

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2017

Public Authority: Bridgend County Borough Council

Address: Civic Offices
Angel Street
Bridgend
CF31 4WB

Decision (including any steps ordered)

1. The complainant requested correspondence between Bridgend County Borough Council ('the Council') and the Welsh Language Commissioner ('WLC') regarding the Council's challenge to the imposition of Welsh language standards. The Council withheld the information requested under section 42 of the FOIA. The Commissioner's decision is that the Council has correctly applied section 42 of the FOIA to the withheld information. She does not require any steps to be taken.

Request and response

2. On 4 August 2016 the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act, I would like a copy of all correspondence to and from the Bridgend County Borough Council and the Welsh Language Commissioner regarding BCBC's proposal for exemption from some of the Welsh Language Standards".
3. The Council responded on 23 August 2016 and stated that the information requested was exempt under section 42 of the FOIA.

4. The complainant wrote to the Council on 29 September and again on 10 October 2016 and requested an internal review of the Council's refusal to disclose the information requested.
5. The Council responded on 12 October 2016 and declined to conduct an internal review as Mr Thomas had not submitted his internal review request within 28 days of the Council's initial response.

Scope of the case

6. The complainant contacted the Commissioner on 12 October 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation is to determine whether the Council correctly applied Section 42(1) to the withheld information.

Reasons for decision

Background

8. The Welsh Language (Wales) Measure 2011¹ ('the Measure') establishes a legal framework to impose a duty on some organisations to comply with standards of conduct relating to the Welsh language. The first step to making standards specifically applicable to an organization is to carry out a standards investigation. The WLC is responsible for carrying out a standards investigation to decide whether an organisation should have to comply with standards, and if so, which standards should be specifically applicable to them. After carrying out a standards investigation the WLC publishes a standards report which sets out the conclusions of the investigation, and the reasons for reaching those conclusions.

¹ <http://www.legislation.gov.uk/mwa/2011/1/contents/enacted>

9. A compliance notice is a notice given to organisations by the WLC which requires them to comply with one or more standards. The compliance notice will state the imposition day (or days) for each standard specified within it. Organisations have the right to challenge the duties included in the compliance notice by applying to the WLC under Section 54 or Section 55 of the Measure. They also have a right of appeal to the Welsh Language Tribunal ('WLT') against the WLC's determination. Following a determination by the WLT, the WLC or the organisation may with the permission of WLT or the High Court, appeal to the High Court on a point of law.

Section 42 – legal professional privilege

10. 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 the maintaining the exemption does not outweigh the public interest in disclosure.
11. There are two limbs of legal professional privilege: advice privilege and litigation privilege. In this case, the Council considers litigation privilege applies.
12. 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. Litigation privilege is slightly wider in scope than legal advice privilege as it can also cover some correspondence between parties when litigation is contemplated or in progress.
13. The withheld information in this case comprises communications between the Council and the WLC relating to its appeal against a compliance notice issued by the WLC in respect of its Welsh language standards investigation. The Council advised that the appeal process is a quasi-judicial process and once the WLC has made a decision on the appeal, the Council has the option to appeal any decision to the WLT and thereafter to the High Court on a point of law.
14. The Council confirmed that the withheld information was created by its litigation team specifically for the purpose of the appeal and represent the Council's pleadings in the case. At the time the information was created there was no intention for it to be made publicly available or to

be shared outside of the appeal process. The Council confirmed that, at the time of the request the appeal was ongoing and no decision had been received from the WLC.

15. The Commissioner has viewed the withheld information in question and is satisfied that it is as the Council has described. Having also considered the wider circumstances of the matter she considers that the withheld information attracts litigation privilege. 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.
16. As the Commissioner is satisfied that all the withheld information is subject to LPP, she has concluded that section 42 of the FOIA is engaged. She will now go on to consider the public interest test.

Public interest arguments in favour of disclosing the requested Information

17. The Council acknowledges that there is a public interest in transparency and accountability relating to its obligations under the Welsh language standards. Disclosure of the withheld information would inform the public of the Council's position in relation to the proposed standards which are the subject of the appeal.
18. The complainant pointed out that there is no public consultation as to what standard should be imposed on the Council by the WLC. As such, the complainant considers that the public has a right to know what standards have been appealed by the Council and their reasoning behind the appeal.

Public interest arguments in favour of maintaining the exemption

19. The Council considered the following factors to favour of maintaining the exemption.
 - Disclosure would place information into the public domain which the Council is relying on in relation to its appeal.
 - The matter is still live as the appeal process is underway. Disclosure would be likely to prejudice the appeal process
 - There is a "risk that disclosing information whilst the case is *sub judice* will be considered interference with due process".

Balance of the public interest arguments

20. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is 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*², the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
21. 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..."
22. 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, she considers that the timing of the request means that significant weight should be attributed to the fact that the appeal to the WLC was on-going at the time the information was produced 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. She therefore determines that the exemption at section 42 has been applied correctly by Council.

² Appeal number EA/2005/0023

Right of appeal

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

Website: 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

Andrew White
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