

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2022

Public Authority: Wirral Metropolitan Borough Council

Address: Town Hall
Brighton Street
Wallasey
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested from Wirral Council ('the council'), a document pack provided to councillors relating to a development agreement.
2. The council refused the request on the basis that the information is subject to legal professional privilege, (section 42 of FOIA).
3. The Commissioner's decision is that the council was correct to apply section 42(1) to withhold the information from disclosure. He has, however, decided that the council did not comply with the requirements of Section 10(1) in that it did not respond to the request within 20 working days.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 22 August 2021, the complainant wrote to the council and requested information in the following terms:

"This request is for pages 1-30 of the private document pack for agenda item 4 (Hoylake Golf Resort Development Agreement) for the Council meeting held on the 11th August 2021 which is described as "a report of the Director of Law and Governance in respect of the Hoylake Golf Resort Development Agreement, following the removal of the Policy and Resource's delegation to consider the matter, at its meeting on 28 July, 2021, in accordance with Article 7.3 of the Constitution.""
6. The council responded on 21 September 2021. It withheld the information citing the exemption in section 42 of FOIA (legal professional privilege – 'LPP').
7. Following an internal review, the council wrote to the complainant on 20 October 2021. It maintained its initial decision.

Scope of the case

8. The complainant contacted the Commissioner on 24 October 2021 to complain about the way his request for information had been handled.
9. He argues that the council should have considered the requested information under the terms of the Environmental Information Regulations 2004 ('the EIR') rather than FOIA, and that it should have disclosed the requested information to him. He further argues that even if some parts of the document are subject to LPP, he does not consider that the report, in its entirety, should be subject to it.
10. The Commissioner considers that the scope of the complaint is therefore whether the council was correct to withhold the requested information under section 42 of FOIA. The Commissioner will also look at the time which the council took to respond to the request for information.

Reasons for decision

FOIA or EIR

11. The complainant argues that the council was not correct to consider the information under FOIA. He considers that it relates to the Hoylake Golf Resort Development Agreement, and that it should therefore have been considered under the EIR. The council argues that it was correct to consider the information under FOIA.
12. Regulation 2 of the EIR provides the definition of environmental information for the purposes of the EIR. Regulation 2 provides that:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –...

 - (c) ... measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
13. The council argues that the information falls under FOIA rather than the EIR as it is legal advice held in relation to a claim issued against the council regarding an alleged breach of a contractual agreement. As such, it argues that it is not a measure etc, which is likely to affect the elements and factors defined within Regulation 2(a).
14. The Commissioner has considered the withheld information together with the relevant background. He has considered whether the information relates to issues which might affect the environmental factors defined in Regulation 2(a).
15. The information is legal advice relating to a legal dispute between the council and the Nicklaus Joint Venture Group ('the NJVG') over the council's decision to pull out of an agreement to part fund the development of the golf resort. The council had made the decision to pull out of the arrangement and a claim was made by NJVG in response. The relevant advice relates to the claim, not to the development.
16. As the advice does not relate to issues which would have an affect on the factors listed in Regulation 2(a), the Commissioner is satisfied that the council was correct to argue that the information falls to be considered under section 42(1) of FOIA.

Section 42 – Legal Professional Privilege

17. Section 42(1) states that:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

18. This exemption is subject to the public interest test.

19. Legal professional privilege ('LPP') protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* as:

“ ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation.”

20. There are two categories of LPP – litigation privilege and legal advice privilege. The council argues that the information is subject to litigation 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.

21. The Commissioner is satisfied that the withheld information comprises a report providing legal advice from a professional lawyer to his client, the council, and that it exists for the dominant purpose of providing legal advice relating to a risk of litigation. It is advice provided by the Director of Law and Governance in a professional legal context to councillors for their information prior to them making a decision on how to proceed regarding the claim. Therefore, the Commissioner is satisfied that the report attracts LPP in its entirety.

22. The Commissioner has next considered whether the privilege has been lost. The Commissioner applies the test as to whether there has been any previous disclosures to the world to the extent that the information can no longer be said to be confidential.

23. Whilst details of the settlement agreement itself were deemed not to be subject to confidentiality, and some information on the settlement was disclosed, this was not the case with the legal advice. The Commissioner is also not aware of any previous disclosure of the advice to the world at large.
24. The Commissioner therefore finds that section 42 is engaged in respect of the withheld information.

The public interest test

25. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. The test is whether 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 complainant argued that it is not clear whether the council considered its response to his request at a sufficiently high level to refuse the request. This matter relates to the council's internal processes and is not a matter for the Commissioner to consider in this instance.
27. He also argued that insufficient reasoning was given at the internal review stage regarding the public interest factors and the balancing of these. The Commissioner, however, considers that the review upheld the original decision, and that adequate reasons were provided within the initial response to establish the council's arguments and the reasons for its decision.
28. The Commissioner accepts that there is public interest in creating greater transparency on the issue of the dispute. The council entered into a controversial agreement regarding a development on a greenfield site, but subsequently withdrew from that agreement. As a result, a large amount of public money was paid in settlement to the NJVG. In effect, therefore, a large amount of public money was expended by the council with little, or no, apparent benefit to the community.
29. The council accepted that a large amount of people would be impacted by the decision due to the large amount of money involved.

Public interest arguments in favour of maintaining the exemption

30. The council argued the factors in favour of withholding the information included:

- The concept of LPP reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients;
- This confidentiality promotes respect for the rule of law and administration of justice by encouraging clients to seek legal advice and allowing for full and frank exchanges between clients and their lawyers;
- Withholding the advice protects the rights of the individuals to seek and receive fully informed and reasoned legal advice.
- There is a strong presumption in favour of maintaining the concept of LPP, and the rationale of ensuring frankness in the exchange of views which serves the wider administration of justice.
- Applying this to the current case, disclosing the legal advice just after the settlement of the legal dispute is very likely to be harmful to the administration of justice.

Balance of the public interest arguments

31. In the case of *Bellamy*, the Tribunal, in explaining the balance of factors to consider when assessing the public interest test, it said:

"... there is strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest."

32. The Commissioner must therefore take into account the in-built public interest in the maintenance of LPP. The general public interest inherent in this exemption 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. That principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.
33. The Commissioner considers the factors in favour of disclosure include the assumption in favour of disclosure and the rationale behind the assumption (i.e., accountability, transparency, furthering public debate etc).

34. He recognises that additional weight may be added to the above factors in favour of disclosure if the issues involved in the case include:

- A large amount of money;
- A significant group of people are affected by the advice or resulting decision;
- There has been a lack of transparency in the public authority's actions;
- There has been misrepresentation of advice that was given;
- There has been a selective disclosure of only part of advice that was given.

35. The Commissioner recognises that it is also important to take into account the significance of the actual information and what it reveals.

Conclusion

36. The Commissioner has considered the arguments put forward by the complainant and the council. He has also had regard to the content of the withheld information.

37. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for their decision-making.

38. The Commissioner also considers that there is a public interest in favour of disclosure due to the large amount of money concerned, and the large amount of people who had consistently expressed concerns over the development. He notes that resources expended on the project by the council ultimately ended with no tangible benefit to the community.

39. However, the information withheld under section 42 relates to the council's position regarding the claim. Not the wider issue of the development itself.

40. The Commissioner has also taken into account that the settlement agreement was agreed by the council in a meeting of the council on 11 August 2021 and the complainant's request was made to the council on 22 August 2021. The request was therefore made a very short time after the council had agreed to settle the dispute with NJVG.

41. The Commissioner has seen no evidence that there was any lack of transparency of the council's actions, nor any misrepresentation of the advice which it received.

42. Whilst the Commissioner has taken into account the public interest factors in favour of the advice being disclosed, he considers that, in this instance, this is outweighed by the public interest in the exemption being maintained.
43. The Commissioner's decision is therefore that the council was correct to apply section 42 to withhold the information in this instance.

Section 10(1)

44. The complainant argued that the council did not comply with the time requirements of FOIA in providing its response to his request for information.
45. Section 10(1) of FOIA provides that a public authority must provide its response promptly, and in any event, not later than the twentieth working day following the date of receipt.
46. The complainant made his request for information on Sunday 22 August 2021. The first working day of the 20 working days was therefore 23 August 2021.
47. The council responded to the request on 21 September 2021.
48. This falls outside of the 20 working days required by section 10(1) of FOIA by a period of one day.
49. The Commissioner's decision is therefore that the council did not comply with the requirements of section 10(1).

Right of appeal

50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. 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.
52. 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

Ian Walley
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