

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2022

Public Authority: Wirral Borough Council
Address: 5 Sandford Street
Birkenhead
CH41 1BN

Decision (including any steps ordered)

1. The complainant has requested information from Wirral Borough Council (the Council) relating to the settlement of a legal dispute in connection with the Hoylake golf resort project. The complainant wants to know why the Council paid the developer, Nicklaus Joint Venture Group (NJVG), in settlement.
2. The Commissioner's decision is that the Council was correct to rely on section 42(1) of FOIA (the 'legal professional privilege' exemption) to withhold the information within scope of the request, but the Council breached sections 10(1) and 17(1) of FOIA because it failed to provide a valid response within 20 working days.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 21 August 2021, the complainant wrote to the Council and requested information in the following terms:
"... please can you publish exactly what the payment represents in terms of which clauses from the DA [Development Agreement] it

covers where the developer has real potential to claim for losses against the council for non-fulfilment of the project.”

5. The complainant wants to know why the Council paid NJVG in settlement. The complainant’s request was titled ‘Reasons for Issuing a Cash ‘Settlement’ to the Nicklaus Joint Venture Group’, and the complainant later referred to the request by that title at internal review stage.
6. The Council responded on 22 September 2021. It stated that:

“Your request is in effect seeking the disclosure of the legal advice given to Councillors regarding the matter of the NJVG Development Agreement. I confirm that a confidential report of the Director of Law and Governance was considered at a meeting of Wirral's full Council meeting of 11 August 2021. This contained legal advice which is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.”
7. The Council went on to state that it was refusing to disclose the report mentioned above, pursuant to the legal professional privilege exemption at section 42(1) of FOIA.
8. Following an internal review the Council wrote to the complainant on 20 October 2021. It upheld its original decision that section 42 of FOIA is engaged and should be maintained. It stated that the legal advice in question remains privileged and confidential. In the internal review request, the complainant had suggested to the Council that the information that was requested “surrounding a financial settlement pertaining to an abandoned golf resort project” may be considered to be environmental information falling under the Environmental Information Regulations 2004 (EIR), but on that point the Council responded that:

“The legal advice relates to a legal dispute ... and is not sufficiently connected to measures relating to environmental information to come within the scope of EIR”.

Scope of the case

9. The complainant contacted the Commissioner on 28 October 2021 to complain about the way the request for information had been handled.
10. The complainant disagrees with the Council’s refusal to provide the requested information. The complainant said to the Commissioner that the Council’s reliance on section 42 of FOIA is “questionable” and that the request “does not directly ask the Council to reveal details of legal

advice". The complainant said "At the very least, I would like ... a brief summary of what invited the need to offer a settlement agreement".

11. The complainant also complained to the Commissioner that the Council failed to respond to the request within the required 20 working days.
12. The Commissioner therefore considers that the scope of the case is to:
 - Decide whether the Council was correct to withhold the recorded information within scope of the request under section 42(1) of FOIA.
 - Decide whether the Council has complied with its obligations under sections 10(1) and 17(1) of FOIA.
13. Although (as noted above) the complainant said to the Council that the requested information may fall under EIR (which the Council disputed), the complainant did not include that issue in their complaint. However, as part of deciding whether the Council was correct to apply section 42(1) of FOIA the Commissioner has considered whether EIR may apply to the information.

Reasons for decision

FOIA or EIR?

14. Regulation 2 of EIR defines 'environmental information' for the purposes of EIR:

"... any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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;

- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)".
15. The Commissioner directs the complainant to the decision notice he has published recently on his website in respect of [IC-136737-F8Q0](#) – a complaint submitted to the Commissioner about a request that was made around the same time (August 2021) as the request in the present case, and involving the same public authority, the same withheld information and the same FOIA exemption. That decision notice states (paragraph 15) that the withheld information relates to NJVG's claim, not the Hoylake development itself; and (paragraph 16) that the Commissioner is satisfied that the withheld information falls under FOIA not EIR. The Commissioner therefore reaches the same conclusion here.

Legal professional privilege

16. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege and this claim to legal professional privilege could be maintained in legal proceedings.
17. The legal professional privilege exemption is subject to a public interest test.
18. Although the complainant argued that the request "does not directly ask the Council to reveal details of legal advice", the Commissioner considers that the way the request was expressed meant that the type of information within scope of the request was always likely to be legal advice (for example note the words "where the developer has real potential to claim"). The Commissioner explained this to the complainant during initial correspondence.
19. The Council has confirmed to the Commissioner that it did not, at the time of the request, hold any other recorded information within scope of the request apart from the report it has referred to in its refusal notice.
20. Legal professional privilege protects the confidentiality of communications between a lawyer and client. Based on the Council's submissions, and having examined the withheld information and

considered the parties/circumstances involved, the Commissioner is satisfied that the information within scope of the request is confidential legal advice. It relates to a claim that was made by NJVG, so litigation privilege applies here. As the Commissioner's website [guidance](#) explains:

"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".

21. The Commissioner is aware of no evidence suggesting that this privilege has been waived. The complainant emphasised that a public statement by the Council declared "no obligation of confidentiality shall apply to the content of the settlement agreement", and the complainant believes this means that legal professional privilege has been waived in respect of the requested information; however the Commissioner has explained to the complainant (as the Council has) that the fact that the **content** of the settlement agreement is not confidential does not mean that the legal advice behind the settlement agreement has lost its confidentiality.
22. Section 42(1) being engaged, next the Commissioner must consider the public interest test. This involves balancing the arguments in favour of disclosure with the arguments in favour of maintaining the exemption.

Public interest test – complainant's position

23. The complainant is concerned about the Council's decision to pay NJVG to settle the dispute. In the request, the complainant argued that the Development Agreement put the Council in a strong position; that under the agreement the Council had no obligation to provide funding for the project; and that while NJVG's claim had little chance of success in court the Council paid NJVG almost £500,000 in settlement. Key public interest factors in favour of disclosure, based on the complainant's comments, would include the amount of money involved and the number of people (tax payers) affected, and considerations like accountability and transparency in relation to the Council's expenditure.

Public interest test – Council's position

24. In response the Council acknowledged a level of public interest given the amount of money involved. However it argued that the public interest in disclosure does not outweigh the factors in favour of maintaining the exemption, for example the importance of the ability to seek and obtain frank legal advice. The Council also said the matter was recent and disclosure so soon after the settlement was very likely to harm the administration of justice – maintaining confidentiality ensures that in future legal advisers are not constrained in how they express their

advice, because of a risk that the advice will be published soon after the settlement.

Public interest test – the Commissioner's position

25. The Commissioner upholds the Council's position regarding section 42(1) of FOIA and he considers that it is most appropriate and proportionate simply to direct the complainant to the reasoning set out in the decision notice for [IC-136737-F8Q0](#) at paragraphs 31 – 43 (to be read in conjunction with the Commissioner's [guidance](#) on section 42 and the public interest test – paragraphs 51 – 55), rather than to repeat it here.

Time for compliance/refusal of request

26. Section 1(1) of FOIA states that:

"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."

27. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".

28. Section 17(1) of FOIA states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that ... information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

29. From the evidence provided to the Commissioner in this case, it is clear that the Council did not issue its response in accordance with FOIA.

30. The request seems to have been made on 21 August 2021 (a Saturday), although in its response of 22 September 2021 the Council thanked the requester for the request "of 22 August 2021". Whether it was received

on 21 or 22 August 2021, the twentieth working day following the date of receipt was 20 September 2021 (30 August 2021 was a bank holiday). However the Council did not respond until 22 September 2021.

31. The Commissioner finds that the Council breached sections 10(1) and 17(1) of FOIA because it did not, within 20 working days of receiving the request, confirm whether any information was held within scope and issue its refusal notice stating that the information is exempt and why.

Right of appeal

32. 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

33. 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.
34. 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

Daniel Kennedy
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