

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 16 April 2018

Public Authority: Carmarthenshire County Council

Address: foia@carmarthenshire.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about the Joint Working Agreement ('JWA') for the Swansea Bay City Deal. Carmarthenshire County Council ('the Council') confirmed it did not hold some information and withheld a copy of the draft JWA under section 42 of the FOIA. Following the Commissioner's intervention, the Council agreed that the request should have been considered under the EIR and confirmed that it considered regulation 12(5)(b) to apply. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 1 November 2017, the complainant wrote to the Council and
"I understand that the council has recently instructed external solicitors to provide a new Joint Working Agreement for the Swansea Bay City Deal to replace an earlier draft which could not be agreed upon by the partners.

Please could you provide:

A copy of the draft JWA which has now been rejected and the total paid by the council for commissioning this earlier draft and any subsequent amendments before it was rejected.

If this was a shared cost please provide a breakdown of cost per partner”.

3. The Council responded on 20 December 2017 and stated that it had not paid towards the costs of the work in question. The Council confirmed that it held a copy of the draft JWA, but it considered it to be exempt under section 42 of the FOIA.
4. On 21 December 2017 the complainant requested an internal review of the Council’s decision to withhold the draft working agreement.
5. The Council provided the outcome of its internal review on 3 January 2018 and upheld its decision that the draft JWA requested was exempt under section 42 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 12 January 2018 to complain about the way her request for information had been handled.
7. As part of her investigation, the Commissioner asked the Council to consider whether the request should have been handled under the EIR ie whether the requested information constitutes environmental information. On 2 March 2018, the Council confirmed it had revisited the request and concluded that the EIR is the correct access regime. The Council also confirmed that it considered regulation 12(5)(b) of the EIR to apply.
8. The scope of the Commissioner’s investigation into this complaint is to determine whether the Council correctly withheld a copy of the draft JWA.

Reasons for decision

Correct access regime

9. Information is ‘environmental information’ if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition

in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.

10. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
11. The withheld information in this case is a draft JWA for the Swansea Bay City Deal (SBCD), which is a joint project with four local authorities in West Wales. According to its website¹:

"The City Deal is expected to give the Swansea Bay City Region a permanent uplift in its GVA of £1.8 billion and will generate almost 10,000 new jobs over the next 15 years.

The total investment package is made up of £241 million UK and Welsh Government funding, £396 million other Public Sector investment and £637 million from the Private Sector.

The City Deal programme encompasses 11 projects across 4 key themes of Economic Acceleration, Life Science and Well-being, Energy, and Smart Manufacturing. An enhanced Digital Infrastructure & next generation wireless networks and the development of workforce skills and talent will underpin each".

12. During the course of the Commissioner's investigation, she asked the Council to consider whether the request should have been considered under the EIR as opposed to the FOIA. This is because the Commissioner considered that the SBCD is a measure, as defined by regulation 2(1)(c) of the EIR, which was likely to have an effect on the elements of the environment, including land, landscape, air and water. The draft JWA would therefore constitute information on this measure.
13. Whilst the Council considered that the JWA is more concerned with governance arrangements for managing and administering the project and does not, in itself concern or contain any environmental information, it accepted that the JWA constitutes information on measures and activities which will have an effect on the elements of the environment including land, landscape, air and water. The Council accepted that the request should have been considered under the EIR

¹ <http://www.swanseabaycitydeal.wales/about/>

and confirmed that it considered regulation 12(5)(b) applied to the request.

Regulation 12(5)(b) – Legal professional privilege

14. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”. The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
15. The success, or not, of an application of regulation 12(5)(b) in terms of LPP will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?
16. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. Legal advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
17. In order to attract LPP, the information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.

18. The withheld information in this case comprises a draft JWA in respect of the SBCD. The Council confirmed that the document in question "*was prepared by and sent to our Head of Administration & Law by the external solicitor instructed to provide the advice, which in this case largely took the form of the draft agreement*". The Council stated that the only reason it instructed external solicitors was to obtain advice on a governance structure for the SBCD project. The legal advice received in this case largely took the form of the draft JWA.
19. In her internal review request, the complainant argued that the Council had misinterpreted the concept of LPP, by applying it to an agreement, draft or otherwise. She considers the Council's interpretation of LPP in this case would mean that it would cover all documents which have involved professional legal advice. This would cover a significant proportion of agreements, reports and legal texts such as the Council's constitution even after it has been adopted. The Council addressed this point in its internal review response. It referred to the fact that legal advice privilege had been defined by a number of court cases, "*to mean not just confidential communications between a lawyer and their client but also 'all material forming part of the continuum of those communications'* (*Balabel v Air India [1988] 1 Ch 317*)(*Three Rivers No 6 [2005] 1 AC 610*)".
20. The Commissioner accepts that LPP can apply wherever communications pass between a client and their legal advisor in a '*relevant legal context*'. As such privilege may be available where the communication is made for the purpose of obtaining advice from a professional legal advisor even where the advice sought is not necessarily legal advice.
21. Having considered the withheld information and the Council's representations, 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.
22. 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.
23. The Council confirmed that the draft JWA has been shared with the Head of Administration and Law in the Council itself, as well as their counterparts in each of the other three local authorities who are part of the SBCD project (Pembrokeshire County Council, Swansea Council and Neath Port Talbot County Borough Council).

24. In her internal review request, the complainant suggested that some of the local authorities with whom the draft JWA was shared went on to share the document with their elected members. The Council does not consider that sharing information with elected members would constitute a loss of confidence as the elected members "*would be part of the 'client' body which is in receipt of the legal advice in question*". The Council has confirmed that the content of the draft JWA has not been made public and as such it does not consider that privilege has been lost.
25. Based on the Council's representations, and as far as the Commissioner has been able to establish, the withheld information was not publicly known at the time of the request and there is therefore no suggestion that confidence has been lost. As such, the Commissioner is satisfied that the withheld information is subject to LPP.
26. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. She considers the likelihood of this happening to be more probable than not. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and she therefore finds that the exception at regulation 12(5)(b) is engaged.

Public interest test

27. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested Information

28. The Council acknowledges that there is a public interest in transparency and openness in the working of the Council. The Council also acknowledges that disclosure would help hold its leadership to account. In addition, disclosure would further public knowledge about a high profile project which involves the expenditure of significant public funds.

29. The complainant considers that the public interest in favour of disclosure of the draft JWA outweighs the public interest in maintaining the exemption. She stated that the SBCD involves a significant amount of public money. She also referred to fact that progress of the project, delays and issues with governance have been widely reported in the press.

Public interest arguments in favour of maintaining the exception

30. In this case, the Council considers that there is an inherent public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice.
31. The Council stated that, in considering the public interest test in this case it had taken into account the decision in *"the House of Lords in Three Rivers No 6 [2005] 1 AC 610 where the court emphasised the significant public interest that existed in preserving the confidentiality of communications between lawyers to ensure the proper and fair administration of justice"*.
32. The Council explained that the legal advice is considered to be very much 'live' in that the joint working agreement was still in the process of being agreed/concluded at the time of the request and the complaint to the Commissioner.
33. The Council confirmed that it did not consider there are any special or unusual factors in this case which would tip the balance of the public interest in favour of disclosure.

Balance of the public interest test

34. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, she has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.
35. 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. She believes that this

is especially the case where the public authority's actions have a direct effect on the environment.

36. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to matters around large scale developments and regeneration affecting a significant amount of people. She accepts that disclosure of the withheld information in this case would provide a degree of transparency and reassurance in relation to the governance and management arrangements for the SBCD project.
37. The Commissioner considers that another factor in favour of disclosing the information is the number of people who may be affected by the subject matter. In *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people". The Commissioner notes that the SBCD project has the potential to affect a fairly significant group of people. She also notes that there has been a number of media articles about the project in question.
38. The Commissioner notes that the public interest in maintaining this exception 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 her inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the Council had misrepresented any legal advice it has received or evidence of a significant lack of transparency. Whilst the Commissioner accepts that the decision in this particular case has the potential to affect a fairly significant number of people, she does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exception.
39. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner also considers that the timing of the request in this case weighs heavily in favour of maintaining the exception given that the JWA had not been concluded at the time of the request. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight, in her view in this case there are stronger public interest arguments in favour of maintaining the exception. The Commissioner accepts that if disclosure were ordered, this would undermine the Council's ability to obtain legal advice in a timely fashion

in the future and have the confidence that advice given is done so freely without the consideration of disclosure. This would lead to advice that is not informed by all the relevant facts, and could result in poorer decisions being made because the Council would not have the benefit of thorough legal advice.

40. In summary, the Commissioner has concluded that the public interest in maintaining the exception at Regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Right of appeal

41. 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

42. 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.
43. 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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