

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

Date: 23 March 2015

Public Authority: City of York Council

Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested legal advice regarding the trial closure of a bridge in the centre of York to private motor vehicles. The City of York Council (the Council) withheld the legal advice under section 42 of FOIA, on the basis that it was subject to legal professional privilege. During the course of his investigation the Council advised the Commissioner that it believed the request should have been dealt with under the EIR. It therefore withdrew its application of section 42 and now cited regulation 12(5)(b) – course of justice, as its basis for refusing the request.
2. The Commissioner's decision is that the advice does attract legal professional privilege and its disclosure would have an adverse effect on the course of justice. The Council is entitled to refuse the request under regulation 12(5)(b).
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. On 24 July 2014, the complainant wrote to the Council and requested information in the following terms:

"Please send me the following information, under the Freedom of Information Act 2000:

1. Legal advice provided to the council regarding the trial closure of Lendal Bridge and the subsequent reopening, before, during and after the trial.
2. Legal advice provided to the council on the traffic adjudicator's inquiry and ruling on the use of ANPR on Lendal Bridge and Coppergate, and the council's subsequent appeal.
3. Legal advice provided to the council on the council leader's decision to offer refunds for Lendal Bridge fines – both before and after the decision was taken."

(‘ANPR’ refers to automatic number plate recognition)

5. The Council responded on 15 August 2014. In respect of the first point it directed the complainant to a limited amount of information on the decision to close the bridge which was available on the Council's website. As this information was available to the complainant by other means it was, technically, exempt under section 21. The Council said that it did not hold any further advice in respect of point 1. In respect of points 2 and 3 the Council confirmed it held information captured by the request, however it explained that this information was exempt under section 42 on the basis that it attracted legal professional privilege.
6. Following an internal review the Council wrote to the complainant on 19 September 2014. The Council maintained its decision to withhold the requested information under section 42.
7. During his investigation the Commissioner asked the Council to consider whether the bridge closure would have an impact on the environment and therefore whether the information which had been requested was environmental information as defined by the EIR. On the 12 January 2015 the Council confirmed that the requested information was environmental and therefore the request should have been considered under the EIR.
8. The Council went onto apply regulation 12(5)(b) to the requested information . This exception provides that a public authority can withhold information if its disclosure would adversely affect the course of justice. It is accepted that this provision can extend to the protection of information covered by legal professional privilege.

Background

9. Lendal Bridge is one of the main crossings of the River Ouse in York. In August 2013 the Council used a Traffic Regulation Order to close the bridge to motor vehicles, other than buses, during the daytime. The traffic order did not create a normal bus lane, but closed the entire width of the carriageway to private vehicles during its period of operation.
10. The closure was introduced on a trial basis as part of an experiment to cut congestion and enhance the public's experience of the city centre. It formed part of a larger scheme which involved the permanent application of a traffic order to another area within the city, Coppergate. The bridge was reopened in April 2014, however the restrictions on Coppergate are still in place. The decision to close the bridge proved very controversial.
11. Drivers contravening the traffic orders at Lendal Bridge or Coppergate were served with penalty charge notices (PCNs), a number of which were appealed to the independent Traffic Penalty Tribunal (TPT). In March 2014 the TPT issued a judgement in which its adjudicator found a driver was not liable for the fine imposed. This was because he found the signs warning motorists of the restrictions were inadequate and because of how cameras were used to enforce the restrictions. As this decision had significant implications for the scheme the Council sought a review of that decision.
12. The press reported that around 47,000 fines were issued costing drivers a total of £1.3m. Despite the fact that the Council challenged the TPT's decision, by the time the complainant raised her concerns with the Commissioner the Council had undertaken to refund the fines of any driver who applied for their money back.

Scope of the case

13. The complainant contacted the Commissioner on 12 November 2014 to complain about the way her request for information had been handled. She argued that in assessing the public interest in disclosing the information the Council had failed to take account of the enormous public opposition to the scheme and the large administrative costs involved in the trial closure.
14. The Commissioner considers that the issues which need to be decided are firstly whether the information is environmental information and

therefore whether the requests should have been dealt with under FOIA or the EIR.

15. If the information is environmental, the next issue is whether the exception provided by regulation 12(5)(b) – course of justice, applies to the information that has been withheld and, if so, whether it can be maintained in the public interest.
16. If the information is not covered by the EIR the question is whether the withheld information is exempt under section 42 – legal professional privilege and whether that exemption can be maintained in the public interest.

Reasons for decision

The correct access regime

17. Under regulation 2(1)(c) of the EIR the definition of environmental information includes information on measures, such as policies, plans, programmes, and activities affecting, or likely to affect either the elements of the environment, or factors such as noise and emissions affecting those elements.
18. The Council informed the Commissioner that the closure of Lendal Bridge would have reduced motorised traffic significantly and would have had an impact on the localised environment. It explained that the closure was introduced to maximise pedestrian, cyclists and bus access through the city and to enhance the attractiveness of the city centre. The report on which the Council's cabinet based its decision to close the bridge also referred to potential environmental improvements in air quality and a reduction of carbon emissions in the long term.
19. In light of the above the Commissioner is satisfied the trial bridge closure was a measure likely to affect factors such as emissions and noise, which would in turn have an effect on the elements of the environment such as air. It follows that any information on that measure would fall under the definition of environmental information.
20. The request should be considered under the EIR and therefore the next issue is whether the legal advice that has been requested can be withheld under regulation 12(5)(b).

Regulation 12(5)(b) – course of justice.

21. Regulation 12(5)(b) provides that a public authority can refuse a request if disclosing the information would adversely affect the course of justice or the ability of a person to receive a fair trial.
22. The Commissioner interprets the term 'would' to mean that it must be more probable than not, that disclosing the information would have a negative impact on the course of justice, or the ability of a person to receive a fair trial.
23. The term 'course of justice' is capable of encompassing a wide range of issues. It has been established at Tribunal that the term incorporates the concept of legal professional privilege.
24. Legal professional privilege protects information which was created for the dominant purpose of seeking or providing legal advice. It attaches to correspondence between a client and their legal advisor. As such it is capable of protecting not just the legal opinion itself, but the correspondence seeking that advice together with any background information specially created to brief the legal advisor about the circumstances of a case.
25. Not only do the communications have to be between a client and their legal advisor, they must also remain confidential if they are to attract legal professional privilege. The Commissioner has read the withheld information. The Council has provided both the instructions it gave its legal counsel setting out the issues on which the Council sought advice, together with the advice that was subsequently provided. It should be noted that it is only the advice that has actually been requested. The Commissioner is satisfied that the advice was provided by a qualified legal advisor and the Council has advised the Commissioner that these communications remain confidential. Therefore the Commissioner finds that the withheld information is capable of attracting legal professional privilege.
26. The value of legal professional privilege is that it allows a client to be entirely open about the matter on which they need legal advice. This is necessary if the legal advisor is to provide full and frank advice. This may involve exposing any vulnerability in the client's position. Therefore it is important that the client is confident that the discussions with their legal advisor remain private. If this was not the case clients may be deterred from being as open with their legal advisors as was necessary. This would have a negative impact on the course of justice. The Commissioner is satisfied that the disclosure of any privileged information without very obvious and compelling reasons would undermine the principle that people should be able to obtain the best

and most robust legal advice they can. This in turn would undermine the course of justice. This provides sufficient grounds on its own to find the exception is engaged.

27. In addition there are other factors, specific to this case, which strengthen the conclusion that disclosing this legal advice would have an adverse affect on the course of justice. In this particular case the legal advice concerned the Council's appeal against the TPT's decision to quash a PCN. The TPT's decisions had implications for the enforcement of the restrictions imposed on both Lendal Bridge and Coppergate and the legal issues discussed in the advice are equally relevant to both locations.
28. At the time the request was made in July 2014 the Council was still pursuing a review of the TPT's decision in respect of a PCN issued for a breach of the traffic order at Coppergate. It is understood that this process is still ongoing and that in the event that the Council is not satisfied with the review's outcome it will have the option of seeking a judicial review of the TPT's decision. Therefore the requested legal advice relates to ongoing litigation. To disclose the legal advice which one party is relying on in legal proceedings, whilst those proceedings are still ongoing, would have an adverse effect on their ability to properly develop and argue their case. This would have an adverse effect on the course of justice.
29. The Commissioner is satisfied that the exception provided by regulation 12(4)(b) is engaged. However the exception is subject to the public interest test.

Public interest test

30. Under regulation 12(1)(b) an exception can only be relied on if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
31. It is very clear from the complainant's submissions and a quick internet review of local press coverage that the trial closure of Lendal Bridge was very controversial. In such circumstances there is an increased value in providing access to information relating to the decision making process.
32. The TPT's finding in respect of the penalty charges issued by the Council appear to question whether the traffic orders were legal and whether the restrictions could be enforced in the way the Council intended. Therefore there is also a value in the public having confidence in the legality of any regulations which they are subject to. However there is nothing to prevent those concerned seeking their own legal advice on whether the Council has the authority to implement and enforce the restrictions

imposed on Lendal Bridge. Access regimes such as the EIR should not be used as a means to obtain free legal advice.

33. As outlined in paragraph 12 it is clear that a lot of people have been affected by the Lendal Bridge traffic order. The total number of drivers affected by the issues addressed by the legal advice will be greater when account is taken of those fined for contravening the restrictions at Coppergate. The press also report concerns raised by businesses who believe the closure of Lendal Bridge has discouraged customers. The costs incurred implementing the scheme and later in appealing the TPT's decision have had an impact on public finances and so have affected all residents. A significant number of people have been affected in one way or another by the road traffic orders and this increases the public interest in providing access to information on the Council's decision.
34. The closure of Lendal Bridge has caused people to question the judgement and competence of the Council and disclosing the information would also enable a more informed debate of these issues.
35. The complainant has submitted that by the time the request was made the trial closure of Lendal Bridge had ended and that the Council was no longer appealing the TPT's decisions relating to PCNs issued in respect of Lendal Bridge. Furthermore by the time of her complaint to the Commissioner seven months had passed since the trial ended. She argues that as a consequence the public interest in maintaining the exception has waned.
36. The Commissioner accepts that, as a general rule, the harm caused by disclosing information will diminish over time. However it is important to recognise that when considering a complaint, the Commissioner can only look at the circumstances that existed at the time the request was made. Therefore in July 2014 the legal advice was still relatively recent. Furthermore although the trial closure of Lendal Bridge may have ended, the advice is equally relevant, and inextricably linked to, the enforcement of the Coppergate traffic order, which is still a live issue.
37. The public interest in maintaining the exception includes preserving the principle that clients should be free to consult with their legal advisors in confidence. Even if the advice related solely to Lendal Bridge, disclosing the requested advice would undermine that principle. The principle of legal professional privilege is fundamental to the operation of the English legal system and should not be undermined lightly.
38. Another significant public interest factor in favour of maintaining the exception is that the issue to which the advice relates is still live, ie the ongoing litigation in respect of the enforcement of the Coppergate traffic order. The disclosure would undermine the fairness of those proceedings

and could deter the Council from seeking further advice or being as candid when seeking further advice if it had reason to believe such communications could also be made public.

39. The Commissioner has also had regard for the actual issue to which the advice relates. Clearly there is greater need to protect the fairness of legal processes where an individual's liberty may be at stake as in criminal proceedings, or where the matter concerns the protection of vulnerable members of society such as in child protection cases. The legal advice in this case does not touch on issues of such importance.
40. However that it is not to say the matter is of little or no significance. The traffic order for Coppergate is intended to be permanent. Its introduction is intended to improve traffic flow and to bring environmental benefits. It is therefore important for the Council to ensure that it has the authority to enforce that traffic order. Furthermore the use of such orders could be an important tool for tackling similar problems elsewhere in the city. Therefore it is important for the Council to resolve the problems which arose when such orders were introduced at Lendal Bridge and Coppergate.
41. The trial closure of Lendal Bridge was controversial with a large number of people falling foul of the restrictions and being fined as a consequence. The experience has raised questions around the Council's performance but to some extent it will only be once the proceedings in respect of Coppergate have been concluded that it will become apparent whether the Council acted properly when enforcing the Lendal Bridge order. Nevertheless there is clearly a public interest in disclosing legal advice that informs the public's understanding of the actions taken.
42. Balanced against those factors is the very strong public interest in preserving the principle that people should be able to consult their legal advisor confident in the knowledge that such discussions will remain private. In addition the requested legal advice relates to legal proceedings which were on going. The outcome of those proceedings could have significant consequences for the Council's ability to implement measures affecting traffic congestion and the environment.
43. In light of the above the Commissioner finds that the public interest in maintaining the exception outweighs the public interest in favour of disclosing the legal advice. The Council is entitled to rely on regulation 12(5)(b) to withhold the information. The Commissioner does not require the Council to take any further action in this matter.

Right of appeal

44. 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

45. 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.
46. 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