

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 16 January 2014

Public Authority: Scarborough Borough Council
Address: Town Hall
St Nicholas Street
Scarborough
YO11 2HG

Decision (including any steps ordered)

1. The complainant requested information relating to a pre-planning application advice request.
2. The Commissioner's decision is that the public authority was entitled to withhold the requested information on the basis of the exception at regulation 12(5)(b). The Commissioner however finds the public authority in breach of regulation 14(2) for failing to respond to the request within 20 working days.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 24 August 2012 the complainant wrote to the public authority and requested information in the following terms:

'In the last few months Scarborough Borough Council engaged East Riding of Yorkshire Council Planning Committee. The engagement was in relation to the move of the civic functions for the current SBC Town Hall on St Nicholas Street in Scarborough to a proposed new location on Dunslow Road, Eastfield, near Scarborough. This wasn't a full planning request, it was a pre-application request with a view to asking for planning permission.

Please can you provide all documentation and communication from East Riding of Yorkshire Council relating to this pre-application planning request so I can see the outcome of the pre-application request.'

5. The public authority responded on 17 July 2013. It supplied the complainant a redacted copy of a pre-planning application advice it had received from East Riding of Yorkshire Council Planning Department (EYRC Planning Department). It claimed that the redacted information was exempt from disclosure on the basis of regulation 12(5)(b) of the EIR.

6. On 24 July 2013 the complainant requested an internal review in the following terms:

'I'm extremely unsatisfied with the redacted document, which is virtually blank. I request an Internal review.'

7. On 2 August 2013, he wrote back to the public authority in the following terms:

'The reason I have requested an Internal review is that I believe it was the pre-application advice that steered SBC away from moving the Civic Function of the Town Hall to Prospect House, Eastfield, and not the reasons that were given by SBC to the local press at the time.

If this information does prove that SBC have deliberately misinformed the public, then quite obviously it is in the public interest and should be disclosed.'

8. On 12 August 2013 the public authority wrote back with details of the outcome of the internal review. It upheld the original decision.

Scope of the case

9. On 12 August 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically disputes the decision to withhold the information redacted

from the pre-planning application advice (the disputed information) for reasons the Commissioner has specifically addressed further below.

10. He also queried whether the public authority had fully responded to his request. In his own words: *`.....there will be many more pieces of information floating around, in the form of letters and internal and external emails, from which it is possible to fully discern the "outcome of the advice request."*` The Commissioner notes that the complainant did not raise this particular issue with the public authority prior to the completion of the internal review. He had the opportunity to do so in the emails of 24 July and 2 August but he did not. Instead, he only disputed the public authority's decision to withhold information from the pre-planning application advice.
11. The Commissioner is not obliged to consider any aspect of a complaint before the complainant has raised the matter with the relevant public authority and also exhausted the public authority's complaints procedure. The Commissioner did not therefore consider the complainant's assertion that the public authority holds additional information within the scope of his request.
12. The substantive scope of the Commissioner's investigation therefore was to determine whether the public authority is entitled to withhold the disputed information on the basis of the exception at regulation 12(5)(b).

Reasons for decision

The Disputed Information

13. The public authority explained that ERYC Planning Department had asked the public authority to obtain formal legal advice on a number of points prior to the public authority submitting a pre-planning application advice request. A planning Barrister was consequently instructed by the public authority. The Barrister provided written advice to the public authority. EYRC Planning Department then gave their advice (the pre-planning application advice) based upon the legal advice received by the public authority. The majority of the content of the pre-planning application advice is taken directly from the legal advice, or at the very least betrays the trend of that legal advice.
14. To be clear, the disputed information is information which the public authority redacted from the pre-planning application advice because the public authority considers that the information reveals the legal advice it

obtained from the planning Barrister or betrays the trend of the legal advice.

Regulation 12(5)(b)

15. A public authority may refuse to disclose information on the basis of regulation 12(5)(b) if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
16. The public authority clarified that it was relying on the exception at regulation 12(5)(b) specifically because it considers that the disputed information attracts legal professional privilege.
17. The public authority claims that disclosure would undermine the principle of lawyer/client confidentiality, and thus the course of justice.

Is the exception at regulation 12(5)(b) engaged?

18. The public authority considers that the disputed information is subject to advice privilege, not litigation privilege.
19. 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 (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
20. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies.
21. The Commissioner does not consider that the legal advice was obtained by the public authority for the dominant purpose of obtaining legal advice about proposed or contemplated litigation. The public authority sought legal advice primarily to inform a pre-application advice request to EYRC. The pre-planning advice requested was in relation to a proposal to re-locate the Town Hall from the town centre to another site. There was no real prospect or likelihood of litigation against the public authority in relation to the proposed planning application at the time the legal advice was sought or provided.

22. The Commissioner is satisfied that the disputed information reveals the legal advice obtained by the public authority. He accepts that in the instances where strictly speaking, the disputed information does not reveal the actual contents of the legal advice, it betrays the trend of the advice. Therefore, the disputed information attracts legal professional privilege because it is confidential advice provided by a lawyer to his/her client (the public authority) made for the dominant purpose of giving advice. The Commissioner accepts that it is subject to advice privilege. Information which betrays the trend of the advice is also subject to advice privilege because it more or less reflects the actual legal advice obtained by the public authority.
23. The importance of the principle behind legal professional privilege is well established; which is to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
24. The Commissioner accepts that disclosing the disputed information would undermine the long established principle behind legal professional privilege.
25. The Commissioner therefore finds that disclosing the disputed information would adversely affect the course of justice. The public authority was entitled to engage regulation 12(5)(b).

Public Interest Test

26. The exception at regulation 12(5)(a) is however subject to a public interest test. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Complainant's arguments

27. The complainant's public interest arguments are summarised below.
28. The complainant believes that disclosure would show that elected members and/or public officials have conspired to deliberately mis-inform the public about the reasons for halting the re-location of the Town Hall.
29. The proposed re-location planning process and the consultation exercise is reputed to have cost the local tax payer some £500,000 before it was halted.

Public authority's arguments

30. The public authority considered the following factors were in favour of disclosing the disputed information:
- Openness and transparency in decision making.
 - Furthering public debate, and best value in the provision of its services.
 - The public authority acknowledged that the proposal to re-locate the Town Hall is a matter of public interest due to concerns amongst local residents about the impact upon the provision of services, and any perceived effect upon the economy of the town centre.
31. The public authority however considered that the following factors were in favour of maintaining the exception:
- The inherent strong public interest in maintaining the fundamental principle of legal professional privilege.
 - The risk of a weakening of confidence in the general principle of legal professional privilege. The public, particularly local residents have an interest in ensuring that it is able to obtain proper legal advice so that its decisions are as fully informed as possible, for the benefit of the borough.
 - The fact that it had published various reports regarding the proposals.¹ The reasons for not going ahead with the re-location were provided to the public via minutes of a Cabinet meeting on 17 July 2012.²
 - If it had chosen to go ahead with a planning application for the proposed new site, this would have been heard in public, with papers relevant to the application published beforehand to allow consultation and input from those with an interest. No planning permission would have been granted or refused until that process was completed.
 - Although it did not make the planning application, if in future it decided to, the legal advice would be relevant and may be used further. It

¹ For example:

<http://democracy.scarborough.gov.uk/ieListDocuments.aspx?CIId=235&MIId=4146>

² <http://democracy.scarborough.gov.uk/mgAi.aspx?ID=19521>

could not completely rule out that possibility in light of continuing budget cuts.

- There is no comparable strong public interest in disclosure so as to override legal professional privilege. For example, there are no substantiated allegations of malpractice or wrong-doing. The public authority strongly disagreed that the proposal and consultation exercise had cost £500,000. It provided the Commissioner with an estimated cost which is far less than the amount alleged by the complainant. The estimated cost is less than £80,000. The public authority explained that the proposed re-location (therefore some of the cost) was part of a wider and ongoing project relating to the Town Hall site and the Futurist, in partnership with the Homes and Communities Agency.

Balance of the public interest

32. The Commissioner agrees that disclosure would enhance the general public interests in openness, transparency and accountability. More specifically, he shares the view that it would further the debate on the impact of re-locating the Town Hall on the provision of services and the economy of the town centre.
33. However, the Commissioner has to balance those factors against the strong public interest inherent in the principle of legal professional privilege. That public interest as already mentioned is to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Equally strong public interest in disclosure must at least be shown in order to override the inbuilt public interest in maintaining legal professional privilege.
34. The Commissioner does not share the view that the disputed information would reveal that the public authority's officers conspired to deliberately mis-inform the public about the reasons for halting the re-location of the Town Hall. There is nothing to suggest from the information that that was the case. Furthermore, the Commissioner does not believe that the estimated cost of the process and the consultation exercise is significant enough in this case to override the inherent strong public interest in maintaining legal professional privilege.
35. The Commissioner is also persuaded that there is a public interest in the public authority being able to refer to the legal advice in future should it decide to consider re-locating the Town Hall again. Revealing the legal advice could affect the public authority's ability to obtain full and frank legal advice in relation to a planning application in future.

36. The Commissioner therefore finds that the public interest factors in favour of disclosure in this case are appreciably weaker than those in favour of maintaining legal professional privilege. In all the circumstances of the case, the public interest in maintaining the exception at regulation 12(5)(a) outweighs the public interest in disclosure.

Procedural Matters

37. A public authority is required by virtue of regulation 14(2) of the EIR to issue a refusal notice within 20 working days.
38. The Commissioner finds the public authority in breach of regulation 14(2) for failing to issue its refusal notice of 17 July 2013 within the statutory time limit.

Other Matters

39. In addition to the regulation 14(2) breach, the Commissioner notes the extensive amount of time it took the public authority to respond to the request. He would be very concerned to see another case involving the public authority and such a lengthy delay, and asks it to take steps (if they have not since been taken) to ensure that this does not reoccur.

Right of appeal

40. 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: GRC@hmcts.gsi.gov.uk

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

41. 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.
42. 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

Alexander Ganotis
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