

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2015

Public Authority: Wrexham County Borough Council
Address: Guildhall
Wrexham
LL11 1AY

Decision (including any steps ordered)

1. The complainant requested legal advice about changes to the structure of Wrexham County Borough Council ('the Council') and compliance with the Local Government (Wales) Measure 2011. The Council withheld the information on the basis that it was subject to legal professional privilege, and was therefore exempt under section 42(1) of the FOIA. The Commissioner's decision is that the Council has correctly applied section 42(1) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 11 May 2015, the complainant wrote to the Council and requested information in the following terms:

"Wrexham Council have received legal advice from Counsel regarding changes to the structure of the Council and compliance with the Local Government (Wales) Measure 2011. I request a copy of that legal advice".
3. The Council responded on 3 June 2015 and stated that the information requested was exempt under section 42 of the FOIA.

4. On 3 June 2015 the complainant requested an internal review of the Council's handling of the request on the basis that "the council owns the information and not one individual".
5. The Council provided the outcome of its internal review on 2 July 2015 and upheld its decision that the information requested was exempt under section 42 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 9 July 2015 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation is to determine whether the Council should disclose the withheld information, or whether it was correct in relying on section 42 of the FOIA.

Reasons for decision

Section 42 – legal professional privilege

8. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege ("LPP") could be maintained in legal proceedings. This exemption is subject to a public interest test.
9. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both 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.
10. The information which the Council has withheld under section 42 in this case consists of legal advice received from Counsel relating to its executive arrangements under the Local Government Act 2000 (as amended) and the Local Government (Wales) Measure 2011.
11. Having considered the withheld information the Commissioner is satisfied that it represents a communication that, 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 obtaining legal advice.

12. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
13. The Council advised that the legal advice was communicated directed to its Head of Corporate & Customer Service and the substance of the advice has been shared with a small number of Council officers and members on a need-to-know basis. The Council confirmed that the information has not been widely publicised or shared and therefore remains confidential.
14. Based on the Council's representations and as far as the Commissioner can see the Commissioner is satisfied that the legal advice was not publicly known at the time of the request and there is therefore no suggestion that its confidentiality had been lost. The Commissioner is persuaded that the withheld information is legally privileged and therefore engages section 42.
15. As section 42 is a qualified exemption and therefore subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

16. The Council accepts that there is an inherent public interest in transparency and accountability particularly where it relates to ensuring a public authority operates within its legal framework, as in this case.
17. The complainant put forward a number of reasons why he considers the legal advice should be disclosed. The complainant alleged that, on the basis of the legal advice from Counsel, the Council amended its Constitution and model of governance to one of a Cabinet with the ruling administration taking up all Cabinet seats. The complainant advised that the effect of these changes was that there was a substantial increase in the cost of member's allowances and senior salaries costing around £60,000, with most of the benefit going to the ruling administration whilst other suffered a detriment. He is of the view that there should be openness and transparency regarding the rationale to increase spending on member's allowances and senior salaries. He also believes that elected members should be entitled to information regarding the basis on which they either gain or suffer a detriment.

18. The complainant in this case is a councillor for the Council and as the Council "owns" the legal advice, he is of the view that as an elected member he is entitled to a copy of the legal advice. In addition, he stated that, as there is no intention for any litigation, any privilege attached to the information is invalid.

Public interest arguments in favour of maintaining the exemption

19. The Local Government (Wales) Measure 2011, ('the 2011 Measure') amongst other things, contained provisions requiring councils to allocate the Chairs of certain committees to "opposition groups". Opposition groups are defined as groups which are not represented on a council's executive. According to a report on the issue considered by the Council at its meeting on 20 May 2015¹, opposition groups are:

"defined as groups which are not represented on the council's executive. Where there are such groups then the Council is required to allocate chairs of some scrutiny committees in accordance with a statutory formula and the Chair of Democratic Services Committee to these groups and further the Audit Committee must appoint its Chair either from these opposition groups or from its lay member or members if more than one. The only exception to this rule is for Councils where all the groups are represented on their executive. Until September last year this was the case in Wrexham but in September [2014] a new group was formed comprising two members. A group of that size was not entitled to a seat on the Board under our proportionality rules which meant that it became the only "opposition group" within the meaning of the Measure".

20. Prior to a Corporate Assessment of the Council by the Wales Audit Office ('WAO'), at an early meeting with the WAO queries were raised as to whether the Council's arrangements complied fully with the 2011 Measure. As a result, the Council sought legal advice relating to the political balance of its Executive Board and two of its committees following a change within its political grouping.
21. In this case, in relation to the public interest in favour of maintaining the exception, the Council put forward the following arguments:
- The importance of maintaining the principle behind LPP in safeguarding the confidentiality of communications between a client and his or her lawyer to ensure access to full and frank legal advice.

¹ <http://moderngov.wrexham.gov.uk/mgConvert2PDF.aspx?ID=3246>

- It is in the public interest that the Council is able to seek legal advice, in confidence, when an issue as to its composition arises.
- The subject matter of the advice considered a key question of the lawfulness of the Council's statutory committees as a result of change in its political make-up. The Council considers that this heightens the sensitivity of the information.
- The Council's executive arrangements should not be unduly compromised through disclosure of the legal advice.
- Disclosure could prejudice the Council's ability to protect and defend its legal position.
- The age of the information – the legal advice was received a few weeks prior to the request being made in this case.

Balance of the public interest arguments

22. 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 given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.
23. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people, the timing of the request and the status of the advice.
24. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. In this case, disclosure would increase transparency in the way that the Council amended its Constitution and removed the requirement for political balance of its Executive.

25. The Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exemption. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. In this case the Commissioner has seen no evidence to suggest that there is a large amount of public money at stake or that a large number of people are affected. These are therefore not significant factors to weigh in favour of disclosure.
26. The Commissioner has also considered the circumstances of this particular case and the content of the withheld information. He has considered the timing of the request and the status of the advice. He notes that the legal advice was received a couple of weeks prior to the request and was considered by the Council at a meeting after the request was received, at which point a decision was made on the subject matter. The legal advice cannot therefore be said to have served its purpose.
27. The Commissioner would agree that LPP cannot be used as a cover for illegal or corrupt behaviour or conduct by public authorities or those representing them. However, the withheld information requested by the complainant does not show or indicate any such illegal activity. The Commissioner has also considered whether there is any evidence that the Council has misrepresented the legal advice, a factor may greatly add to the case for disclosure. In the Commissioner's view, there is not.
28. The Commissioner notes that the complainant in this case is an elected member of the Council and as a result he believes he is entitled to access to the legal advice. However, the FOIA is applicant blind and motive blind and the consideration for the Commissioner is essentially whether the information should be put into the public domain.
29. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisors and that this would lead to advice that is constrained in some way. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
30. In reaching a view on where the public interest lies, the Commissioner is satisfied that in this case the 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 therefore determines that the exemption at section 42 has been applied correctly by the Council.

Right of appeal

31. 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@hmcts.gsi.gov.uk

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

32. 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.
33. 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
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SK9 5AF