

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

### **Decision notice**

**Date:** 19 September 2018

**Public Authority:** Sheffield City Council

**Address:** Town Hall  
Pinstone Street  
Sheffield  
S1 2HH

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

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1. The complainant has requested information relating to a contract between Sheffield City Council ("the Council") and a contractor. The Council disclosed some information and said that the remainder was exempt from disclosure by virtue of the exemption at section 42 (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the Council was entitled to apply the exemption at section 42(1) FOIA to the withheld information. No steps are required.

#### **Background**

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3. In August 2012, the Council entered into a private finance initiative 'Streets Ahead' contract with Amey Hallam Highways Ltd ("Amey"), an infrastructure support service provider, to maintain the city's roads, pavements, street lights and highway trees.
4. The request under consideration relates to a health and safety conviction incurred by another company within the Amey group, in 2011. The complainant is concerned that this may not have been properly disclosed during the contract tender process and has submitted a number of FOIA requests to the Council on the matter.

## Request and response

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5. On 29 December 2017, the complainant wrote to the Council and requested information in the following terms:

*"In an email from [name redacted] to myself (dated 16th November 2017), he claims that a 'review' by Council officers took place following a health and safety fatality/conviction involving Amey being brought to [the Council's] attention when it was reported in the media in 2011.*

*I would like copies of documentation pertaining to this review (including but not limited to the minutes taken) with details of when the review took place, which Council officers were involved in the review, what was considered in the review, how the decision was arrived at in relation to the outcome, and the communication of that outcome to [name redacted] (Project Sponsor) and also the PFI Project Board (comprising [names redacted]).*

*When doing so, please provide original Microsoft Word documents (except where evidence was not produced in Word), not scans or pdf conversions.*

*As these documents relate to the winning bidder of the PFI contract, they should have been retained in accordance with the Council's Constitution. Furthermore, this information would not be considered to be 'financially sensitive' as it contains no information of a commercial or financial nature, nor would it be a breach of confidentiality as details of the H&S fatality and conviction already reside in the public domain."*

6. The Council responded on 26 January 2018. It disclosed the early part of an email chain on the matters described in the request, with redactions made under section 40(2) (personal information) in respect of names and contact information of council officers. It withheld the remainder of the email chain, on the grounds that the information was exempt from disclosure under section 42 (legal professional privilege) of the FOIA.

7. The complainant requested an internal review on the same day. He said:

*"I have reasonable grounds to assert that the information provided is false. Firstly, the hyperlink is a dead link, the correct link is actually: <https://www.shponline.co.uk/worker-fell-...>*

*There could be a valid argument that the link has changed, but there is also an equal argument that the link has never changed.*

*Secondly, the font changes colour during the first email with regard to the named bidders."*

8. He asked for some metadata in relation to the emails, to verify their authenticity. He added:

*"I would also like further details of the alleged 'review' which according to [name redacted] was undertaken by Council officers. The email thread provided is neither indicative of, or proof of, a review having taken place by Council officers. If there is anything of a legally privileged nature in the 'review' by SCC and its legal representatives, please redact it but leave all remaining SCC content intact that is not legally privileged."*

9. In a follow up email, the same day, he asked:

*"The question about whether Amey did/should have declared this incident in their PQQ submission was sent internally to HighwaysProcurementTeam at SCC, therefore is not subject to legal privilege. Could you please advise what the response was of the HighwaysProcurementTeam to this question."*

10. The Council provided the outcome of the internal review on 26 February 2018. It upheld its application of section 40(2) and section 42. With regard to the specific points raised by the complainant, it said:

*"I am happy the redactions have been applied correctly and I see no evidence of there being any fabrication or otherwise of this documentation. The communications are over six years old so it is not a surprise that the hyperlink included on the initial email communications have changed and this is not evidence on any efforts to commit what would be an offence of altering information as a result of a Freedom of Information Act request. Furthermore you have been provided a copy of the information as per the emails held i.e. the font's are different and this reflects the original emails held... I consider the "review" of the Health and Safety concerns have been provided in accordance with your initial request. As noted previously the Council considers that the Streets Ahead contract is not affected by the Health and Safety concerns that you have noted in your sequence of FOI requests and associated correspondence with the Council."*

## **Scope of the case**

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11. The complainant contacted the Commissioner on 24 April 2018 to complain about the way his request for information had been handled.

He disputed that the redacted information was subject to legal professional privilege. Referring to the email chain that had been disclosed, he said:

*"...as can be seen from the chain of emails, the last email (top of page 1) was sent internally to the HighwaysProcurementTeam, so believe it is not bound by legal professional privilege (ie. solicitors, etc.) As such I would like to request the ICO overturn this decision and ask that SCC provide ALL relevant internal emails in this chain".*

12. The analysis below considers the Council's application of section 42 of the FOIA to withhold some of the information in the email chain identified by the Council as falling within the scope of the request. The complainant did not challenge the application of section 40 to withhold personal data, and so that has not been considered in this decision notice.
13. The Commissioner has had sight of the withheld information when considering this matter.

## **Reasons for decision**

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### **Section 42(1) – legal professional privilege**

14. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege ("LPP") and this claim to privilege could be maintained in legal proceedings.
15. LPP protects the confidentiality of communications between a client and their lawyer. There are two categories of legal professional privilege – litigation privilege and legal advice privilege. The Council maintains that the information attracts legal advice privilege. Legal advice privilege covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, about legal rights, liabilities, obligations or remedies.
16. The complainant has questioned whether the parties involved in the email exchange may be categorised as lawyer and client. In her

guidance on section 42<sup>1</sup>, the Commissioner recognises that for the purposes of the exemption, the generic term “lawyer” means a legal adviser acting in a professional capacity.

17. The Council said that the communications were sent to the Council’s lead legal officer for the Streets Ahead procurement project, and that they are a qualified solicitor. That person then provided advice as to legal liabilities and obligations, based on the information that was included in the email chain. It said the communication was therefore between the Council as client (individual officers forming part of the client base who can seek legal advice on matters as required) to its legal representative as adviser.
18. The addresses in the email chain confirm that the emails were sent to the Council’s lead legal officer. The Commissioner therefore accepts that there was a professional legal adviser and client relationship between the two parties.
19. As to the content of the emails, the Council confirmed that they were the only information it held which fell within the scope of the request, and stated:

*“These communications seek legal opinion on the relevance of the highlighted health and safety issue to the bidders’ involved in the tender process for the Street Ahead project and the validity of the PQQ response.*

*The advice was sought in relation to the responses submitted by bidders to the PQQ stage questions and the obligation on bidders to subsequently qualify their position on the identified health and safety investigation during the tender process.”*

20. The Commissioner has seen the full email chain, including the response provided by the lead legal officer. She is satisfied that it relates to legal liabilities and obligations. The Commissioner therefore considers it to be legal advice and that the redacted information falls within the scope of the exemption at section 42(1).

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

21. LPP will be waived if there has been a previous disclosure of the information to the world at large and it can therefore no longer be considered to be confidential. The Council explained that the information remains confidential and has not been shared or disclosed outside the Council.
22. The Commissioner is therefore satisfied that the redacted information attracts LPP. This is because the advice in the communications is not publically known and there is no suggestion that privilege has been lost. The Commissioner therefore finds that section 42(1) is engaged.

### **Public interest test**

23. Section 42 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 42(1) outweighs the public interest in disclosing the information.

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

24. The complainant argued that disclosure is in the public interest due to breaches of health and safety legislation which he believes Amey has committed during its delivery of the Streets Ahead contract.
25. The Council recognised the public interest in transparency and openness regarding how it spends public money and the decisions it makes which would improve public awareness of, and engagement with, its decision making processes. It also accepted that disclosure would provide information about the Council procurement process for the Streets Ahead contract and address local concerns about that process.

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

26. The Council argued that disclosure would:
  - adversely affect the ability of the Council to seek and act upon legal advice without constraint, disrupting the legal adviser/client relationship;
  - disturb the openness of communications between the Council as client and its legal advisers and interfere with the provision of full and frank legal advice;
  - assist individuals or organisations in attempting to challenge or dispute advice provision; and

- be of little value as the procurement process is complete and the issue of the reporting of health and safety concerns has been exhaustively reviewed and responded to in previous FOI requests and wider correspondence.

*Balance of the public interest*

27. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. The general public interest inherent in this 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. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
28. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in *Council v Information Commissioner and Gavin Aitchison (GIA 4281 2012)* where, at paragraph 58, Upper Tribunal Judge Williams said:  
  
*"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".*
29. The Commissioner recognises the public interest in openness and transparency and she acknowledges the value in providing access to information to enable the public to understand more fully the conduct of public authorities and to encourage public debate and scrutiny.
30. The Commissioner also understands that the complainant has specific reasons for wanting the information, to do with objecting to the Council's programme of street tree management, which Amey holds the contract for. However, the public interest in the context of the FOIA refers to the broader public good. As the Commissioner has noted above, the Upper Tribunal and numerous First-tier Tribunal (Information Rights) decisions have highlighted the very strong in-built public interest in protecting the confidentiality of legal advice. In order to outweigh the inherent public interest in maintaining the exemption the Commissioner considers that there must be a compelling argument for disclosure. In

this case the Commissioner has not been presented with any such arguments.

31. In weighing the complainant's interests against those of the Council and its ability to seek confidential legal advice for facilitating its wider public responsibilities, the Commissioner does not consider that the interests of the complainant, or the public interest, are sufficiently strong to warrant the disclosure of information which is subject to LPP and that the public interest in maintaining the exemption outweighs the public interest in disclosure.



## Right of appeal

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32. 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)

33. 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.
34. 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 .....**

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