

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

### **Decision notice**

**Date:** 30 January 2020

**Public Authority:** Oxford City Council

**Address:** St Aldate's Chambers  
109 St Aldate's  
Oxford  
OX1 1DS

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

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1. The complainant has asked Oxford City Council for copies of communications and records of contacts between GL Hearn and the Council which relate to the commissioning, production and approval of the content of the Oxford Local Plan. The Commissioner has established that the Council does not hold any information within the scope of the complainant's request other than an annotated 'Clarification Note' which is the subject of the Council's application of section 42(1) of the FOIA.
2. The Commissioner's decision is that Oxford City Council has complied with section 1 of the FOIA and that it has properly applied the exemption to disclosure provided by section 42(1).
3. The Commissioner requires the public authority to take no further action in this matter.

#### **Request and response**

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4. On 24 July 2019, the complainant wrote to Oxford City Council and requested information in the following terms:

"This Freedom of Information request concerns the Oxford Local Plan 2016 - 2036. On 29 May 2019, the Planning Inspectors appointed to examine the Oxford Local Plan 2036 provided to Oxford City Council a set of questions and comments in the document entitled "Initial Questions and Comments to OCC" (document 1C.1). Oxford City Council has recently published, in a series of documents, its responses to the

Planning Inspectors' Initial Questions and Comments. This information request explores how Oxford City Council's response to Question 1, detailed in the document titled "OCC.1A\_\_OCC\_Response\_to\_Inspectors\_Initial\_Queries\_and\_Comments\_IC1\_Q1.pdf" was worked up. Document IC1\_Q1 contains a Clarification Note from GL Hearn<sup>1</sup> who were commissioned by the Oxford City Council to independently assess the City's projected housing need.

Please supply copies of all communications relating to the commissioning, production and approval of the content of OCC.1A. This should include details and records of all contacts between GL Hearn and Oxford City Council representatives in addition to internal communications and meeting minutes."

5. The Council sent its response to the complainant on 20 August 2019. The complainant was advised that a meeting took place on 21 June 2019 with GL Hearn and two named persons. The purpose of that meeting was to discuss the Inspectors' question and what would be helpful to include in a clarification note. The Council informed the complainant that it held no written records of that meeting.
6. Additionally, the Council advised the complainant that it holds a copy of an email exchange with the Council's QC, which includes a draft copy of the document published on the Council's website. The Council told the complainant that it was refusing to disclose this information in reliance on section 42(1) of the FOIA, on the grounds that it is subject to legal professional privilege.
7. On 30 August 2019, the complainant wrote to the Council to request an internal review of its decision to withhold the correspondence between the Council and its QC. The complainant's email set out her rationale that the withheld information should be disclosed.
8. Also, on 30 August, the complainant wrote a second email to the Council. In that email the complainant pointed out that she had asked for "...all communications relating to the commissioning, production and

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<sup>1</sup> GL Hearn (part of Capita plc) is a real estate consultancy which provides planning, development and advisory outcomes to private and public sector clients. In 2014, Oxford City Council instructed GL Hearn to undertake a Strategic Housing Market Assessment to inform the Council's Local Plan.

The examination of the Oxford Local Plan took place during 2019. The Council in its capacity of Local Planning Authority asked GL Hearn to clarify points raised by objectors to work it had undertaken in 2014, as part of the Local Plan examination.

approval of the OCC.1' and that this should 'include details and records of all the contracts between GL Hearn and Oxford City Council representatives in addition to internal communications and meeting minutes'. The complainant asserted that the Council had not responded fully to her request and had instead focussed only on the email exchanges between the Council and its QC.

9. The complainant asserted what she considers is the likelihood that communications took place and she referenced documents, which had previously been supplied, to support her position.
10. On 5 October 2019, the Council wrote to the complainant to advise her of its internal review decision. The Council provided the complainant with explanations of the points raised in her emails of 30 August.
11. The Council confirmed the status of the 'Clarification Note' and that it had discussed with GL Hearn the scope and cost of an 'extension' of existing work. The Council informed the complainant that there are no notes of that conversation.
12. The Council also confirmed that it provided GL Hearn with feedback on the note via email and it advised the complainant that those emails no longer exist. According to the Council, the emails are routinely deleted once a matter has been completed. Additionally, some feedback was provided in telephone calls but again no notes were taken.
13. The Council confirmed that there had been email discussions between the Council and GL Hearn about the final costs for this work and, although those emails are outside the terms of the complainant's request, the Council told the complainant that it could arrange for them to be made available to her.
14. The Council advised the complainant that planning officers had asked for a clarification note as it was anticipated that one would be needed in readiness for the Cherwell Local Plan Part 2 Examination. It confirmed that GL Hearn met with officers in February 2019 and a very short note was prepared. Ultimately the Council had determined that the note was not needed for that examination. The Council told the complainant that its "officers did not finalise that note, use it or publish it. The officers did not think it was very clear and the Council did not pay for this note. The officers later picked this up again when dealing with the Council's responses to the Inspectors' questions regarding its Local Plan. This resulted in the final Clarification Note that has been published. No records have been kept of the earlier drafts. As stated above there are no records of early communications about or any early drafts of the Clarification Note".

15. The Council advised the complainant that draft versions of the note were not kept. It said, "Officers do not routinely keep such documents as they become irrelevant once a document is finalised and keeping them presents a potential risk of publishing a wrong version or other colleagues accidentally referring to the wrong version, as well as making officers mailboxes and version control unmanageable".
16. The complainant was informed that, "...there was not a formal commissioning process for the Clarification Note as it related to the original work of GL Hearn undertaken for the Council. The scope of the note and the approach to fee was discussed in a meeting with GL Hearn but the Council does not have any notes for this meeting".
17. At a meeting of 10 July 2019, the Council's Cabinet member for Planning and its Acting Head of Planning discussed the OCC.1 prior to its submission to the Inspectors. The Council told the complainant that, "A note of that meeting was not taken".
18. The Council confirmed its application of section 42 of the FOIA in respect of email exchanges between Council officers and the Council's QC and the draft copy of the document IC1\_Q1 on the grounds of legal professional privilege.
19. Finally, the Council informed the complainant that it does not hold any further information in relation to her FOI request.

### **Scope of the case**

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20. The complainant contacted the Commissioner on 11 October 2019 to complain about the way her request for information had been handled.
21. The complainant advised the Commissioner that she was not happy with the Council's responses, including its internal review, and she made the following points in support of her complaint:
22. The Council advised the complainant that there was no formal brief for the GL Hearn 'note'. The Council describes that 'note' as simple and short. However, the complainant says that the 'note' was in fact 10 pages long and contained detailed data which formed an important part of a response to Government Inspectors on a critical aspect of Oxford City's Local Plan.
23. The Council has stated that relevant emails have been deleted and it gives the reasons for this. However, in respect of a previous FoI request, also related to GL Hearn, the complainant was given emails which were well over a year old. This is at variance with the Council's

position in respect of the emails the Council has in this case, which are much more recent.

24. There appears to be a complete lack of notes of any conversations. In addition, an external consultant has been commissioned to undertake an important piece of work with apparently no formal commissioning process. The complainant asserts that the Council's response is not credible, and it suggests it is seeking to avoid providing the information which she has requested.
25. With respect to the Council response concerning the correspondence between the Council and its QC and its application of section 42, the complainant makes the following points:
26. The Council is not currently involved in any legal proceedings or legal action. The Council is merely in the process of answering the questions of the Inspectors who have been appointed to examine the Local Plan. This particular question relates to the Council's housing need and is of great interest to those following the Local Plan Process. The review of the Local Plan is supposed to be an open and transparent process and to withhold the correspondence between the Council and the Council's QC would seem to be contrary to this.
27. The preparation of the Oxford Local Plan requires the spending of public funds and the final document will affect all residents of the City. The Local Plan examination is required to be held in public. It is therefore hard to imagine a situation where it would be less in the public interest to withhold the correspondence between the Council and the Council's QC.
28. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the Council holds more information than that it disclosed in response to her request. Additionally, the Commissioner told the complainant that she would determine whether the Council is entitled to rely on Section 42(1) of the FOIA in order to withhold any of the information she has requested.

## **Reasons for decision**

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### **Section 1 of the FOIA**

29. Section 1 of the FOIA states that –

“(1) any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

30. The Commissioner has investigated whether the Council holds the information which the complainant has asked for.
31. To make a determination of that question, the Commissioner applies the civil test which requires her to consider the question in terms of 'the balance of probabilities': This is the test applied by the Information Rights Tribunal when it has considered whether information is held in past cases.
32. The Commissioner has investigated whether the Council holds recorded information falling within the scope of the complainant's request. She has done this by asking the Council questions about the searches it has made to locate the information which the complainant seeks and questions about the possible deletion/destruction of information which might be relevant to the complainant's request.
33. The Council has assured the Commissioner that it has carried out detailed and thorough searches of its electronic files and manually held files for the information requested by the complainant.
34. The Council Advised the Commissioner that its Planning Service identified those officers involved in the Local Plan Project and in preparing the Council's response to the Planning Inspectors' 'initial Questions and Comments to OCC' document - "the project".
35. The Planning Service conducted a search of its officers' electronic mailboxes and all subfolders for correspondence from and to GL Hearn. According to the Council, this search was comprehensive, encompassing other attendant internal emails between officers, as well as emails forwarded between officers.
36. The Council's search used key words associated with the project, including: 'clarification note', 'Oxford note', 'SHMA', 'SHMA roll forward' 'GL Hear' and [*'a named individual'*].
37. More senior officers who were involved at key sign-off stages of the Council's responses were identified and the same searches were carried out of their mailboxes and electronic files.
38. The Council's searches were not restricted to key words. They also included the relevant time period in order to provide wider search criteria.

39. A search of the Council's Shared Planning 'M' Drive was carried out using the same criteria outlined above, and officers searched the hard drives of their computers.
40. Further searches included searches of notebooks and paper files in order to ascertain whether hard copy notes of meetings or drafts were retained. These searches included paper-based records held at the Council's home as well as those the officers may have taken home at the time.
41. Having undertaken the searches listed above, the Council's Freedom of Information Officer was provided with all the information within the scope of the complainant's request.
42. The Council assures the Commissioner that its searches would have retrieved relevant information as they included all the officers involved in the project and all of the locations where files were stored and where documents would have been saved electronically.
43. The Council has informed the Commissioner that its officers do not use personal laptops or devices for Council work purposes and no Council information is saved to any personal device.
44. None of the Council's officers was able to identify any relevant information when they searched their notebooks, meeting notes or hard-copy documents that may have been taken home. No records were found where searches were made to locate any hard-copy information which may have been printed off for the purpose of proof reading, etc.
45. Asked whether the Council ever held relevant information which has since been destroyed or deleted, the Council said, "There would have been drafts with comments leading to a final version of the clarification note". These drafts were not retained once a response was completed and when a final version was published on the Council's Local Plan webpage.
46. The documents which included the clarification note were sent to the Inspectorate's Local Plan programme officer on 12 July 2019 and the Council was informed it could publish those documents shortly afterwards. The Council did this on 17 July 2019 and, because the drafts were no longer needed, officers deleted their emails. Council Officers who work in planning to 'tidy' their electronic mailboxes at different times. This is because of the capacity of their email inbox to hold large documents.
47. The Council does not hold a record of the destruction of any of the information which meets the terms of the complainant's request. Its Retention Policy is silent on these types of document. Whilst the Council

is currently reviewing its Policy, the driving factor in the retention of documents relating to planning is driven by the size of its officers' mailboxes. That said, the Council advised the Commissioner that there is no operational reason why drafts of documents should be retained once a project is completed and the report has been published on the Council's website.

48. There have been few occasions when a draft of a document has been retained by an officer. Such an occasion occurred when information had been retained to meet a previous request for information from this same complainant.
49. The Council has informed the Commissioner that it has no business purposes for retaining planning draft reports once the final report has been published. Similarly, there are no statutory requirements for the Council to keep draft documents once the final documents are published.
50. The Commissioner has considered the representations made by the Council in respect of the information which the complainant has asked for and which the Council says it did not hold when the complainant made her request.
51. The Commissioner accepts that the Council has carried out appropriate and reasonable searches for the information which the complainant seeks. On the balance of probability, the Commissioner has decided the Council does not hold any recorded information other than that which is the subject of its application of section 42 of the FOIA.
52. The Commissioner has concluded that the Council has complied with section 1 of the FOIA by informing the complainant that, with the exception of the information which is the subject of its application of section 42, it does not hold the information she has asked for.

## **Section 42 – Legal professional privilege**

53. Section 42 provides an exemption from the duty to disclose information where the information is subject to a claim of legal professional privilege.
54. There are two types of legal professional privilege: Advice privilege, which can attach to information in circumstances where there is no contemplated or pending litigation and where the information concerns the seeking or provision of legal advice. Litigation privilege may attach to information which concerns contemplated or pending litigation.
55. The purpose of legal professional privilege is to protect 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 Department for Trade and Industry* (EA/2005/0023) ("Bellamy") 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."*

56. The Council has confirmed to the Commissioner that it relies on legal professional privilege to withhold an annotated copy of a 'Clarification Note' from GL Hearn, dated July 2019.
57. The Council has applied section 42 of the FOIA to the Clarification Note on the grounds that it is part of a communication between the Council - acting as the client, and its professional legal advisor, who is a QC. The Council says that the communication was for the sole or dominant purpose of obtaining or providing legal advice.
58. The Council says it sought legal advice in the form of comments from its legal advisor in respect of the draft Clarification Note from GL Hearn. This note provided clarification on the purposes and output of the 2018 update to housing need for the City of Oxford, which provided further clarification and justification for the continued use of the 'Objectively Assessed Need of 1,400 dwellings per annum'.
59. The legal advice was sought by the Council to ensure that the Council was being consistent in the legal position which was being presented to the Inspectors and to the public.
60. The Council asserts that the withheld information attracts legal advice privilege and it assures the Commissioner that it's confidence has not been lost by being circulated beyond its officers who were working on the project. The Council adds that it has taken no steps to waive the legal professional privilege attached to the withheld information.
61. Having reviewed the withheld 'Clarification Note', the Commissioner is satisfied that it attracts legal professional privilege and therefore she is content that section 42(1) is properly engaged.
62. Section 42(1) of the FOIA is a qualified exemption. The Commissioner is therefore required to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Arguments in favour of disclosing the requested information*

63. The Commissioner considers that some weight must always be given to the general principles of accountability and transparency which are achieved through the disclosure of information held by public authorities.
64. The Commissioner recognises that disclosure of the withheld note could assist the public in understanding the basis of how the Council made its decisions. She accepts that the disclosure of the QC's annotations might assure the public that the Council is acting lawfully and is considering in detail the legal position relating to Oxford City Council's Housing Needs update.
65. The Commissioner fully accepts that disclosure of the withheld note would likely foster greater trust in the decisions taken by the Council following its receipt of its legal adviser's advice. Disclosure of the legal advice given to the Council would allow the public to consider the quality of that advice and see if and how the Council's officers acted on it.

*Arguments in maintaining the exemption*

66. In the case of *Bellamy v The Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the requested information, and it said that:

*"... there is strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".*

67. In order to balance the opposing public interest factors, the Commissioner must give weight to the in-built public interest in maintaining this exemption. In the Commissioner's opinion, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege, that is, safeguarding openness in all communications between a client and their lawyer to ensure access to full and frank legal advice. The Commissioner holds the view that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.
68. The Commissioner considers that weight must always be given to maintaining the principle of legal privilege and the maintenance of this

exception. Nevertheless, she also recognises there might be circumstances where the public interest will favour disclosing the information. Such circumstances would need to be evident in the details of a particular case. They include instances where:

- large amounts of money are involved;
- whether or not a significant group of people are affected by the advice or resulting decision;
- lack of transparency in the public authority's actions;
- misrepresentation of advice that was given;
- selective disclosure of only part of advice that was given.

69. In this case, the Commissioner has considered those arguments favouring disclosure of the withheld note against to the information Tribunal's previous decisions in respect of maintaining legal professional privilege. She has also had regard to the content of the withheld information.

70. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decisions. She gives some weight to those arguments.

71. The Commissioner acknowledges that the Council has published the final document. She considers that there is no over-riding public interest in revealing the Council's legal adviser's advice on, what is now, an out-of-date draft version of the published document.

72. The Commissioner has seen no evidence of any lack of transparency on the Council's part and there appears to have been no partial or selective disclosure of its legal adviser's advice by the Council.

73. In order to outweigh the inherent public interest in maintaining the exemption, the Commissioner considers that there must be public interest arguments for disclosure which outweigh the public interest arguments in the exemption being maintained. In this case, the Commissioner has not found any circumstance or factor that would equal or outweigh the strong public interest inherent within the exemption.

The Commissioner is satisfied that the Council has correctly applied the exemption provided by section 42(1) of the FOIA. The Council is therefore entitled to withhold the annotated GL Hearn Clarification Note.

**Right of appeal**

74. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

75. 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.
76. 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 .....**

**Andrew White  
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