

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

### **Decision notice**

**Date:** 7 November 2013

**Public Authority:** Wrexham County Borough Council

**Address:** The Guildhall

Wrexham

LL11 1AY

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

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1. The complainant requested information about a particular House of Lords Judgement. The Council withheld some information relating to the request under section 32 of the FOIA. The Council also stated that it did not hold any financial information relating to the court case. During the course of the Commissioner's investigation, the Council stated that it was relying on section 32 for some of the requested information and section 42 in relation to other information held. The Commissioner's decision is that the exemptions have been applied correctly by the Council. He does not require any steps to be taken.

### **Request and response**

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2. On 13 January 2013, the complainant wrote to the Council in relation to a particular Court Judgement - Wrexham County Borough Council v Berry[2003] UKHL 26 (22 May 2003) and requested information in the following terms:
  - "1) You should provide us with Copies of the Final Order made in the House of Lords on the 22<sup>nd</sup> May 2003 and in the Court of Appeal.
  - 2) You should inform us the amount of money that had been paid to the names of the Barristers and Solicitors, with the payments made to the Barrister/Solicitor
    - (a) Planning Inspectorate
    - (b) High Court of Justice
    - (c) Court of Appeal (Civil Division)

(d) House of Lords".

3. The Council responded on 6 February 2013 asking whether the complainant was a party involved in the case in question, whether he was representing one of the parties involved or details of any other involvement in the case. The Council also asked him to confirm the date of the Court of Appeal referred to.
4. The complainant wrote to the Council on 6 February 2013 confirming that he was not a party to the case in question
5. The Council responded on 14 February 2013 confirming that it held some information relevant to the request, which might have included a copy of the Final Order. However, the Council confirmed it considered any information held to be exempt under section 32 of the FOIA. The Council stated that it did not hold any information relevant to question 2 as financial information is retained for a period of 6 years and then destroyed in accordance with its retention scheme.
6. On 14 February 2013, the complainant requested an internal review of the Council's handling of his request.
7. The Council provided the outcome of its internal review on 18 March 2013 in which it maintained its original position that any information held was exempt under section 32 of the FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 21 May 2013 to complain about the way his request for information had been handled.
9. The Commissioner wrote to the complainant on 5 August 2013 to confirm that the scope of his investigation would be to consider whether the Council should disclose a copy of the Final Order requested, or whether it was correct in relying on section 32 of the FOIA.
10. During the course of the Commissioner's investigation, the Council stated that, as well as the Final Order, it held a copy of a letter from its solicitors regarding the case which it also considered fell within the scope of the case as it related to the Final Order.
11. Prior to the Commissioner's investigation, the Council did not specifically confirm whether it held a copy of the Final Order. The Council stated that it held information relevant to the request "which may include a copy of the Final Order". During the Commissioner's investigation the

Council confirmed that it held a copy of the Final Order dated 22 May 2003. The Final Order was provided by solicitors who represented the Council in the case in question, with a covering letter. The Final Order also included a copy of the earlier Court of Appeal order dated 12 October 2001, relating to the case in question.

12. The Council confirmed that it considered the Final Order to be exempt under section 32 of the FOIA and the covering letter from its solicitors exempt under section 42 of the FOIA. In light of this, the Commissioner expanded his investigation to include consideration of the Council's application of section 42 to the requested information.

## **Reasons for decision**

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### **Section 32 – Court records**

13. Section 32(1) states:

"Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
  - (i) a court, or
  - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."

14. Section 32 is an absolute exemption which means that if a request is received for information covered by this section there is neither a duty to disclose it nor to confirm or deny that it is held. Moreover there is no need to consider whether there might be a stronger public interest in making the disclosure despite the existence of an exemption. In other words, information is either exempt or it is not.
15. The Council considers that the transcript of the Final Order (which includes a copy of the earlier Court of Appeal order dated 12 October 2001) is exempt under sections 32(1)(b) and (c) because the document was created by the administrative staff of the court and served under the Council's Solicitors who, in turn, passed it on to the Council.

16. In considering the application of section 32(1)(c) it is first necessary to consider whether the information is in fact contained within a document created by a court or a member of the administrative staff of a court, in relation to a particular cause or matter. The next step is to consider if this information is only held by the public authority in such a document.
17. The Council advised the Commissioner that the Final Order dated 22 May 2003 is a transcription which includes the previous order issued by the Court of Appeal dated 12 October 2001. The document was served on the Council as it was a party to the case in question and forms part of the case records. In light of this the Commissioner is satisfied that the first test of section 32(1)(c)(i) is met as the withheld information was created by the court.
18. From his examination of the withheld information and the evidence from the Council, the Commissioner is satisfied that the second test of section 32(1)(c)(i) is met as the information is held only by virtue of being contained within a document created by the court.
19. In view of the above, the Commissioner's decision is that the information is exempt from disclosure under section 32 of the FOIA. Section 32 is an absolute exemption therefore the Commissioner does not need to carry out a public interest test to decide whether the information should be disclosed where the exemption is applicable.

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

20. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege.
21. 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 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.
22. The Council has applied section 42 to a letter from solicitors who represented the Council in the case in question, which accompanied a copy of the Final Order. The letter provides legal advice on the interpretation of the Final Order and the steps required by the Council in connection with the legal proceedings. The Council considers the information to attract advice and litigation advice privilege
23. Having considered the withheld information the Commissioner is satisfied that the letter is a communication which, at the time it was

made, was confidential; was made between a client and professional legal advisers acting in their professional capacity; and was made for the sole or dominant purpose of providing legal advice as part of the legal proceedings in a particular case. The Commissioner is therefore satisfied that the withheld information is subject to litigation privilege.

24. Information will only be privileged so long as it is held confidentially. The Commissioner notes that the judgement of the House of Lords is publicly available<sup>1</sup>. However, as far as the Commissioner has been able to establish, the information contained within the letter in question was not publicly known at the time of the request and there is therefore no suggestion that privilege has been lost.

### **The public interest test**

25. As section 42 is a qualified exemption, the Commissioner has gone on to consider 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**

26. The Council does not consider there is any wider public interest in disclosure of the information requested as it relates to details of resolving cost issues associated with particular proceedings. The Council considers that the substance of the judgement itself, which as mentioned above is publicly available, satisfies any wider public interest.

### **Public interest arguments in favour of maintaining the exemption**

27. The Council argues that there is an inherent public interest in maintaining legal professional privilege in order to protect the frankness between a lawyer and his client in order to serve the wider interests of administering justice.
28. Whilst the Council acknowledge that the letter relates to proceedings which were concluded some time ago, it advised that the legal advice relates to resolving the final administrative matters associated with costs following conclusion of the legal case in question. The Council argues that disclosure would be prejudicial to the Council in other cases. The Council again reiterated that it considers the information would only

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030522/wrex-1.htm>

be of interest to the parties to the proceedings in question. The Council's view is that there is no wider public interest in disclosure which would outweigh the public interest in maintaining the integrity and confidentiality of the principle of legal professional privilege.

### **Balance of the public interest test**

29. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature.
30. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that this should not mean that this exemption effectively becomes absolute. In his view, equalling or outweighing that inherently strong public interest usually involves factors such as decisions that will affect a large number of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
31. In this case the withheld information does not show or indicate any illegal activity, or that the advice affects a large number of people. The Commissioner has also seen no evidence to suggest that the Council has misrepresented the legal advice, a factor that may greatly add to the case for disclosure.
32. The Commissioner recognises that the complainant may have an interest in disclosure of the information requested. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions in knowing that public authorities have reached decisions on the basis of sound legal advice. However, having regard to the circumstances of this case, it is the Commissioner's view that the strong inherent public interest in maintaining the Council's right to obtain appropriate legal advice in confidence outweighs the public interest in disclosure.

## Right of appeal

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33. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

34. 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.
35. 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 .....**

**Anne Jones**  
**Assistant Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**