

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2021

Public Authority: Warrington Borough Council
Address: 1 Time Square
Warrington
WA1 2EN

Decision (including any steps ordered)

1. The complainant has requested information relating to the Warrington Borough Council's investments in Redwood Bank Ltd. Warrington Borough Council disclosed some information and withheld other information under the exemption for legal professional privilege (section 42).
2. The Commissioner's decision is that Warrington Borough Council correctly withheld the information under section 42.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant provided the following explanation for requesting the information in question:

"WBC (Warrington Borough Council) have invested £32m in shares in a start up bank called Redwood Bank Ltd. In total WBC have paid £4.72 per share for a 33% shareholding whilst eleven other shareholders have paid just 37 pence per share for a 67% shareholding. This is such a huge discrepancy that it inevitably raised public concerns and resulted in an objection to WBC's auditors Grant Thornton (GT) about the expenditure of money in Redwood. My FoI called for copies of correspondence between WBC, Grant Thornton and its legal advisers in order that I could understand the reasons why such a decision was made and whether due process had been followed."

5. The council has accepted that the complainant has correctly represented the facts although it considers that the question whether the price paid per share is a "huge discrepancy" is a matter of opinion.

Request and response

6. On 23 October 2018, the complainant wrote to Warrington Borough Council (the "council") and requested information in the following terms:

"Please let me have a copy of all correspondence and the minutes of any meetings between the Council and the auditors Grant Thornton or any other organisation, firm, advisor or company, where the subject is the Council's 2017/2018 accounts."

7. The council responded on 6 December 2018 and confirmed that it was withholding the requested information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
8. Subsequently to this the complainant complained to the Commissioner and this resulted a decision notice being issued on 6 December 2019¹. For reasons explained in that decision notice, the council in that case eventually refused the request on cost grounds under section 12 of the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616531/fs50829352.pdf>

FOIA. The decision notice recorded that the council had breached the FOIA and directed it to provide the complainant with a new response.

9. The council issued a new response to the complainant on 9 April 2020 which disclosed some information and withheld other information under a range of exemptions.
10. On 6 June 2020 the complainant wrote to the council to ask that it carry out an internal review of its handling of the request. The council provided its review response on 17 June 2021. It disclosed some information and confirmed that it was withholding other information under the exemption for legal professional privilege (section 42).

Scope of the case

11. On 23 June 2021, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld information under section 42 of the FOIA.

Reasons for decision

Section 42(1) – legal professional privilege

13. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
14. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) (“Bellamy”) 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.”

15. There are two categories of LPP – litigation privilege and legal 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. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
16. Communications made between adviser and client in a relevant legal context will, therefore, attract privilege.
17. The Commissioner's view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation, or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information 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.

The withheld information

18. The council has confirmed that the withheld information consists of specific paragraphs contained in a report of 16 January 2017 to the council's Executive Board meeting and an email of 3 July 2019
19. The council has explained that the report sought Executive Board approval for the council to invest in Redwood Bank Ltd. It confirmed that the withheld paragraphs contained summaries of legal advice provided by the solicitor of the council.
20. In relation to the email, the council confirmed that this consisted of advice provided by the council's solicitor to officers of the council.
21. The council has explained that the withheld information consists of legal advice it needed in order to make a lawful decision and that advice was provided by the solicitor in his professional capacity as a lawyer. It confirmed that the purpose of the advice was to ensure that any decision was lawful and could be defended in respect of any challenge of legality.
22. The council has explained that, where the advice has been provided, for example to the auditor, it was provided subject to legal privilege with no waiver. The council explained that advice was shared for the auditor to

assess the objection to the accounts and for release to their legal advisers if required and confirmed that it was requested that if the auditor proposed to release documents elsewhere that it was only done after obtaining consent in writing from the council appreciating that such consent or lack of it did not override any statutory requirements on their part. The council is satisfied that the legal advice remains privileged and that any sharing of the advice has been made as a restricted disclosure.

23. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the exemption at section 42(1) of the FOIA is engaged. Since it is a qualified exemption, she has considered the balance of the public interest.

Public interest in disclosure

24. The complainant has argued that the withheld information relates to the council's decision to invest £32m in shares in Redwood Bank Ltd. They consider that there appears to be a discrepancy between the council's payment of £4.72 per share for a 33% shareholding, set against other shareholders paying just 37 pence per share for a 67% shareholding. In short, given the sum of public money involved and the appearance of a poor deal, there is a strong public interest in disclosing information regarding the council's decision making in this matter. Disclosure, it is argued, would serve the public interest in transparency and accountability.
25. The council has recognised that there is a clear public interest in accountability, transparency and furthering public debate. It has accepted that additional weight should be given to the fact that this matter involves a relatively large amount of money, though small as a proportion of the council's investments and expenditure.
26. The council accepts that it should be accountable for the quality of its decision making. It acknowledged that ensuring that decisions are made based on good quality legal advice is a part of that accountability and it is in the public interest to know whether the council followed, or went against any legal advice when it comes to decision making which will affect the public.

Public interest in maintaining the exemption

27. The council confirmed that it refused disclosure to maintain the principle behind LPP to enable it to obtain full, frank legal advice from its advisors in confidence. It explained that LPP is intended to provide confidentiality between clients and professional legal advisors to ensure openness and frankness between them. This confidentiality, it has argued, safeguards access to fully informed, realistic and frank legal

advice, including weaknesses and counter arguments. The council has stated that it considers that this in turn serves the wider administration of justice because its legal advisors need to present the full picture to the client. It has argued that if a legal advisor is unable to provide comprehensive legal advice to their client, for fear of disclosure, the quality of decision making is likely to be adversely affected and this would not be in the public interest.

28. The council has further argued that reports and minutes relating to the matter have been published and there has been no lack of transparency in the council's actions. It has highlighted that there has been considerable public debate about the value for money and wisdom of the expenditure and the personalities involved. More significantly, the council has noted that there has also been the opportunity to call the council to account through the audit process which has had access to this information and which is still ongoing. The council considers that a very significant amount of material has been made publicly available and the withheld information does not provide any further information on the prices paid for shares which is the complainant's stated interest.
29. In addition to the above the Commissioner notes that the withheld advice remains relatively recent and, more significantly, relevant to live, ongoing issues.

Balance of the public interest

30. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the 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. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
31. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in *Council v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".

32. Conversely, the Commissioner is alive to the complainant's concerns. She recognises that there is a strong public interest in transparency and accountability, particularly where significant sums of public money are involved. In addition, in situations where there may be public perception that something irregular has happened or where it appears that poor judgement has been applied, she considers that the need for transparency is enhanced. This is not to reach any conclusions about the council's decision making in this instance but rather to recognise that even the perception of poor practice can result in damage to public trust in the effectiveness of public authorities.
33. Notwithstanding the above, the Commissioner is mindful that the council has placed substantial information regarding this matter in the public domain. She also recognises that there are existing mechanisms for addressing concerns about the council's financial activities and that the audit process is currently engaged. Where there are existing legal remedies available to interrogate and, if necessary, challenge practice, there would need to be strong reasons for bypassing these and reasons that would warrant overturning the strong public interest inherent in maintaining LPP.
34. Whilst the Commissioner recognises that there are genuine public interest reasons for being assured that the council has sought and followed appropriate legal advice in relation to its investments, she considers that this is something that can be addressed via the audit process. She does not consider that the available evidence warrants disclosing the advice outside this process.
35. Whilst the Commissioner is sympathetic to the complainant's concerns and recognises why the matter is of public concern, for the reasons set out above she does not consider that disclosing information subject to LPP is necessary to address those concerns in this case.
36. The Commissioner has concluded that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other matters

37. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

Section 45 code of practice – internal reviews

38. The code of practice issued under section 45 of the FOIA (the “Code”) provides guidance for public authorities on best practice in meeting their responsibilities under Part I of the FOIA. It sets the standard for all public authorities when considering how to respond to Freedom of Information requests.

39. In relation to the carrying out of internal reviews, paragraph 5.4 of the Code states:

“Requests for internal review should be acknowledged and the applicant informed of the target date for responding. This should normally be within 20 working days of receipt.”²

40. Paragraph 5.5 states:

“If an internal review is complex, requires consultation with third parties or the relevant information is of a high volume, public authorities may need longer than 20 working days to consider the issues and respond. In these instances, the public authority should inform the applicant and provide a reasonable target date by which they will be able to respond to the internal review. It is best practice for this to be no more than an additional 20 working days...”

41. In this case the complainant requested an internal review on 6 June 2020 and, after being prompted by the Commissioner, the council issued its response on 17 June 2021.

42. The Commissioner considers that the time the council took to carry out an internal review in this case does not conform to the recommendations of the Code. The Commissioner expects that, in future, the council’s practice will conform with the Code and with the recommendations contained within her own guidance.

2

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

43. 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

44. 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.

45. 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

Ben Tomes
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