

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2023

Public Authority: East Lindsey District Council
Address: Tedder Hall
Manby Park
Louth
Lincolnshire
LN11 8UP

Decision (including any steps ordered)

1. The complainant requested information about liability for Business Improvement District (BID) levies. East Lindsey District Council (the "council") refused the request under the exemption for legal professional privilege (section 42).
2. The Commissioner's decision is that the council correctly withheld the information under section 42(1) and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 8 February 2023 the complainant wrote to East Lindsey District Council (the "council") and requested the following information:

"As a result of the Council's reply to FOI-2122-03-628 / IR-2223-05-01 I am concerned that the Council does not hold information about the liability for the BID Levy of the largest retail premises in the former BID area.

As a result I would like information regarding the following four premises please.

1. Morrison's Superstore, PE25 3QT (515170720019308)
2. The Lookout Public House, PE25 1JB, (510183951062007)
3. Sun City Amusements, PE25 1LQ, (510183939029103)
4. East Lindsey District Council Foreshore, PE25 3HW (515170637016316)

Please answer each of the following questions for each of the above premises.

1. Was the hereditament liable to pay the BID Levy at any time between 24/3/2022 and 31/8/2022
 2. If the hereditament was liable, what was the date range of liability.
 3. If the Council holds the information requested in question 1, what are the circumstances that lead the Council to hold the information about that premises but not for Tesco's Superstore as stated in their earlier reply?"
5. The council responded on 28 February 2023 and confirmed that it was withholding the information under the exemption for legal professional privilege – section 42 of the FOIA.
6. On 4 April 2023 the council sent the complainant the outcome of its internal review which upheld its original position.

Reasons for decision

Section 42 – Legal Professional Privilege

7. Section 42 provides an exemption for information which is subject to Legal Professional Privilege (LPP).
8. There are two types of privilege within the concept of LPP – advice privilege and litigation privilege.
9. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.
10. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility.
11. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
12. The council has confirmed that it considers the withheld information is subject to both advice and litigation privilege.
13. The council confirmed to the Commissioner that matters relating to the request are the subject of live litigation and a Court hearing is scheduled. The council has stated that the complainant is the respondent in those matters and is contesting their liability to pay the Business Improvement District (BID) levy, which is a statutory levy similar to business rates.
14. The council has confirmed that the litigation to which the information relates is concerned with in what capacity businesses are liable to pay the BID levy which has not been paid. In order to answer the questions raised in the request, which relate to liability, the council has argued that this would involve the disclosure of information subject to litigation privilege. The council has confirmed that the information has not otherwise been placed in the public domain and that the privilege attached to the advice has not been lost.

15. There is no requirement to demonstrate any prejudice or adverse effect when applying section 42, since it is a class-based exemption. That is, there is no need to show that any harm would occur from disclosure of the information. To engage the exemption, it is sufficient for an authority to demonstrate that information is subject to LPP.
16. Having considered the council's arguments the Commissioner is satisfied that the withheld information is subject to advice and litigation privilege and that section 42(1) is engaged. He has gone on to consider the public interest test.

Public interest in disclosure

17. The council has noted the public interest in openness and transparency and acknowledged that disclosure of the information would serve the public interest in these principles.
18. The council has also recognised that it has a duty to act impartially and transparently, particularly in contentious matters such as those to which the request relates.
19. The council has also accepted that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions, creating a degree of accountability and enhancing the transparency of the process through which such decisions are arrived at.
20. The complainant considers that it is in the public interest for the council to confirm whether businesses are liable for the BID levy and has pointed to other information in the public domain which they consider undermines the council's position LPP.

Public interest in maintaining the exemption

21. The council maintains that it is not in the public interest to disclose this information pending the outcome of the current Court Case.
22. The council considers that there is a strong public interest in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. It considers that this public interest is heightened whilst the Court Case is still 'live' and issues of liability have yet to be decided.

Balance of the public interest

23. The Commissioner considers that the public interest inherent in the exemption will always be strong due to the importance of the principle

behind LPP. He considers that the public interest in maintaining LPP is intensified when issues to which advice relate are live, as in this case.

24. The Commissioner recognises that there is a specific public interest in matters relating to liability for businesses in respect of the BID levy and he recognises that the complainant may have a personal interest in this matter. However, the Commissioner considers that there is a broader public interest in allowing such matters to be addressed via existing legal remedies and not circumvented or impeded via disclosures under the FOIA.
25. In relation to the complainant's argument that other information in the public domain contradicts the council's position in relation to LPP, the Commissioner does not consider this to be the case. Logically, if the information the complainant seeks was in the public domain this would negate the need for their request. The Commissioner has no evidence that the withheld information has been subject to unrestricted disclosure.
26. The Commissioner considers that it is well-established that the public interest in maintaining LPP carries a heavier weighting when matters to which advice relate remain live. It is clear in this case that litigation is in progress.
27. 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.
28. In all the circumstances of this case, the Commissioner does not consider that there are factors present that would equal or outweigh the strong public interest inherent within the exemption.
29. The Commissioner therefore considers that the council is entitled to rely on section 42(1) to withhold the information.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF