

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2017

Public Authority: Peterborough City Council
Address: Town Hall
Bridge St
Peterborough
PE1 1HF

Decision (including any steps ordered)

1. The complainant has requested information relating to a deal between Peterborough City Council and Lucent Strategic Land Fund ("Peterborough Investment Partnership"). The public authority refused the request, withholding the information under the exemptions for legal professional privilege (section 42) and commercial interests (section 43(2)).
2. The Commissioner's decision is that Peterborough City Council breached section 1(1), correctly applied section 42 to withhold the legal advice from Pinsent Masons and, in respect of advice from Grant Thornton, failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the advice from Grant Thornton to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 20 October 2016, the complainant wrote to Peterborough City Council (the "council") and requested information in the following terms:

"External advice obtained from Grant Thornton, Pinsent Masons and PwC regarding the deal between the council and Lucent Strategic Land Fund ('the Peterborough Investment Partnership'), including copies of any due diligence reports conducted on any aspect of the deal."
6. On 2 November 2016 the council notified the complainant that it was extending the time for compliance in order to consider the public interest in relation to the exemptions in section 41 and section 42.
7. On 16 December 2016 the council responded and confirmed that it was withholding the advice from Pinsent Masons under the exemption for legal professional privilege (section 42). It also confirmed that it was withholding information from Grant Thornton and PwC under the exemption for commercial interests, section 43(2) of the FOIA.
8. Following an internal review the council wrote to the complainant on 31 January 2017. It stated that it was maintaining its position.

Scope of the case

9. On 2 February 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. At the time of the complaint to the Commissioner, the council's position was that external advice obtained from PwC was exempt under section 43(2). During the course of the investigation the council confirmed that it did not actually hold advice from PwC in relation to the matters referred to in the request.
11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied exemptions to withhold the requested information.

Reasons for decision

Section 1(1) – duty to confirm or deny

12. Section 1(1) of the FOIA states:

“Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

13. The council initially withheld requested advice from PwC under section 43(2) of the FOIA. During the Commissioner’s investigation the council confirmed that it did not actually hold any relevant information from PwC.

14. The Commissioner finds that, in initially confirming that this information was held, the council breached section 1(1).

15. As the council has now correctly confirmed the information is not held the Commissioner does not require the council to take any further action in this regard.

Section 42 – legal professional privilege

16. The council has withheld legal advice from Pinsent Masons under section 42 of the FOIA.

17. Section 42 provides an exemption for information that is subject to legal professional privilege (LPP).

18. The principle of LPP is based on the need to protect a client’s confidence that communication with his or her legal advisor will be treated in confidence. There are two types of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated).

19. The council confirmed that the withheld information constitutes a communication between a legal advisor (Pinsent Masons) and its client (the council) made for the sole purpose of obtaining legal advice. The council explained that the advice was given in Pinsent Masons’ professional capacity as a legal advisor.

20. The council explained that the advice was sought in relation to the Peterborough Investment Partnership (PIP). The council's website provides the following details about the PIP:

*"PIP is a joint venture between the city council and Lucent Strategic Land Fund. The council transfers the land into the partnership and Lucent the funding and then when a site has gained planning permission it will be sold and both parties take a share of the profits. Any profit is divided proportionately between the council and Lucent according to each party's contribution to each scheme."*¹

21. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the withheld information is subject to LPP and that the confidence attached to the advice has not been lost via unrestricted disclosure.
22. As she has decided that the exemption is engaged the Commissioner has gone on to consider the public interest test.

Public interest in disclosure

23. The council has acknowledged that there is a general public interest in openness and transparency around public authority decision making.
24. The Commissioner accepts that there is a general public interest in public authorities being transparent about their decision-making as this promotes public understanding, reassurance that appropriate judgements are being and provides a mechanism for accountability.
25. The complainant has provided the Commissioner with the following public interest arguments in favour of disclosure:
- There has been a great deal of secrecy surrounding this exceptionally complex deal;
 - There was no competitive tender, a potential breach of procurement law;
 - The deal involves the transfer of large swathes of the council's valuable spare development land to a private company, at no

¹ <https://www.peterborough.gov.uk/news/council/important-step-taken-for-key-city-centre-regeneration-sites/>

financial consideration, in a long term deal carrying significant financial risk and uncertainty;

- The advisor to the deal is a tax haven "shell" company registered on the Isle of Man called Lucent Holdings Ltd / Lucent Advisors Ltd;
 - The principle investors, KMG-SICAV-SIF in Luxembourg, have no track-record of delivering projects like this, nor do the advisors, Lucent Advisors Ltd;
 - The deal involves the council acting commercially as a 50/50 joint venture partner with a controlling interest in a UK LLP, leading critics to say that the deal goes beyond what the council is legally allowed to do (i.e. the council risks operating *ultra vires*).
26. The complainant also directed the Commissioner to an article in Private Eye magazine, which detailed a similar deal between Allerdale Borough Council². The article reports that, in that case, the deal was conducted "...against the advice of accountants at Deloitte."

Public interest in maintaining the exemption

27. The council has argued that there is a strong public interest in allowing it to explore issues with its legal advisors and to make rigorous and detailed analyses of any proposed scheme or venture. It has submitted that disclosing advice would inhibit council officers in future dealings with legal advisors.
28. The council has also argued that disclosing the information would also, in the event of a future claim, prejudice its interests by exposing its legal position to potential challengers. It has also suggested that the withheld information contains little or nothing of interest to those not directly engaged with the project.
29. The Commissioner acknowledges that disclosing advice may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. This general view has also been supported by the Information Tribunal.

² Private Eye magazine, Issue 1428, Page 18, 30 September 2016).

Balance of the public interest

30. In considering where the balance of the public interest lies, the Commissioner has given due weight to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP; 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 course of justice.
31. In relation to the specific arguments provided by the complainant, the Commissioner considers that these can be taken to suggest that disclosure of the information would bring evidence to light of professional neglect and / or misconduct or illegality.
32. The council has strongly refuted the complainant's accusations of potential wrongdoing in relation to this matter and stated that it considers that no additional weighting in favour of disclosure should be attributed to the arguments.
33. The Commissioner is not herself suggesting that the council has behaved inappropriately in this matter or otherwise taken the wrong decision - such judgements are not within her remit. However, she considers that the public interest in this case is impacted by the public's need to be assured of the probity of the decision making; and when coupled with the amount of public expenditure involved there is sufficient weight to warrant public interest in understanding the factors affecting confidence in the council performing its functions.
34. The Commissioner is fully aware of the emphasis that the Tribunal has placed on clients being able to seek legal advice in a confidential context. However, it is also the case that the exemption is a qualified one, not absolute, and it must be shown that there is a clear, compelling and specific justification that at least equals the public interest in disclosing the information in dispute.
35. Whilst the Commissioner is mindful of the complainant's concerns, she does not consider that the evidence provided directly counts in favour of disclosing the legal advice received by the council in this case. Public interest factors should always be relevant to the context under consideration and, that another authority might have experienced difficulties in a similar arrangement is not transposable to the council's position.
36. Similarly, it is not the Commissioner's role to make judgements about partners that public authorities enter into relationships with; except where such arrangements are directly linked to misconduct, illegality or misrepresentation of advice received.

37. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest"³.
38. In this case, with no direct evidence of wrong doing or actions counter to advice provided, the Commissioner has concluded that, in light of the factors above, the public interest in disclosing the information in this case does not outweigh the public interest in maintaining the exemption.

Section 43(2) – prejudice to commercial interests

39. The council withheld advice from Grant Thornton under section 43(2).
40. Section 43(2) provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
41. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to the PIP which, as noted above, regards a business venture between the council and Lucent Strategic Land Fund. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
42. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.

Likelihood of the prejudice occurring

43. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

3

http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

44. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
45. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
46. The council has argued that disclosure of the information would prejudice its commercial interests. The Commissioner notes that the council is, therefore, relying on the second limb of the prejudice test, which places a stronger burden on the authority to demonstrate engagement.

The nature of the prejudice

47. The council has stated that:

"...under its Efficiency Strategies, it is committed to seeking new forms of service provision and entrepreneurial ventures to face the financial challenges which all public bodies will face over the future years, and in this regard it has developed the scheme entered into by the Council with Lucent Strategic Land Fund..."

48. The council explained that, although the various elements involved in the venture are not unique, *"...the way in which they have been incorporated into the scheme is innovative and will better enable the Council to better face those challenges and will also present the Council with commercial opportunities with regard to other local authorities and public bodies."*

49. In its initial response to the request the council also stated:

"It is considered that if the information requested were to be disclosed to the public, this would expose the Council to potential financial loss and which could adversely affect its commercial interests, thereby impacting on residents of the City."

50. The Commissioner notes that the council's arguments are generic and simply define the effects of the information being disclosed using the terms of the exemption. The council's submissions make no reference to any specific elements of the withheld information nor do they identify any specific prejudice to commercial interests which disclosure would

cause. No link is made between disclosure of discrete elements of the information and explicit, demonstrable prejudicial effects.

51. The Commissioner is left with the impression that the council has sought to withhold the information on an entirely general basis with no regard for the details of the information or the evidential threshold required to demonstrate that the exemption is engaged.
52. The Commissioner considers that the council has had ample opportunities to make submissions in relation to its position and that it was made aware of the scope and depth of arguments needed to support its application of the exemption.
53. The Commissioner further considers that, where a public authority has failed to provide adequate submissions, it is not her responsibility to generate arguments on its behalf or to facilitate its application of an exemption. She considers that the duty to provide information under the FOIA or, in cases where information is being withheld, to show that an exemption is engaged, rests with the public authority in receipt of the request.
54. In this case, the Commissioner finds that the council has failed to demonstrate that disclosing the information would prejudice its commercial interest and that the exemption is not, therefore, engaged.
55. As she has concluded that the exemption is not engaged the Commissioner has not gone on to consider public interest test.

Right of appeal

56. 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

57. 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.

58. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF