

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2022

Public Authority: National Highways
Address: National Traffic Operations Centre
3 Ridgeway
Quinton Business Park
Birmingham
B32 1AF

Decision (including any steps ordered)

1. The complainant has requested the legal advice that National Highways received in relation to the A27 Arundel Bypass Project.
2. National Highways refused to provide the requested information, citing regulation 12(5)(b) (the course of justice and inquiries) of the EIR.
3. The Commissioner's decision is that the exception is engaged but the public interest lies in disclosure.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, with all personal information redacted under regulation 13 of the EIR.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

6. On 7 February 2022 the requestor made the following request:

“I would like to see QCs’ advice to Highways England that is mentioned in the letter from Arundel Bypass project leader [Redacted] to the Department of Transport on 6 August 2020 (acquired by FOI)...”
7. On 7 March 2022 National Highways (‘NH’) refused the request, citing section 42 (legal professional privilege) of FOIA.
8. On 8 March 2022 the requestor wrote to NH, dissatisfied and asking it to conduct an internal review.
9. On 23 March 2022 the complainant wrote to NH, on the requestor’s behalf, and advised that the request should have been dealt with under the EIR and not FOIA.
10. On 5 May 2022 NH provided the outcome to its internal review. It acknowledged that the request should have been dealt with under the EIR but still withheld the information under regulation 12(5)(b).
11. NH’s website described the A27 Arundel Bypass Project as follows: ‘As the main road serving the south coast, the A27 is a crucial route through the southeast. However, as it passes through Arundel it operates well over capacity and causes disruption and severe congestion. National Highways is therefore developing options for how the route could be improved.’
12. In 2019 NH put forward six colour-labelled options for the A27 route for the public to have their say on. Initially NH identified the magenta route, which would briefly enter South Down National Park (‘SDNP’), as the preferred route. However, legal advice led to NH changing its mind. The grey route is now the preferred route.
13. The Commissioner understands that the project will be classed as a Nationally Significant Infrastructure Project (NSIP) and therefore the final decision on the bypass will lie with the Secretary of State. The project will cost upwards of £320 million. According to the Arundel Bypass Neighbourhood Committee¹, the grey route will affect ‘The villages of Binsted, Walberton, Fontwell, Tortington; the wildlife of Binsted Woods, and wetlands from the iconic floodplain south of Arundel to the Binsted Rife Valley.’

¹ [Arundel Bypass Neighbourhood Committee](#)

Reasons for decision

Regulation 12(5)(b) - the course of justice and inquiries

14. Regulation 12(5)(b) of the EIR exempts information from disclosure if doing so 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.
15. The withheld information in this case is formal legal advice, from counsel to NH, about the preferred route. It is given in counsel's professional capacity in order to advise their client, NH. The Commissioner's guidance on regulation 12(5)(b) states 'it is fundamental to the English legal system that a client can speak freely and frankly with their legal adviser to obtain legal advice based on full knowledge of all the relevant circumstances of the case.' This is what is known as legal professional privilege and such information can engage regulation 12(5)(b) if its disclosure would adversely affect the course of justice.
16. The complainant has argued that a briefing, provided by NH for the Department for Transport, has been partially disclosed in response to a previous FOI request. The complainant believes that since this briefing is now in the public domain, and this briefing touches upon the legal advice in question, any legal professional privilege that might have been attached to the withheld information has been waived.
17. NH dispute this position. It has explained that 'The Briefing Note has been put in the public domain and is itself no longer confidential, but this does not affect the confidentiality of the legal advice which the complainant now requests. The Briefing Note contains only a limited summary of some of the conclusions of the legal advice – this comes nowhere near undermining the confidentiality of the legal advice which is far more detailed and comprehensive. It therefore does not reveal the content or substance of the withheld information.'
18. The Commissioner has compared the withheld information to the redacted briefing note that is in the public domain and agrees with NH. Whilst summaries of some legal advice are included in the briefing, the substance of other legal advice is either not referenced at all, or redacted from the brief. Ultimately, the references to legal advice that are included in the brief do not come close to revealing the detail and substance of the legal advice which the Commissioner is satisfied remains confidential.
19. Returning to regulation 12(5)(b), in order for information to engage the exception its disclosure must adversely affect the course of justice.

20. NH has argued that the legal advice in question was given at a time when it was highly likely that NH's position in relation to the bypass would be challenged via judicial review. NH still think that judicial review remains very likely and, therefore, disclosure of the withheld information would weaken NH's position and its ability to rely on said legal advice.
21. The Commissioner is satisfied that disclosure of the withheld information would adversely affect the course of justice and therefore, the exception is engaged. Now the Commissioner will move onto consider whether the public interest lies in disclosure or in maintaining the exception.

The public interest test

Public interest in disclosure

22. NH acknowledges that 'There is an important public interest in the work of public bodies being transparent and open to scrutiny to increase diligence and to protect the public purse.' The Commissioner also notes that there is always a presumption in favour of disclosure under the EIR.
23. NH also acknowledges that the withheld information would expand on the the references to the legal advice as described in the briefing and the information about the bypass that is already in the public domain.
24. Whilst NH hasn't acknowledged it, the Commissioner notes that the bypass project has been the subject of significant opposition² from the local authority and residents in the villages that will be directly affected by the grey route. During the 2019 consultation, 22% of Arundel District Council favoured the magenta route whilst only 7% favoured the grey route³, the now preferred route. There has also been opposition from multiple groups who are concerned with the route's impact on the landscape, listed buildings and wildlife, including the Woodland Trust⁴ who are particularly concerned with the route's effect on bats.

² [Greying the land \(arundelbypass.co.uk\)](http://arundelbypass.co.uk)

³ [A27 Arundel Bypass Preferred Route Announcement - National Highways - Citizen Space](#)

⁴ [A27 Bypass Project Threatens Veteran Trees - Woodland Trust](#)

Public interest in maintaining the exemption

25. NH has explained that making the actual legal advice public would be of limited public interest, since it has made the fact it has sought legal advice public.
26. Furthermore, NH has stressed that interested parties have always been able to engage with the process 'following the PRA in October 2020 and at Statutory Consultation from 11/1/22 to 8/3/22. In addition (and prior to those events) a number of consultation events were undertaken in 2017 and 2019, with further supplementary consultation proposed for late 2022. There will be more opportunities for the public to engage with the Project as it progresses under the 2008 Act.'
27. NH is also concerned that the project remains live and at likely risk of challenge. Given that the detail of the advice remains confidential, disclosure would harm the project by increasing risk of legal and other forms of challenge. NH is concerned that disclosure of this legal advice would undermine its ability to seek legal advice in the future, which is necessary to enable it to deliver this and future important strategic projects.

The balance of the public interest

28. The Commissioner has determined that the public interest lies in disclosure, though he notes the public interest is very finely balanced in this instance. On the one hand, there is a strong principle behind LPP: safeguarding 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. It is also relevant that NH consider challenge of the project is likely.
29. On the other hand, a significant number of villages and towns will be affected along the grey route. It will affect a significant number of people, a significant amount of whom still oppose the grey route. Whilst the fact that legal advice has been sought is public knowledge; the substance of the advice that led to the change in preferred route is not.
30. There are clearly strong arguments in favour of withholding the legal advice and the Commissioner acknowledges that NH has sought out the views of Arundel District Council, and other parties, during this process. However, the Commissioner is mindful of the sheer amount of taxpayer money involved in the project, over £320 million.
31. It's not the role of the Commissioner to comment on the appropriateness of the project or NH's preferred route. He notes that recently the Arundel District Council has supported the grey route, implying it is a better alternative than no bypass at all. However, there are still individuals who oppose the bypass (over 6000 people have

signed a petition against it) and are suggesting 'the Arundel Alternative'.⁵

32. In reaching his decision, the Commissioner has kept in mind the presumption in favour of disclosure under the EIR. He has also studied the legal advice in question and considered its significance and what it actually reveals.
33. Whilst the Commissioner acknowledges NH's arguments, if it has already engaged at length with the local authority and individuals, as it says it has, a full picture should be painted of the proposal that is being put forward to the Secretary of State.
34. Ultimately, there are concerns about the project in question and, given its cost, the Commissioner considers that transparency is paramount. The legal advice would reveal NH's thought process behind its backing of the grey route. The Commissioner notes that it might have the opposite effect of what NH envisages and actually persuade individuals that the grey route is the best option. If not, it would at least reassure the public that their concerns have been considered and listened to.
35. The Commissioner understands that the next stage of the project is a supplementary consultation⁶, held from 16 November to 16 December 2022, where NH will 'present our revised design and seek feedback on the changes put forward. We'll be announcing more details about our consultation in the next few weeks – including timing and locations of consultation events and document deposit points.'
36. If NH previously backed the magenta route and then, on receipt of legal advice, changed its position, the public should also be allowed the opportunity to consider the detail of this advice. The final decision relating to the project lies with the Secretary of State and so, in the Commissioner's opinion, the supplementary consultation that is to follow should be as robust as possible. In order for this to be achieved, NH should present as full a picture as possible of its position.

⁵ [Arundel Alternative](#)

⁶ [A27 Arundel bypass - National Highways](#)

Right of appeal

37. 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

38. 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.
39. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
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