

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2015

Public Authority: North Yorkshire County Council
Address: County Hall
Northallerton
DL7 8AL

Decision (including any steps ordered)

1. The complainant has requested information regarding advice North Yorkshire County Council (NYCC) received regarding the exclusion of a particular bus service from the English National Concessionary Travel Scheme. NYCC has withheld the information which it says is exempt from disclosure under section 42(1) of the FOIA (legal professional privilege).
2. The Commissioner's decision is that:
 - NYCC has correctly applied section 42(1) to the information because it is subject to legal professional privilege; and that
 - the public interest favours withholding the information.
3. He does not require North Yorkshire County Council to take any steps.

Request and response

4. On 31 March, the complainant wrote to North Yorkshire County Council and requested information in the following terms:

"I should be grateful if you could also forward a copy of the advice received from counsel and NYCC's Assistant Chief Executive Legal and Democratic Services (both referenced in the report you forwarded)."
5. NYCC responded on 17 April and refused to provide the requested information, citing the exemption under section 42 as its reason for doing so.

6. Following an internal review NYCC wrote to the complainant on 11 May. It revised its position and said that it does not hold any recorded information with regard to advice received by the Assistant Chief Executive Legal and Democratic Services (ACE LDS). It maintained its position that the information that it does hold with regard to advice received from Counsel is exempt from disclosure under section 42, and the public interest favours maintaining this exemption.

Scope of the case

7. The complainant initially contacted the Commissioner on 21 May to complain about the way his request for information had been handled. He subsequently confirmed that, while sceptical that NYCC does not hold any written advice from its internal legal advisers, his primary concern is NYCC's application of section 42 to the information that it has confirmed that it holds, namely the Counsel's legal advice.
8. The Commissioner has focussed his investigation on whether NYCC has correctly applied section 42 to this information.

Background

9. The complainant has told the Commissioner that the English National Concessionary Travel Scheme (ENCTS) was introduced in April 2008 and permits holders of ENCTS passes (senior citizens and disabled persons) to travel on bus services free of charge at particular times and on particular days. The scheme is administered locally by Travel Concession Authorities (TCAs), such as NYCC, which reimburse bus operators for carrying ENCTS pass holders.
10. In 2009 the scheme was amended to explicitly exclude certain types of service that were felt to be outside the spirit of ENCTS – these included services operated primarily for the purposes of tourism or because of the historical interest of the whole vehicle.
11. In August 2014, NYCC conducted surveys on Sunday Dales Bus Services (SDBS) and subsequently consulted on the proposal to remove the SDBS from ENCTS with the consultation closing in January 2015. Although the decision was challenged, NYCC implemented most of its proposed changes to the SDBS network with effect from May 2015.
12. NYCC has told the Commissioner that, in a separate request, the complainant had requested a copy of an executive report submitted to the executive members of NYCC in January 2015, regarding the

exclusion of bus services from concessionary fares. It released this to him. The executive report mentions legal advice provided by counsel and the Assistant Executive Legal and Democratic Services of NYCC and this generated the request that is the subject of this notice.

Reasons for decision

13. Section 42(1) of the FOIA says that information is exempt if it is subject to legal professional privilege (LPP).
14. NYCC has applied this exemption to legal advice it originally received in March 2011 regarding concessionary fares on certain sea front bus services. It referred to this advice during its consideration earlier this year, of the withdrawal of concessionary fares from the Sunday Dales Bus Service.
15. The purpose of legal professional privilege is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and their client remain confidential.
16. There are two forms of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about pending or contemplated legal proceedings.
17. Advice privilege applies where there is no litigation contemplated or in progress. It also protects confidential communications between a lawyer and their client, and the communications have to be made for the dominant purpose of obtaining or providing legal advice. NYCC has told the complainant that the information attracts advice privilege.
18. Having had sight of the information in question, the Commissioner considers that the information does constitute legal advice.
19. The Commissioner considers that the legal advice will remain confidential if it has only been shared with a limited number of people on a restricted basis. The Commissioner agrees with NYCC that the advice states that the contents are intended solely for the immediate client and should not be shared (without Counsel's permission). NYCC says that it has complied with this. The Commissioner is therefore satisfied that the advice has remained confidential.

20. Consequently, he is satisfied that the information is capable of attracting legal professional privilege and is exempt information under section 42(1).
21. Section 42 is, however, subject to the public interest test. The public interest test requires the public interest in favour of maintaining the exemption to be weighed against the public interest in disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

Public interest test

Arguments in favour of maintaining the exemption

22. NYCC says that it is required to make severe cuts to its budgets. It needed the advice to help it make a decision about the proposal to remove certain bus services from the concessionary fares scheme. It argues that when making such cuts, it cannot lay itself open to challenge in the future on the legality of its decisions. NYCC says that it needs certainty so that it can make the necessary budgetary decisions today and in the future.
23. NYCC also says that there is a strong inbuilt public interest in the concept of legal professional privilege itself. It ensures frankness and trust between lawyer and client and promotes the wider administration of justice. It says that the confidentiality of legal advice is a fundamental concept that the public would not expect to be broken. NYCC acknowledges that this advice was originally provided some time ago but says that is still applicable to this present public transport review. It says that it has been relied upon more than once and it expects that it will rely on it again in the future. NYCC says that the legal professional privilege therefore remains strong.

Arguments in favour of disclosing the information

24. NYCC says it is mindful of the general public interest in the transparency and accountability of NYCC business. It also acknowledges an assumption in favour of disclosing information that will promote an understanding of the spending of public funds and particularly public service reduction. NYCC also took into account the public interest in relation to the operation of a scheme that provides concessionary fares to those people who are less able to pay full fares.

25. The complainant has referred the Commissioner to the Department for Transport's (DfT) submission to NYCC's 2009 consultation. With regard to tourist sightseeing services, DfT had said:

"By this we mean the type of services which charge premium fares and may provide a commentary or tour"

The complainant says that although none of the SDBS services that have been withdrawn from ENCTS meet any of the DfT criteria for *tourist sightseeing services*, NYCC is adamant that their removal is consistent with ENCTS legislation, based on the advice it received from its own Counsel and ACE LDS.

26. He argues that, if correct, this could open up a major opportunity for TCAs – all of whom he acknowledges are struggling with funding cuts – to make wholesale withdrawals of services from ENCTS. For example, most Sunday bus services could fall within NYCC's interpretation of *tourist sightseeing services*.
27. The complainant says that throughout the consultation on the exclusion proposals, NYCC has sought to portray itself as having no discretion regarding the removal of the SDBS from the mandatory ENCTS provisions. Its various legal advices being to the effect that these are *tourist sightseeing services*.
28. The complainant consequently argues that the content of the legal advices is of paramount importance if an effective challenge is to be mounted against NYCC's decision, or if pressure is to be brought on DfT and or/parliament to address a genuine weakness in the ENCTS legislation.
29. He says that he and hundreds of other ENCTS pass holders have had an entitlement that was granted by parliament, restricted by NYCC based on what he considers is unsound research and legal advice that it is unwilling to disclose. Additional costs have therefore been imposed on ENCTS pass holders.
30. The complainant argues that the basic rationale for the whole concept of the FOIA is that public bodies should be open and transparent, with non-disclosure of information being very much the exception. He says that NYCC sought external legal advice whilst formulating its policy in respect of SDBS. It has now implemented that policy. In all the documents that have been disclosed to him by NYCC, the complainant says that at no time have the authors made any reference to caveats that may have been expressed by counsel or reservations about the legality or adverse legal consequences of the proposed policy. He says that the impression that was created was that the case for withdrawing the SDBS from

ENCTS was "rock-solid". The complainant cannot therefore understand why NYCC refuses to disclose the advice.

31. Finally, the complainant argues that if the legal advice revealed genuine deficiencies in the ENCTS legislation – in that it permits a wider interpretation of *tourist sightseeing services* than that envisaged by DfT and parliament – there is a public duty on NYCC to share those advices rather than to simply use them to justify its own cost-cutting.

Balance of the public interest

32. NYCC has referred the Commissioner to the Information Tribunal appeal decision EA/2005/0023. This identified that a significant public interest in disclosing information would usually be required in order to override legal professional privilege. There must be some clear, compelling and specific public interest justification for disclosure which must outweigh the strong public interest in protecting communications that are intended to be confidential.
33. NYCC acknowledges that the exclusion proposals would cause detriment to some sections of the population. It says, however, that analysis of a survey that it undertook, suggests that the majority of users of the SDBS live outside the immediate Dales and North Yorkshire area, and that the majority of journeys were for leisure travel.
34. It argues that although the impact on certain individuals in the local community would be noticeable, the overall impact on the public would be limited. As only a limited proportion of the local community would be affected by the decision, NYCC considers that the information is of significant private interest, rather than significant public interest.
35. NYCC says that it has already undertaken research and consultation on the proposals and that the public has had the opportunity to engage in the process and to obtain information about the proposals. It also says that it has already disclosed a number of documents to the complainant that concern assessments of the potential impact of the proposals. It notes that its Counsel's advice is summarised in the executive report referred to at paragraph 12, which has been disclosed to the complainant.
36. NYCC acknowledges that the public interest in maintaining legal advice privilege may wane with the passage of time. It says that although the advice in question is dated March 2011, the proposal to reduce concessionary fares is part of an ongoing review, with the aim of reducing NYCC expenditure. As previously noted, the advice has been used prior to this particular issue and NYCC considers it is likely that it

may need to rely on the advice again in the future, as part of the public transport review process.

37. Having undertaken its own balancing exercise, NYCC has concluded that although there will undoubtedly be significant individual interest in the requested information, the wider public interest is relatively low. It considers there are no exceptional circumstances that would favour disclosure and that the inherent necessity for being able to seek and receive confidential legal advice outweighs any public interest in disclosure in this case.
38. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as argued by some public authorities including NYCC at paragraph 32, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. He notes the Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) to this effect:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41)
39. In his guidance on section 42¹, the Commissioner gives factors that might be considered when balancing the public interest arguments. In addition to the strong element of public interest inbuilt into the concept of legal professional privilege and the rationale behind it, additional weight may be added to the above argument for maintaining the exemption if the advice is recent and live. This appears to the Commissioner to be relevant in this case.
40. Similarly, in addition to the assumption of disclosure and the rationale behind the assumption (ie accountability and transparency), additional weight may be added to the arguments for disclosure if: there is a large number of people affected; a perception that the authority has not been transparent; has misrepresented the advice given or has selectively

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

disclosed only part of the advice given. Again, the Commissioner considers these factors are of potential relevance in this case.

41. With regard to the additional factors for maintaining the exemption, the Commissioner notes, as NYCC has done, that the advice in question was produced in March 2011 in response to a separate proposal to exclude seafront bus services and park and ride schemes from concessionary fares. It could therefore not be said to be recent advice. And while it is broadly applicable to the proposal in this case - both proposals concern removal of particular bus services from ENCTS - the detail of both proposals - and therefore their effect - differs, with the present proposal concerning the exclusion of the Sunday Dales Bus Service.
42. Although the advice dates back to 2011 however, the proposal about which the complainant has concerns only came into effect from May 2015, and the related executive report which drew on the advice was submitted in January this year. It is therefore clear that the advice is still regarded as current and it is still being relied on to take decisions about bus service concessions, and in particular the decision in this case.
43. The Commissioner notes that the changes to the SDBS network came into effect from May 2015 following the earlier consultation. However, at the time of the complainant's request in March, the issue and the advice were therefore still 'live'.
44. It is the Commissioner's view that because of the above factors, the inherent weight associated with legal professional privilege in this case remains considerable.
45. With regard to the additional factors for disclosing the information, the Commissioner has first considered the number of people affected by the requested information ie the advice that NYCC drew on in reaching its decision to withdraw the SDBS from the ENCTS scheme. He does not agree that with NYCC that the requested information is of limited private interest. This is because, at the time of the request, the number of North Yorkshire residents aged over 60, and/or with a disability - so were consequently current or potential future users of the ENCTS pass - is likely to have been substantial (the 2011 Census suggests perhaps 25% of NYCC's population). These residents might consequently be affected by NYCC's withdrawal of the SDBS from the ENCTS scheme and therefore the Commissioner considers that the withheld information does have some wider public interest.
46. Regarding whether the authority has been transparent, NYCC says that its surveys, conducted in August 2014, found that the majority of SDBS users were not older or disabled residents of North Yorkshire but came

from outside the area with the majority of journeys being for leisure travel. The Commissioner notes that more than one response to its consultation, included in the aforementioned executive report, mention that the survey was carried out in August, which is the peak holiday month and therefore responders to the survey were more likely to have been holidaymakers (ie tourists). Nevertheless, the Commissioner agrees with NYCC when it says that it has undertaken research and consultation on the proposals and the public has had the opportunity to engage in, and obtain information about, the proposals.

47. Having considered both parties arguments for disclosing and withholding the information, the Commissioner has decided that, on balance, the public interest in withholding the information is greater. He considers that the public interest in the information has been addressed through the consultation process and the release of other related information to the complainant (and therefore to the wider world). This includes the executive report in which he notes the legal advice in question has been summarised. The inherent necessity for NYCC to be able to seek and receive confidential legal advice, without the expectation that it will be disclosed to the public, therefore outweighs the public interest in disclosing the information in this case.

Right of appeal

48. 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

49. 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.
50. 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

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