

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 3 July 2012

Public Authority: East Herts District Council
Address: The Council Offices
The Causeway
Bishop's Stortford
Hertfordshire
CM23 2EN

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to her complaints against the previous Chief Executive and the subsequent investigations. The Commissioner's decision is that East Herts District Council has correctly applied the exemption for personal data and the exemption for legal professional privilege and is therefore entitled to withhold the information.

Request and response

2. On 6 February 2011, the complainant wrote to East Herts District Council ('the council') and requested information in the following terms:

"Under the Freedom of Information Act could you please provide me with any and all correspondence relating to my original complaints, made on 10th August 2010 against the Chief Executive and the subsequent investigation, including but not limited to correspondence between [named councillor], [named officer], [named employee of Eversheds], [named officer], and [named officer]."
3. The council responded on 23 March 2011 stating that section 14 of the FOIA is engaged and therefore there is no duty to disclose the information.
4. On 23 March 2011, the complainant requested an internal review and stated that she believed she has a right to the information under the Data Protection Act 1998.

5. A subject access request response was issued by the council on 4 May 2011 disclosing some information. Two further documents were disclosed following the Commissioner's data protection assessment of 31 October 2011 (case reference RFA0408078).
6. The freedom of information element of this request was then included in the decision notice FS50364930 issued on 16 November 2011. The decision notice stated that section 14 of the FOIA did not apply therefore the council must reconsider the requests and either provide the requested information or issue a valid refusal notice which complies with section 17 of the FOIA or regulation 14 of the EIR as appropriate.
7. The council responded to the complainant in January 2012 stating that the request has been dealt with as a subject access request which was the subject of a complaint to ICO under reference RFA0408078 and all information to which the complainant is entitled has been released.
8. A review of the January 2012 response was requested on 31 January 2012 stating that additional correspondence should be available under the FOIA. The complainant specifically stated the following:

"I believe that additional correspondence between [named officers and named employee of Eversheds] should be available under FOI.

For example, [named employee of Eversheds] wrote in his report " *I interviewed the complainant, former Councillor [named councillor], [named officers] and the subject of the complaint, the Council's Chief Executive, [name].*". I would expect to see the correspondence related to those interviews."
9. The council provided an internal review response on 21 February 2012. It stated that the council does not hold a record of interviews referred to by the complainant and in any case such information is the personal information of the party who gave it and would therefore be exempt from disclosure under section 40 of the FOIA. It further stated that a copy of the witness statement was sent to each person by [named employee of Eversheds] shortly after the interview was undertaken.
10. Following the intervention of the Commissioner, a further response was issued on 16 May 2012 releasing further information containing redactions under section 40 and section 42 of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically she:

- claimed that the internal review was ambiguous;
 - questioned whether the council were saying that senior officers used private email addresses to correspond with [named employee of Eversheds] on this highly sensitive council matter;
 - stated that [named officer] was not in a position to give legal advice and therefore section 42 cannot apply;
 - stated that section 40 cannot apply to council telephone numbers and email addresses and it would be a matter of concern if officers personal contact details had been used; and
 - stated that the information was incomplete as she felt sure that [named employee of Eversheds] would have written to the senior officers he interviewed to confirm his understanding of their representations to him.
12. The councils internal review response (as detailed in paragraph 9) was ambiguous as on the one hand it stated that the council does not hold a record of the interviews and on the other hand stated that a copy of the witness statement was sent to each person. However, during the Commissioners investigation the council confirmed that it does hold correspondence relating to the telephone interviews but considers that the information is exempt from disclosure under section 40(2). This correspondence was found within the council email records of the named officers. Therefore the Commissioner has not deemed it necessary to consider whether senior officers used private email addresses to correspond with [named employee of Eversheds] or whether the information was incomplete.
13. During the Commissioner's investigation the council confirmed that further searches were undertaken and categorised information relevant to the scope of the request as follows:
- "Evidence 1 - Correspondence identified as not previously disclosed to the requestor (that is not the personal information covered under complaint RFA0408078). The Council has now disclosed this information to the requestor.
 - Evidence 2 - Correspondence (Evidence) sent by [previous chief executive] to [named employee of Eversheds] being extensive email chains between her and [complainant]. This information has not been released as it is already in the hands of [complainant].
 - Evidence 3 - Correspondence between [named councillor] and [complainant] not previously released as it is already in the hands of [complainant].

- Evidence 4 - Correspondence relating to the telephone interviews between [previous chief executive and named employee of Eversheds & named officers & named employee of Eversheds]. This is the information the Council considers exempt from disclosure under section 40 (2) being personal information.
 - Evidence 5 - Correspondence not previously released (under section 40) but the Council now considers to be exempt under section 42 (1) Legal Privilege."
14. The majority of the information categorised as Evidence 1 is outside the scope of this decision notice as it has now been released to the complainant.
 15. The information categorised as Evidence 2 and 3 is outside the scope of this decision notice as the Commissioner does not deem it necessary to consider information already know to the complainant.
 16. The Commissioner considers the application of section 40(2) to the information categorised as Evidence 4 and the application of section 42 to the information categorised as Evidence 5. The information redacted from disclosure of Evidence 1 is included in Evidence 4 and 5 and therefore the application of section 40(2) and section 42 to that information will be considered in this decision notice.
 17. The Commissioner notes that Evidence 4 contains an Audit Committee Report entitled Internal Audit Service – Position Statement dated 28 June 2010. He considers this to be outside the scope of this decision notice as the report is a published public document.
 18. The withheld information does not include council telephone numbers and email addresses that are not already known to the complainant therefore the Commissioner has not considered whether section 40 applies to this type of information.
 19. The information constituting the complainants own personal data has been dealt with as a subject access request under the Data Protection Act 1998 and is therefore outside the scope of this decision notice having been dealt with under a data protection case (case reference RFA0408078).
 20. For clarity, this decision notice considers the following:
 - The application of section 40(2) to Evidence 4.
 - The application of section 42 to Evidence 5.

Reasons for decision

Section 40(2)

21. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

22. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

““personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the council argued that disclosure of third party personal data would breach the first data protection principle.

24. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

25. As explained above, the first consideration is whether the withheld information is personal data. The information is records of telephone interviews conducted as part of the investigation into a complaint against the previous Chief Executive and correspondence enabling the interviewees to confirm their accuracy or give them opportunity to make

factual corrections. The Commissioner is satisfied that this is the personal data of the interviewees.

26. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair and/or unlawful.
27. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

28. The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
29. In his guidance, 'Access to information about public authority employees'¹, the Commissioner states that a factor to take into account when considering whether to release information is whether the information is about the employees' professional or personal life and that the threshold for releasing professional information will generally be lower than that for releasing truly personal sensitive information e.g. that found in an employee's occupational health record. The guidance also states that arguments in favour of disclosure are stronger where a disciplinary measure is being taken against a senior member of staff over a serious allegation of impropriety or criminality and that arguments in favour of disclosure are weaker where the information is about an internal disciplinary procedure concerning a relatively minor matter.
30. The Commissioner does not consider that the complaints related to serious allegations of impropriety or criminality. He also acknowledges that there is nothing in the withheld information of a personal nature but instead relates to the actions taken as senior public officers. However, this does not distract from the general expectation of privacy that is

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held in relation to information concerning the investigation of complaints against individuals.

31. The council drew the Commissioners attention to two previous ICO decision notices (FS50132179 and FS50363053) in order to demonstrate that this type of information relates to a personnel matter and that the Commissioner's general view is that such information should remain private. Although, as acknowledged by the council, the investigation in this case did not result in disciplinary action, the Commissioner agrees with the council that there are similarities, in that the requests were for staff interview statements, and therefore a similar reasoning should be applied.
32. Although the Commissioner considers that the withheld information in this case relates to the data subjects' public function rather than their private lives, he is satisfied that the data subjects in this case would reasonably expect that information relating to complaints against individuals would not be made available to the public at large.

Consequences of disclosure

33. The Commissioner is aware that the complainant has been provided with a copy of the investigation report in this case but that the records of the telephone interviews were not included in that report.
34. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the data subjects.
35. The Commissioner considers that disclosure of information relating to a complaint that has not been upheld would be an intrusion of privacy, would cause distress, and could also cause permanent damage to the data subjects' future prospects and general reputation.

Legitimate interests in disclosure

36. The council has stated that it is mindful of a general public interest in transparency in the handling of complaints against senior officers, and the behaviour of such officers.
37. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is the legitimate interest in knowing that complaints have been made, how they have been investigated and the outcome of those complaints. He acknowledges that senior officers should be open to

scrutiny and accountability because they are responsible for the spending of public funds.

38. The council informed the Commissioner that the complaints were made to the Leader of the council who referred to an independent, external, investigator. The independent investigator found that the previous Chief Executive had not breached any code of conduct, nor had she acted unreasonably. The council believes that the appointing of an external, independent, investigator goes some way to satisfying the general public interest, in as much as concerns regarding bias may be assuaged. The Commissioner notes that the report was shared with the complainant on 3 November 2010 and therefore the legitimate interest of the complainant in knowing how the complaints had been investigated and what the outcomes were had been met before the information request was submitted to the council.
39. Nevertheless, the Commissioner is satisfied that there is a legitimate public interest in disclosure in this case.

Conclusion on Section 40(2)

40. As the report concluded that the previous Chief Executive had not breached any code of conduct nor acted unreasonably, the Commissioner does not consider that the legitimate interest of the public knowing that a complaint has been made, how they were investigated and the outcome of the complaints outweighs the legitimate interests of the privacy of the data subjects. The data subjects would not expect such information to be disclosed and disclosure of this type of information is likely to have a detrimental and distressing effect on the data subjects.
41. Taking all this into account, the Commissioner concludes that it would be unfair to the data subjects concerned to release the requested information as he considers that their right to privacy in relation to complaints against them outweighs the interests of the public in knowing that such complaints have been made, how they were investigated and the outcome of the complaints. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
42. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Section 42

43. This exemption provides 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.

44. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege and litigation privilege. In this case, the council sought to rely on advice privilege.
45. Advice privilege will apply where no litigation is in progress or being contemplated. In these 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.
46. In its final response to the Commissioner's enquiries, the council have confirmed that:
 - the information is communications between the councils lawyers (Eversheds) and [named officer] and the Leader of the Council;
 - the information was created for the purpose of seeking or providing legal advice; and
 - the information has not been disclosed or made public.
47. The Commissioner has reviewed the withheld information. Based on that review and the council's submission detailed in paragraph 46 the Commissioner is satisfied that the withheld information is subject to legal professional privilege.
48. In the relation to the complainant's assertion that [named officer] was not in a position to give legal advice, the Commissioner notes that the legal advice was given by Eversheds and that the [named officer] was communicating that advice to the Leader of the council, rather than providing advice himself. Therefore, this does not preclude the information being subject to legal professional privilege.

The public interest test

49. As section 42 is a qualified exemption, the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

50. The council submitted that in considering public interest arguments in favour of disclosing the information it recognised the general public interest in accountability for its decision making. It further recognised the public interest in the transparency of its decision making process and accepts that there is a presumption in the FOIA in favour of disclosure.
51. The Commissioner agrees with the council's submission in favour of disclosing the information as its release would promote accountability and transparency.

Public interest arguments in favour of maintaining the exemption

52. The council submitted that in considering public interest arguments in favour of maintaining the exemption it believes that there is a strong element of public interest inbuilt in maintaining Legal Professional Privilege. It stated that this position was endorsed in the High Court case of *DBERR v Dermod O'Brien*²;

".....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" (para 53).
53. The council also stated that the Commissioner has indicated that there is a general public interest inherent in the non-disclosure of legally privileged materials on the basis of the need to safeguard communications between clients and lawyers so as to ensure access to full and frank legal advice is maintained.
54. The Commissioner and the Information Tribunal have expressed 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 case of *Bellamy v 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".
55. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of

future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

56. In light of the above, 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. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

57. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

58. The council considers that the public interest in maintaining legal professional privilege outweighs the public interest in disclosure in respect of the information categorised as Evidence 5.
59. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
60. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the

council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.

61. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.

Right of appeal

62. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

63. 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.
64. 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

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