

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2020

Public Authority: Reigate & Banstead Borough Council

Address: Town Hall
Castlefield Road, Reigate
Surrey
RH2 0SH

Decision (including any steps ordered)

1. The complainant has requested information from Reigate and Banstead Council ("the Council") in the form of legal advice in relation to the Core Strategy Review approved by the Council in July 2019. The Council refused to disclose the requested information, citing section 42(1) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied the above exemption to the requested information, therefore the Commissioner requires no steps to be taken.

Request and response

3. On 17 July 2019 the complainant requested information from the Council in the following terms:-

"Please could you provide me with a copy of all the advice you received from Counsel in relation to the Core Strategy Review that was approved by Council on 2nd July 2019. (Counsel's advice is referred to in paragraph 19 of the Council meeting agenda.)"
4. The Council responded to the complainant's request on 31 July 2019. It refused to disclose the requested information, citing section 42(1) of the FOIA as a basis for non-disclosure. The complainant sought an internal

review of that decision on 8 August, the result of which was sent to him on 13 September 2019. The reviewer upheld the original decision.

Scope of the case

5. The complainant contacted the Commissioner on 13 September 2019 to complain about the way his request for information had been handled.
6. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of the above exemption.

Reasons for decision

Section 42(1) – information subject to legal professional privilege

7. 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.
8. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) 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 communications or exchanges come into being for the purposes of preparing for litigation."
9. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both 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 therefore attract privilege.

10. 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 legal 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. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
11. In this case the Council has confirmed that it considers the requested information to be subject to legal advice privilege. The communications covered by advice privilege are confidential, made between the Council and its legal advisers acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice regarding the Core Strategy Review. The Council has also confirmed that it is satisfied that privilege has not been lost by virtue of the advice losing any of its confidentiality.
12. The complainant stated in his request for internal review that the legal advice is referred to twice in the Core Strategy summary presented to Councillors (paragraphs 19 and 36) quoting directly from the advice and summarising it, therefore the Council should disclose it. Both the Council and the Commissioner considered that the implication of this statement was that the complainant believed that referring to and quoting from the advice constituted a waiver of privilege and that therefore the information was no longer subject to legal professional privilege.
13. The Commissioner's guidance on section 42 of the FOIA states that, unlike 'waiver' within the context of specific court proceedings, in the context of the FOIA, privilege will only have been lost if previous disclosures to the world at large mean that the information can no longer be considered to be confidential. A public authority must assess whether any disclosure of the information was made in a restricted or an unrestricted way.
14. The Council stated that it was satisfied that the privilege attached to the requested information had not been lost simply because there was a mention of the advice in a document relating to a Council meeting. The Council stated that it was relying on the case of ***Kessler v IC & HMRC*** (29th November 2007) where reference had been made at various points to the existence and conclusion of the advice from the

DTI and it was contended that these references resulted in waiver of privilege. The Information Tribunal at [44] –[45] said:

"We are satisfied that the rule that by relying upon part of a privileged document before a court the party doing so waives privilege in the whole document does not apply to partial disclosure of privilege information outside the context of litigation. . . . We are satisfied that HMRC has not waived legal professional privilege in this instance."

15. Having considered the content of the information, the Commissioner accepts that the requested information is subject to legal professional privilege on the grounds of legal advice privilege as it consists of communications to and from a professional legal adviser for the purpose of seeking and providing legal advice. The Commissioner's guidance states that a communication under section 42 of the FOIA means a document which conveys information, which was the case in this matter as the requested information consisted of legal advice provided to the Council regarding its Core Strategy Review. The Commissioner also accepts that legal professional privilege has not been lost by mere mention of and summary of parts of the advice to a restricted audience. On this basis, the Commissioner finds that section 42(1) of the FOIA is engaged in relation to the requested information.

Public interest test

16. The exemption provided in section 42(1) 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. The Commissioner has considered the factors in favour of maintaining the exemption and has balanced them against those in favour of disclosure of the information withheld under section 42(1) of the FOIA.

Factors in favour of disclosure of the information

17. The Council accepts that public authorities should be accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability, and it would be in the public interest to know whether the Council followed or went against legal advice when it comes to decision-making which will affect the public.
18. The Council also accepts that there is public interest in a disclosure that would promote public debate in respect of proposals affecting the Core Strategy and the Council's development plan. This would go

towards furthering the understanding and insight of the public into the approach of the Council to the Core Strategy and its future.

Factors in favour of maintaining the exemption

19. The Council states that it is vital for it to be able to obtain full and frank legal advice in a safe space, to aid it in complying with its legal obligations and conducting its business accordingly. As legal advice has to be necessarily fair, frank and reasoned, it is inevitable that it is likely to highlight the strengths and weaknesses of a course of action. If legal advice were to be routinely disclosed, public authorities such as the Council may be reluctant to seek advice as the disclosed advice could contain information which may damage their position. As a result, reluctance to seek legal advice may render the Council less able to properly comply with its legal obligations.
20. Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness and frankness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn goes to serve the wider administration of justice. The legal adviser needs to be able to present the full picture to his or her clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. If a legal adviser is unable to provide this comprehensive advice, without fear of subsequent disclosure, the quality of decision making may be adversely affected, which would not be in the public interest at any level.
21. The Council also states that the advice is very recent and the matter to which it relates, i.e. the Core Strategy, remains live. It is not impossible that this may be the subject matter of future litigation, and the Council should be able to rely on the confidentiality of the advice it has received.

Balance of public interest factors

22. The Commissioner is aware that there is a strong element of public interest inbuilt into maintaining LPP. This position was endorsed in the case of *DBERR v Dermot O'Brien* ([2009] EWHC 164 (QB))

".....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight"

23. In the case of *Calland v Information Commissioner & the Financial Services Authority* (EA/2007/0136) the Tribunal commented:

"What is quite plain, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

24. The Commissioner and the Information Tribunal have both expressed the view, in a number of previous decisions, that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the *Bellamy* case, as mentioned in paragraph 23 above, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".

25. There will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept, and it is clear from previous decisions and from the Commissioner's guidance that, as was stated succinctly in the *Bellamy* case, that:

"there is a strong element of public interest inbuilt into the privilege itself and that at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".

26. The Commissioner has considered the public interest arguments in favour of disclosure of the information withheld under section 42, and has concluded that, although significant weight can be attached to transparency and accountability in this case, also to the public interest in knowing the quality of legal advice received by the Council and whether it chose to follow or go against it, the weight of all of these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption, such as the vital importance of the Council being able to obtain free, frank and high quality legal advice without fear of premature disclosure. The arguments are also not sufficient to outweigh or override the inbuilt public interest in information remaining protected by LPP.

27. The Commissioner has also taken into account the Council's information that the advice has been referred to in a public meeting, so the public knows that the Council took legal advice in relation to the Core Strategy and also the effect of that advice. The Commissioner considers that this goes towards informing public debate and providing

an insight into decisions made by the Council around the Core Strategy.

28. In view of the above, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42 of the FOIA outweighs the public interest in disclosing the information.

Right of appeal

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: 0870 739 5836
Email: GRC@justice.gov.uk
Website: 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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SK9 5AF