

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2019

Public Authority: The Commonweal School

Address: The Mall
Swindon
SN1 4JE

Decision (including any steps ordered)

1. The complainant has requested legal advice received by the Commonweal School (the School) on the issue of safeguarding. The School identified information within the scope of the request but withheld this on the basis that information was legally professionally privileged and therefore exempt under section 42 of the FOIA.
2. The Commissioner's decision, after considering the public interest test, is that the School has correctly applied this exemption and the public interest favours withholding the requested information.

Request and response

3. There has been a considerable amount of correspondence on this matter which the Commissioner has summarised.
4. On 20 April 2018 the complainant made a request under FOIA:
'I would like to make a freedom of information request regarding advice the Commonweal School received which led to it concluding that it was right to assert that it was justified in not following its Safeguarding Policy.'
5. The complainant provided a background to the FOIA request but these details have been redacted in this decision notice by the Commissioner.
6. There followed correspondence between the School and the complainant on whether this was a request for information under FOIA or a Subject

Access request for information under the Data Protection Act 1998 (DPA). On 25 April the complainant made it clear that he wished to request the information under both FOIA and DPA. This decision notice considers the request for information under FOIA.

7. On 23 May 2018 the School refused to disclose the information as *'all professional and legal advice sought by the school and/or received by the school with regard to [redacted wording relating to one aspect of] safeguarding issues ... is privileged advice and therefore, exempt information.'*
8. On 24 May, 9 and 15 June the complainant stated his assumption that the School's view is that this falls under section 42 of FOIA and sought clarification:

'In which case this only covers information regarding communication between a lawyer and client. My request asked for legal and professional advice. As such can you please provide any relevant information not based on communication between lawyer and client immediately.'

In respect of any relevant legal advice can the school be clear if such information exists or not.

Would the school be willing to share if it has applied a public interest test and if so why it views sharing of legal advice in this matter to not be in the public interest.'

9. On 22 June the School confirmed that it *'does not hold any written professional advice other than legal advice which is covered by Legal Advice Privilege. The school has applied the public interest test and considered that the general public interest in the principle behind legal professional privilege applies, safeguarding openness in communication between a client and its lawyer. Accordingly the legal advice is exempt from disclosure.'*
10. On 5 July the complainant sought an internal review of his FOIA request. He disputed that this is the subject of a Subject Access request (SAR) under DPA rather than an FOI request. *'The legal guidance the school has taken on what is correct safeguarding and data protection behaviour is not specific to an individual.'*
11. On 9 July the School restated its position. It *'does not hold any written professional advise [sic] other than legal advice and this legal advice is exempt from disclosure'.*

Scope of the case

12. The complainant wrote to the Commissioner on 14 July 2018 and after providing further documents the case was accepted on 2 August 2018.
13. The Commissioner considers the scope of her investigation to be the decision by the School to withhold the legal advice under section 42 of the FOIA.
14. The Commissioner notes that this FOIA request relates to a safeguarding issue which will not be detailed in this decision notice in case of inadvertent disclosure.

Reasons for decision

15. Section 42(1) of the FOIA states 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."

16. The School has identified several pieces of information which it considers within the scope of the request. These have been provided to the Commissioner.
17. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Information Tribunal¹ as *"... a set of rules or principles which are designed to protect the confidentiality 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 [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."*
18. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal

¹ *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*

advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.

19. In its submissions to the Commissioner, the School explained that *'as an academy trust [it] has retained solicitors, Stone King LLP, who are engaged to provide legal advice to the School. The client is the academy trust, a charitable company limited by guarantee, which has a Board of Trustees (i.e. Directors / Governors) who are responsible for the management of the School.'*
20. The School stated that, in 2016, *'litigation was certainly not in progress and it could not be said to be contemplated'* and therefore the School had approached the solicitors, Stone King LLP, for legal advice.
21. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because the withheld information consists of legal opinions and advice provided to the School by a professional legal adviser about whether the School had properly discharged its functions in respect of a safeguarding issue.
22. As such the Commissioner finds that the legal professional privilege exemption is engaged.
23. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

24. The School recognises and understands that there is a public interest in openness and transparency and how this can improve the standard of communications and trust with parents.
25. The complainant has argued that:
 - Parents (and others) have a right to know the basis on which a school makes serious safeguarding decisions about the children in that school's care. In this case the school insists that the advice it received takes precedence over: 1. Its own safeguarding policy (which aligns to statutory safeguarding advice). 2. A safeguarding audit by the LA which was clear that the school needed to ensure its safeguarding policy was followed and parents are informed about safeguarding issues involving their children.

- The legal advice was presented by the chair of governors as legal fact at the [redacted] panel. The [redacted] panel is controlled by the school governors... means that should the school either deliberately or maliciously misinterpret any advice it has received there is no effective way ... to challenge that view.
- With regards to this incident the school has repeatedly failed to be entirely open and honest... It is in the public interest that the school can show itself as trustworthy and provide clear evidence that it is not again in some way confused or misinterpreting reality.

Public interest arguments in favour of maintaining the exemption

26. There is a strong element of public interest inbuilt in this exemption, the central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a very strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence.
27. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.
28. The School has argued that:
 - It is vital to maintain lawyer-client confidentiality and the ability of the School to consult its lawyers on issues relating to safeguarding (as well as other legal issues that arise) in a safe forum without fear of disclosure, is fundamental.
 - Safeguarding is a central part of the School's statutory obligations to its pupils.
 - If there was fear of potential public disclosure it would reduce the candidness of advice sought.
 - Safeguarding advice is very fact specific. It cannot be looked upon as generic 'one size fits all' legal advice. It is essential in any safeguarding context that the School is able to consult its lawyers

in confidence to obtain effective legal advice in a forum which is conducive to a free exchange of views without fear of disclosure.

Balance of the public interest arguments

29. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. However, this FOIA request was for the legal advice relating to a safeguarding issue. The Commissioner considers the privilege attached to the information has not been waived and is still relevant now.
30. The Commissioner's view is that there are stronger public interest arguments in favour of maintaining the exemption. Disclosure could lead to the School being unable to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure.
31. Furthermore, she considers the School's argument that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made to be a strong argument. The Commissioner is also mindful of the Tribunal's comments in the Bellamy case that *'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest.'*
32. It should also be noted that this particular information is specific to an individual concern and disclosure under the FOIA means that this information could be disclosed to the public in general, not just the complainant. As noted by the School above, this type of advice is not generic that could be applied across the board in relation to safeguarding issues in general.
33. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. She therefore concludes that the School correctly withheld the requested information under the exemption at section 42.

Other matters

34. Although they do not form part of this decision notice, the Commissioner would draw the School's attention to the following.
35. The Commissioner notes that the complainant requested the same information under both the DPA and the FOIA.
36. The DPA is specifically concerned with 'personal data' and gives certain rights to individuals, such as access to their own personal data.
37. If the information requested is not the individual's own personal data then the request should be clearly handled under the FOIA. Release of information under FOIA is, effectively, a disclosure to the general public, not just to the person making a request.
38. This decision notice has investigated the request under FOIA but the Commissioner reminds the School that on 26 April 2018, the complainant paid a fee for a Subject Access request (his own personal data) and the School should clearly respond to this if it has not already done so.

Right of appeal

39. 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

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

40. 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.
41. 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

Pamela Clements
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SK9 5AF