

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2017

Public Authority: Kirklees Metropolitan Council
Address: Civic Centre
High Street
Huddersfield
West Yorkshire
HD1 2TG

Decision (including any steps ordered)

1. The complainant has requested a variety of recorded information which relates to the Kirklees Metropolitan Council's relationship with Kirklees Active Leisure. The Council has provided the complainant with much of the information he seeks, including references to locations on the Council's website where relevant information can be readily accessed. Notwithstanding its disclosure of information, the Council has withheld two paragraphs of a report made to its Cabinet on 8 November 2011, entitled 'Kirklees Sport and Leisure Facility Management – Options Appraisal and Update on Renewal Process'. The Council has relied on section 42 of the FOIA to withhold these paragraphs, on the grounds that the information they contain attracts legal professional privilege.
2. The Commissioner's decision is that Kirklees Metropolitan Council has properly applied section 42 to the withheld information.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 22 May 2016, the complainant wrote to Kirklees Metropolitan Council to make the first of two related requests for recorded information. The terms of the complainant's first request are:

"In response to my request [11750] for: The annual funding provided to KAL by Kirklees Council from 2002 onwards, you provided the link:
<http://kirklees.gov/you-kmc/deliveringServices/budget>

Although that allowed me to access the Council's statements of Accounts, these were for 2005-2006 onwards – i.e. there were no links to the Statement of Accounts for 2002/03, 2003/04 and 2004/05. Accordingly, can you provide copies of (or links to) those three statements.

I also request copies of all reports to Cabinet/Committee regarding the Council's monitoring of KAL's performance (operational and financial) from 2002/03 onwards. In addition to those (presumably annual) monitoring reports there may be others documents, such as those associated with the decision to extend the Statement of Understanding to 2032. If so, I also request copies of/links to them.

On a related matter, if not addressed in those reports, please also provide me with copies of/links to the documents addressing the implications of financial and/or operational developments, such as how a decision to change the amount of annual funding to KAL impacted on the achievement of the Council's key policy objectives in health & well-being and other areas.

Also, the 2012/13 Statement of Accounts has this:

The principal activity of KAL is to operate community recreational facilities on behalf of the Council... The Council has a significant influence within the company of 17% (increased from 10% in 2011/12). And: The Council has given guarantees for outstanding contributions to Pension Funds, in the event of default by... Kirklees Active Leisure.

Accordingly, please provide copies of/links to; what informed the decision to increase the Council's influence; and the financial and other implications of a default by KAL."

5. The Council responded to the complainant's request on 20 June 2016, advising him that it holds information concerning monitoring reports and other documents associated with the decision to extend the Statement of Understanding to 2032.
6. The Council provided the complainant with copies of the Statements of Account for 2002/03, 2003/04 and 2005/06 and also with information in respect of the financial implications and operational developments on the achievement of the Council's key policy objectives in health & well-being and other areas.
7. The Council conducted its internal review, and on 28 July, the Council wrote to the complainant to advise him of its final decision. The Council confirmed that its holds information concerning the second part of request – that which concerns its monitoring of Kirklees Active Leisure's performance from 2002/03 onwards and its decision to extend the Statement of Understanding until 2032. The Council advised the

complainant that this information was exempt under section 21 of the FOIA, by virtue of it being available on its website –

<https://democracy.kirklees.gov.uk/ieDocHome.aspx>

8. The Council also advised the complainant that it was sending him a redacted copy of the report it holds in relation to the Statement of Understanding. The complainant was informed that paragraphs 8.2.5 and 8.2.6 were redacted along with the names of officers in reliance of sections 40(2) and 42 of the FOIA.

9. The complainant was advised that the Council does not collate and present information in the way he had stated in the third part of his request. The Council stated that, “all the impacts are detailed in the Medium Term Finance Plans (MTFP)”, which are published on the Council's website. That being the case, the information is exempt by virtue of section 21 of the FOIA and can be found at:

<http://www.kirklees.gov.uk/involve/doc.aspx?ref=zmgrindg&e=810>

and

<http://www.kirklees.gov.uk/beta/delivering-services/budget-and-accounts.aspx>

10. On 3 October 2016, the complainant submitted his second request to the Council. This request concerns information which relates to the Cabinet briefing paper of 29 June 2010 and paragraphs 8.2.5 and 8.2.6 of the Report dated 8 November 2011:

“...I realise my FOI request should have included asking for a copy of the detailed advice provided by Legal Services in respect of arrangements for the management of Council sports centres from April 2012 onwards and compliance with statutory guidance, as well as how the governing documents could be made ‘loose’ enough.

As all that seems likely to have a bearing on the ICO's deliberations, could you please provide me with copies of the relevant papers, including the ‘governing documents’ referred to by Legal Services”

11. The Council responded to the complainant's second request on 2 November. The Council confirmed that it holds the information he seeks but refused to supply it in reliance on sections 40(2) and 42 of the FOIA.

12. On 15 December 2016, having conducted an internal review of the second request, the Council wrote to the complainant to advise him that it was upholding its applications of sections 40(2) and 42 for the FOIA.

Scope of the case

13. The complainant initially contacted the Commissioner on 5 September 2016 to complain about the way his first request for information had been handled. During the intervening period, the complainant submitted his second request.
14. The complainant considers that there are strong indicators that the Council's decision to extend its relationship with Kirklees Active Leisure to 2032 is questionable. He questions whether this relationship has delivered public benefit; whether the renewal process took all relevant factors into account; and whether the Council has complied with the Government's statutory guidance".
15. The Commissioner has restricted her investigation to the Council's withholding of information in reliance on section 42 of the FOIA. The withheld information relates to the complainant's second request and is limited to paragraphs 8.2.5 and 8.2.6 of the report made to the Council's Cabinet, dated 8 November 2011 and titled "Kirklees Sport and Leisure Facility Management – Options Appraisal and Update on Renewal Process".

Reasons for decision

Section 42 – legal professional privilege

16. The Council has advised the Commissioner that the information it is withholding is subject to legal advice privilege. The legal advice is summarised in a report made to the Council's Cabinet – the Executive decision making body of the Council.
17. The advice concerns the option appraisal process in relation to the sport and leisure facility management.
18. The Council has informed the Commissioner that no litigation was in progress or contemplated at that time and legal advice was sought in relation to the funding agreement and the Council's contractual legal responsibilities and available options.
19. The advice was provided by a Principal Legal Officer, who is a solicitor, in the Council's Legal Services department's Contracts and Commercial team. It was provided to Council's Cabinet and it is this body which, for the purpose of legal advice privilege, is the Legal Officer's client.
20. The Commissioner has examined the withheld information. She notes that the report containing the withheld information is marked 'Private and Confidential and that the content of the two withheld paragraphs,

8.2.5 and 8.2.6, is a summary of the advice from the Council's Legal Officer.

21. The Council has drawn the Commissioner's attention to the decision summary for its Cabinet meeting of 8 November 2011. This summary is available on the Council's website¹ and it confirms the identities of the councillors present at the meeting where the report was considered and the fact that the public was excluded.
22. The Council assures the Commissioner that the legal privilege attached to the withheld information has not been 'lost'. It stresses that the advice has not been revealed in its entirety and that only very general implications have been disclosed. Similarly, the reasoning or the grounds of the advice have never been disclosed.
23. The report was presented to Cabinet in a private meeting and the report was not made available to the public. However, the Council later received a request for the report - FOI request 12945 and the report was disclosed. Notwithstanding this disclosure, the Council assures the Commissioner that the legal advice contained at paragraphs 8.2.5 and 8.2.6 was redacted.
24. The Council relies on the Commissioner's own guidance which states:

"If only part of the advice is disclosed outside litigation without restrictions it is possible for the remaining information to keep its LPP protection depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege."
25. Having examined the withheld information, the Commissioner has decided that the exemption provided by section 42 is properly engaged. As section 42 is a qualified exemption, the Commissioner is now required to consider whether the public interest favours the disclosure of the withheld information or whether it should continue to be withheld.

The public interest

Arguments favouring the disclosure of the requested information

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[https://democracy.kirklees.gov.uk/CeListDocuments.aspx?CommitteeId=139&MeetingId=4059&DF=08%2f11%2f2011&Ver=2,](https://democracy.kirklees.gov.uk/CeListDocuments.aspx?CommitteeId=139&MeetingId=4059&DF=08%2f11%2f2011&Ver=2)

26. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions.
27. Disclosure of publicly held information can help foster greater trust in public authorities and may allow greater public participation in the decision making process.
28. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of Kirklees Active Leisure. It would also allow the public to consider the quality of the legal advice which was provided to the Council's Cabinet.

Arguments in favour of maintaining the exception

29. In her previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
30. It is very important that individuals and public authorities are able to consult with lawyers in confidence and be able to obtain confidential legal advice.
31. Should the legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so.
32. 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 argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."
33. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose his own position or legal advice beforehand.

34. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...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..."

35. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

36. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
37. In this case the Council's Executive is responsible for making informed decisions in relation to a contractual relationship. The Council argues that it is important that the decision making body of the Council can obtain full and frank legal advice when making decisions at a formative stage and when making important decisions relating to large amounts of public funds. This is especially so where there are a number of options available to the Council.
38. The Council has advised the Commissioner that the contractual relationship with KAL is ongoing and any consequences that may result from disclosure could leave the Local Authority open to legal challenge. Likewise, it has advised the Commissioner that it attaches significant weight to its ongoing agreement and relationship with KAL.
39. The Council appreciates the public interest for it to be accountable, especially where large sums of public money and high value assets are involved. It accepts that this is particularly the case where the Council's decisions and actions relate to those funds and assets.
40. Likewise, the Council accepts that there may be legitimate concerns about the performance of KAL, its funding arrangements and its ongoing relationship with the Council.
41. Having considered the circumstances of this case, the Council asserts its belief that the public interest in disclosure does not outweigh the strong public interest in maintaining the Council's right to communicate with its

legal advisors in confidence, especially at this high level in the decision making process.

42. The Council accepts that there are large amount of money involved in its on-going relationship with Kirklees Active Leisure. However it points out that there is no evidence of misrepresentation or of any unlawful activity. It has disclosed the remainder of the report to the complainant in the knowledge and understanding that this sets out in detail everything considered by the Council other than the legal advice.
43. The information contained in the disclosed report sets out the options available to the Council, the advantages and disadvantages of those options, the relevant statutory guidance, relevant legislation, details of the Council's priorities, climate plan, financial implications and risks and general legal implications.
44. The Council rebuts the complainant's assertion that its decision is questionable, and his doubts as to whether Kirklees Active Leisure has delivered public benefit and whether the renewal process took all relevant factors into account and complied with statutory guidance.
45. The Council notes that the complainant has not specifically identified any factors which the Council has failed to consider and the Council points out that the statutory guidance requires it to consider more than simple sums of money.
46. The Council has detailed for the Commissioner the statutory provisions and guidance which governs its relationship with Kirklees Active Leisure. The Council has assured the Commissioner that it is not aware of any instance where it has failed to comply with those statutory provisions or guidance.
47. The Council has advised the Commissioner that Kirklees Active Leisure is a wholly independent charitable company which has always had its final accounts independently audited. These accounts are made available on Companies House and Charity Commission websites.
48. The Council has assured the Commissioner that its auditors have never made any comment on the figures the Council has used from Kirklees Active Leisure's accounts.

The Commissioner's decision

49. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is

evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.

50. Having considered this case, the Commissioner considers that there are no factors present which would equal or would outweigh the particularly strong public interest inherent in this exception. The Commissioner has therefore decided that the public interest favouring the continued withholding the requested information is greater than the public interest favouring disclosure. The Commissioner is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld. The Commissioner has decided that the council has properly applied section 42 to the withheld information

Other matters

51. Since making a response to a request for information relating to Kirklees Active Leisure's performance, the link to information about the overall number of visits to sports facilities has changed. This information can now be found at:

<http://www.kirklees.gov.uk/beta/information-and-data/kirklees-information.aspx>

52. Also, in January 2017, Kirklees Active Leisure Trustees presented an update to the Council. This information is now available at:

<https://democracy.kirklees.gov.uk/ieListDocuments.aspx?CIId=138&MIId=5097>

Right of appeal

53. 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

54. 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.
55. 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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SK9 5AF