

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2013

Public Authority: Conwy County Borough Council
Address: Bodlondeb
Conwy
LL30 8DU

Decision (including any steps ordered)

1. The complainant requested copies of valuation reports for a particular property. Conwy County Borough Council ('the Council') withheld the information under the exemption for legal professional privilege at section 42 of the FOIA. The Commissioner's decision is that section 42 is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining the exemption. The Commissioner does not require the Council to take any steps as a result of this notice.

Request and response

2. On 18 December 2012, the complainant wrote to the Council and requested information in the following terms:
 - "(a) All orders to organisations to carry out work or works to Colwyn Bay Pier from March 2012.
 - (b) All invoices which have been rendered for the execution of work or works to Colwyn Bay Pier from March 2012
 - (c) The invoices for any security duties ordered by and paid for by the Council"
3. The Council responded on 21 December 2012 and provided the information requested.

4. On 3 January 2013 the complainant contacted the Council and made a new request for information in the following terms:

"...can you please arrange to supply me with a full copy of certain of the invoices contained within summary attached to your electronic communication. These are as follows:

- (a) All invoices from Redhills Environmental
- (b) Invoice from Lambert Smith Hampton
- (c) Invoice from Valuation office Agency".

5. The Council responded on 17 January 2013 and provided the information requested.

6. On 17 January 2013 the complainant contacted the Council and made a new request for information in the following terms:

"I would now formally request under the Freedom of Information Act 2000 the a [sic] full copy of the reports to which the invoices refer".

7. The Council responded on 12 February 2013 stating that the two valuation reports carried out by Lambert Smith Hampton and the Valuation Office Agency could not be disclosed at the present time as they were obtained in the course of legal proceedings which were on-going. As such the information was considered exempt under section 42 of the FOIA as it was covered by legal professional privilege.

8. On 14 February 2013 the complainant contacted the Council and requested an internal review of its decision to withhold the information requested. He pointed out that whilst there was litigation on-going in relation to the ownership of Victoria Pier, there was no legal action concerning the value of the Pier. In view of this, the complainant said that he did not believe section 42 of the FOIA was applicable.

9. The Council provided the outcome of its internal review on 1 March 2013 and upheld its decision that the requested information was exempt under section 42 of the FOIA and the public interest favoured non-disclosure at that time.

Scope of the case

10. The complainant contacted the Commissioner on 3 March 2013 to complain about the way his request for information had been handled.

11. The Commissioner considers the scope of his investigation is to determine whether the Council correctly applied Section 42(1) to the information requested by the complainant on 17 January 2013.

Reasons for decision

Background

12. The issue of ownership of Victoria Pier ('the Pier') in Colwyn Bay has been the subject of a number of legal challenges between an individual who purchased the Pier in 2003 and the Council. The individual concerned was made bankrupt in 2008 in a dispute over alleged unpaid council tax and business rates. The Council took ownership of the Pier in March 2012, after buying it from the Crown Estates to whom the property was transferred following bankruptcy proceedings against the former owner. The former owner of the Pier and his mother have both taken legal action in relation to matters associated with ownership of the Pier.
13. In August 2012 a judge rejected the former owner's argument that ownership of the Pier should revert to him from the Council. A second claim, by the former owner's mother over a £50,000 interest in the Pier, was adjourned and in November 2012 her application was dismissed. The former owner was granted permission to appeal the decision made in August 2012. At the time of the request (17 January 2013), the issue of ownership of the Pier was subject to a High Court appeal brought by the former owner of the Pier, which was heard in April 2013. The High Court judge ruled that part of the court case brought by the former owner must be heard again before ownership can be settled. This means that a further court case will be needed before the ownership dispute can be settled.

Section 42

14. Section 42(1) provides an exemption for information subject to legal professional privilege. As a qualified exemption, Section 42(1) is subject to the public interest test, which means that the information must be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
15. There are two limbs of legal professional privilege: advice privilege and litigation privilege. In this case, the council sought to rely on litigation privilege.
16. 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. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

17. The withheld information in this case comprises two valuation reports undertaken by Lambert Smith Hampton and the Valuation Office Agency in respect of the Pier. The Commissioner notes that the valuation reports are not communications between a lawyer and client. However, litigation privilege can apply to communications outside the lawyer/client relationship, providing the primary purpose of those communications was for genuinely anticipated litigation. An example might be communications between two medical experts instructed to give evidence in a clinical negligence case. In this case, the Council confirmed that the valuation reports were commissioned on Counsel's advice in order to obtain legal advice on the financial implications of the on-going legal proceedings relating to ownership of the Pier.
18. It is clear that there was on-going litigation relating to ownership of the Pier at the time of the request and the Commissioner accepts that the dominant purpose of the valuation reports was to seek legal advice to assist with the on-going legal case. The Commissioner is therefore satisfied that the withheld information is subject to litigation privilege.
19. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request and there is therefore no suggestion that privilege has been lost.

The public interest test

20. As section 42 is a qualified exemption, the Commissioner has gone on to consider whether, in all the circumstances of the case, 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

21. The Council considered the following factors to be in favour of disclosure.

- The public interest in knowing that legal advice has been followed and all issues properly considered in relation to the Pier.
- Disclosure would demonstrate transparency in the use of resources and provide assurances that any decisions taken are lawful.
- The valuation reports were paid for by the Council and as such, disclosure would provide accountability of expenditure of public funds.

22. The complainant has argued that there is already information in the public domain in relation to the valuation of the Pier, referring to the fact that the Council acquired the Pier in March 2012 following a payment of £35,000.

Public interest arguments in favour of maintaining the exemption

23. The council considered the following factors to favour maintaining the exemption.

- The strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.
- The importance of the Council being able to seek legal advice in confidence.
- The public interest in the free and frank sharing of information with lawyers working on behalf of the Council without fear of disclosure.
- Preventing premature disclosure of matters or related matters still subject to legal proceedings.

24. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*¹, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".

¹ Appeal number EA/2005/0023

25. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."

26. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice or position in advance.

27. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that:

"...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..."

28. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

29. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
30. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and that equalling or outweighing

that inherently strong public interest will usually involve 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. The Commissioner has seen no evidence that the Council has misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.

31. In submissions to the Commissioner the complainant disputed that legal proceedings relating to ownership of the Pier were on-going at the time the Council commissioned the valuation reports in September 2012 as the Court of Appeal did not issue its directions in allowing an Appeal against the decision of the County Court until December 2012. The Council confirmed that at the time the valuation reports were commissioned (September 2012), the application of the mother of former owner of the Pier for a vesting order under section 320(2)(a) of the Insolvency Act 1986 was live as the appeal was not heard until 5 November 2012. At the time of the request (17 January 2013) the former owner had been given leave to appeal the decision made by the Crown Court in August 2012. A hearing had been scheduled for 17 April 2013. In addition, at the time of the request, the former owner of the Pier's mother had also submitted a notice to appeal the decision of the Crown Court on 5 November 2012. When the Council considered the internal review request on 21 February 2013 the former owner's mother had been given leave to appeal and her appeal was also listed for 17 April 2013.
32. As referred to in paragraph 13 of this notice, the matter of ownership of the Pier has still not been resolved. Following the hearing in April 2013 the High Court ruled that part of the court case brought by the former owner must be heard again before ownership can be settled. The fact that the dispute relating to ownership of the Pier was on-going both at the time of the request and remains subject to legal proceedings only serves to strengthen the importance of maintaining the confidentiality of the communications requested by the complainant.
33. In reaching a view on where the public interest lies in this case, the Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, he considers that the timing of the request means that significant weight should be attributed to the fact that there were on-going legal proceedings relating to the subject matter at the time the valuation reports were commissioned and at the time of the request. It is clear to the Commissioner in this case that the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of

disclosure. He therefore determines that the exemption at section 42 has been applied correctly by Council.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Anne Jones
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