked the Council to provide the email mentioned in the report sent by *[name redacted]* on 6 July 2016 and to look at other emails in the chain to see they were also relevant.
10. The Council acknowledged this as a request for an internal review on 26 June 2017. An internal review was then conducted and the outcome communicated to the complainant on 14 July 2017. This explained that

the team handling the request had not initially considered that emails were "documents". Having looked again at the emails referred to in the internal review request, the Council explained they concerned implementation of the policy and were therefore disclosed to the complainant. With regard to the specific email referred to in the internal review request; the Council considered this was exempt from disclosure under section 40(1) of the FOIA as it was personal data and should be considered for disclosure under the subject access provisions.

11. Following the internal review response the complainant wrote to the Council on 17 July 2017 with some further concerns regarding part 3 of the request and the disclosure of the email from *[name redacted]*. The complainant asked the Council to confirm whether this had been disclosed under the FOIA and not as part of the subject access request. The complainant believed if this had been disclosed under the FOIA then a further email would also be caught by the FOIA as the email from *[name redacted]* referred to another email.
12. On 26 July 2017 the Council responded and stated that the email from *[name redacted]* was disclosed as it had been specifically asked for and the information within it was not subject to any exemption but the Council were not convinced it would fall within the scope of the request as it was initially made as it had been interpreted to be for guidance issued to staff in the form of a document rather than in ad hoc correspondence such as an email.
13. In terms of the email referred to in *[name redacted]* email; the Council explained this contained personal data and would be exempt under section 40(2) of the FOIA but in any event this would not be within the scope of the request being considered.
14. The complainant then made a further request for information on 17 August 2017. This was in the following terms:

*"the email exchange you have sent is not the one to which I was referring.*

*In the July 6 2016 email from [name redacted] that you released under an FOI procedure, the following text appears:*

*Please see my email to [name redacted] last week which [name redacted] cc into*

*I am asking for this email exchange which took place the previous week (and not the same day). Given that 6 July 2016 was a Wednesday, I am expecting an exchange that took place sometime between Monday 27 June 2016 to Friday 1 July 2016."*

15. The Council acknowledged this as a new request for information on 11 September 2017 and responded on 14 September 2017. It clarified that the email referred to by the complainant was not sent within the timescale given by the complainant but was actually sent on 4 July 2016. However, the email exchange preceding it did take place during the previous week and the Council provided a copy of one of the emails in the chain, withholding the remainder of the email chain on the basis of legal professional privilege (section 42). An internal review of this decision was conducted and the outcome communicated to the complainant on 19 December 2017 upholding the decision to withhold the information in the email chain.

### Scope of the case

---

16. The complainant contacted the Commissioner on 15 August 2017 to complain about the way his request for information had been handled.
17. During the course of the Commissioner's investigation she wrote to the Council to clarify that, having viewed the emails that were disclosed to the complainant, she did not consider they were the personal data of the requester or third parties and therefore it would appear the email from *[name redacted]* had been disclosed under the FOIA. The Commissioner clarified that the point of dispute as she understood it was the email referred to in this email from *[name redacted]* and the fact this had not been disclosed in response to the complainant's subject access request or under his FOIA request.
18. The Commissioner asked to be provided with a copy of the email referred to in *[name redacted]* email of 6 July 2016 which was addressed to *[name redacted]* in order to be able to determine if this should have been disclosed in response to the original FOIA request as it contained information that could be considered "*internal guidance documents*" for employees on the Home to School Transport policies or if the Council were correct to treat this as a new request.
19. The Commissioner has viewed this email chain and notes the discussions do centre on the Transport policy. However, these discussions do not appear to be information which could be considered as internal guidance to staff. The discussions are internal between a few individuals discussing specific aspects of the policy but are not instructions to staff on the policy. The Commissioner is therefore of the view that this email chain does not fall within the scope of the initial request and the Council were correct to regard this as a new request for information.

20. Therefore, the Commissioner considers the scope of her investigation to be to determine if the Council has correctly withheld the information in this email chain on the basis of section 42 of the FOIA.

## Reasons for decision

---

21. Section 42 of the FOIA states that a public authority may refuse to disclose information if it is subject to legal professional privilege.
22. This exemption is not absolute, so it is subject to the public interest test. Therefore, in addition to demonstrating that the withheld information is subject to legal professional privilege, a public authority must consider the arguments for and against disclosure and demonstrate, in a given case, that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
23. Legal professional privilege covers communications between lawyers and clients for the purpose of obtaining legal advice and communication and/or documents created by or for lawyers for the dominant purpose of litigation.
24. The Council considered all of the preceding emails (after the one disclosed to the complainant) in the chain attracted legal professional privilege. In this case, the privilege claimed is advice privilege. This applies where no litigation is in progress but confidential communications have taken place between a client and lawyer for the dominant purpose of seeking or giving legal advice. The client in this case is the Council.
25. At the time of the request the Council has stated that no there was no pending litigation. Therefore the information would only be subject to advice privilege. The Commissioner acknowledges that the Council is of the view that the information also attracts litigation privilege as there is no pending litigation; however, when the advice was provided there was not proposed litigation and to attract litigation privilege the advice would need to have been given when there was a real prospect or likelihood of litigation rather than just a fear or possibility. Therefore, the Commissioner considers the information only attracts advice privilege.
26. Having reviewed the withheld information the Commissioner notes that the earliest emails in the chain are a covering email from the Council to a lawyer asking for advice. This email sent to the lawyer also includes the earliest email in the chain which is the subject advice is requested on. The subsequent email from the lawyer back to the Council offers the requested legal advice. It is clear that this information constitutes communications and is information exchanged between the internal

client and lawyer for the dominant purpose of seeking and providing legal advice.

27. The Commissioner notes there is a subsequent email, after the legal advice was received from the lawyer which consists of a communication between staff at the Council. The lawyer is copied in to this email and it is a communication between Council staff but it is related to the issue on which legal advice was sought and by copying the lawyer in to the email the Commissioner accepts that there was still an intention to obtain an opinion from the lawyer and this opinion would constitute legal advice.
28. The Commissioner will now go on to consider the public interest test.

*Public interest arguments in favour of disclosure*

29. The Council acknowledges there is a public interest in the disclosure of information which would increase transparency and accountability as well as enhancing the quality of discussions and decision making.

*Public interest arguments in favour of maintaining the exemption*

30. The Council has argued that there is a strong public interest in preserving the principle of legal advice privilege. It states that clients need to be able to consult their lawyers and to be able to fully and frankly communicate in order to obtain high quality, comprehensive legal advice which enables the Council to effectively conduct its business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments as a consequence legal advice may well set out perceived weaknesses of the Council's position. Without such comprehensive advice, the Council's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
31. The Council also argues that disclosure of legal advice could prejudice the Council's ability to defend its legal interests if the decision was judicially reviewed. It also believes there is a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record, leading to a reluctance to seek legal advice and decisions being taken that are legally unsound.

*Balance of the public interest arguments*

32. There is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. This is necessary so that they can lay out all the issues relevant to the matter they require advice on and so that the lawyer can respond in full to those enquiries. This may include explaining any weaknesses in, or



criticism of their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights, or ensure they are acting in compliance with the law.

33. The Commissioner also recognises the public interest in openness and transparency and she understands the value in providing access to information to enable the public to understand more fully why decisions are made and to encourage public debate and scrutiny.
34. In this case, the withheld information relates to internal discussions of the Council's Home to School Transport policy. Disclosure would assist the public in understanding more closely how decisions were made and how the existing policy was determined.
35. However, in this case, the Commissioner considers there are stronger public interest arguments in maintaining the exemption. The withheld information and the legal advice was still relevant at the time of the request, it discusses the Council's position on the Transport policy and the reasons for this position. The Transport policy is still in place and disclosing the legal advice on this would not be in the public interest as it would undermine the principle of legal advice and hinder the Trust being able to obtain full and thorough legal advice in order to make balanced decisions. To outweigh this clear public interest in maintaining the exemption there would need to be a compelling argument for disclosure and in this case the Commissioner has not been presented with any such argument and does not consider that there is a reasonable justification for disclosure.
36. If disclosure were ordered in this case, it would undermine the principle of legal professional privilege and the ability in future for the Council to obtain necessarily free, frank and candid legal advice, which in turn would hinder the Council's ability to carry out its functions and make fully informed decisions. The Commissioner does not consider such consequences are in the interests of the wider public.

## Right of appeal

---

37. 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: 0870 739 5836

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)

38. 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.
39. 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 .....

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**