

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 January 2017

**Public Authority:** Wirral Metropolitan Borough Council

**Address:** Town Hall  
Brighton Street  
Wallasey  
Merseyside, CH44 8ED

### Decision (including any steps ordered)

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1. The complainant has requested the legal advice received by Wirral Metropolitan Borough Council (the Council) from the legal QC on the issue of the proposed monthly newsletter. The Council identified information within the scope of the request but withheld this on the basis that information was legally professionally privileged and therefore exempt under section 42 of the FOIA.
2. The Commissioner's decision, after considering the public interest test, is that the Council has correctly applied this exemption and the public interest favours withholding the requested information.

### Request and response

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3. On 27 July 2016 the complainant made an FOIA request for a copy of Counsel's advice which had been referred to at the meeting of the Business Overview and Scrutiny Committee held on Wednesday 27 July 2016.
4. On 16 August 2016 the Council responded and withheld the information citing section 42, legal professional privilege.
5. On 16 August 2016 the complainant requested an internal review.
6. On 14 September 2016 the Council upheld the decision to withhold the legal advice under section 42.

7. The complainant wrote to the Commissioner on 14 October 2016.

### Scope of the case

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8. The Commissioner considers the scope of her investigation to be the decision by the Council to withhold the legal advice under section 42 of the FOIA.

### Reasons for decision

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9. Section 42(1) of the FOIA 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."*

10. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Information Tribunal<sup>1</sup> as "*... a set of rules or principles which are designed to protect the confidentiality 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 [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.*"
11. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
12. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because the withheld information consists of legal opinions and advice provided to the Council

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<sup>1</sup> *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*

by a professional legal adviser on the issue of the proposed publication of the Council newsletter.

13. As such the Commissioner finds that the requested information is subject to legal advice privilege and also notes that the Council considers this issue to still be 'live' and would use this advice to guide its thinking in future issues around this subject. The Commissioner consequently finds that the legal professional privilege exemption is engaged.
14. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosing the information*

15. The public interest arguments in favour of the information being disclosed revolve around creating greater transparency in the workings of the Council. In particular disclosure may assist the public in understanding how the Council makes decisions.
16. The Commissioner acknowledges there has been some general and political interest in this issue as there has been more than one complaint to the Commissioner.

*Public interest arguments in favour of maintaining the exemption*

17. There is a strong element of public interest inbuilt in this exemption. The central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a very strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence.
18. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.
19. The Council has explained that the legal advice it received has remained confidential and has not been disclosed to the world at large thus retaining its legally privileged status. The advice relates to an issue which is still relevant and 'live'. Information was published in the public

domain regarding the proposed publication in June 2016 (item 20) and the issue was debated again in October 2016:

<http://democracy.wirral.gov.uk/ieListDocuments.aspx?CIId=121&MIId=5503>

<http://democracy.wirral.gov.uk/documents/g5808/Printed%20minutes%2017th-Oct-2016%2017.15%20Council.pdf?T=1>

*Balance of the public interest arguments*

20. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. However, as the Council considers the information to still be relevant and would be relied upon in any future considerations of this issue, the Commissioner considers the privilege attached to the information has not been waived and is still relevant now.
21. The Commissioner's view is that there are stronger public interest arguments in favour of maintaining the exemption. She considers the Council's argument that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made to be a strong argument. Disclosure could lead to the Council being unable to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. The Commissioner is also mindful of the Tribunal's comments in the *Bellamy* case that *"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest."*
22. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. She therefore concludes that the Council correctly withheld the requested information under the exemption at section 42.

## Right of appeal

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23. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

24. 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.
25. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**