

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2019

Public Authority: Highways England Company Limited

Address: Bridge House
1 Walnut Tree Close
Guildford
GU1 4LZ

Decision (including any steps ordered)

1. The complainant has requested the legal advice received from the Department for Transport (DfT) on a planning matter. Highways England Company Limited (Highways England) identified information within the scope of the request but withheld this on the basis that the information was legally professionally privileged and therefore exempt under section 42 of the FOIA.
2. The Commissioner's decision, after considering the public interest test, is that Highways England has correctly applied this exemption and the public interest favours withholding the requested information.

Request and response

3. On 2 July 2018 the complainant made the following FOIA request:
'I would be grateful if you could supply me (by email preferred) with a copy of the "advice received from the Department for Transport" as referred to in page 3 paragraph 4 of the attached consultee response from Highways England to Planning Application ref 17/01191/OUTMEI at Lichfield District Council.'
4. On 30 July 2018 Highways England responded and withheld the information citing section 42, legal professional privilege and section 41, provided in confidence.
5. On 30 July 2018 the complainant requested an internal review.

6. On 28 August 2018 Highways England upheld the decision to withhold the legal advice under section 42. It did not refer to section 41.

Scope of the case

7. The complainant wrote to the Commissioner on 14 October 2018.
8. The Commissioner considers the scope of her investigation to be the decision by Highways England to withhold the legal advice under section 42 of the FOIA.

Reasons for decision

9. Section 42(1) of the FOIA states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

10. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Information Tribunal¹ as *"a set of rules or principles which are designed to protect the confidentiality between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."*
11. There are two types 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 in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.

¹ *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*

12. In its submissions to the Commissioner Highways England stated that it relied on the legal advice privilege. The request arises from the following statement which was contained in the Annex to Highways England Planning Response to Lichfield District Council in respect of Planning Application 17/01191/OUTMEI:

'Since that time, Highways England has received advice from the Department of Transport regarding the interpretation of traffic arising from committed developments that is to be considered in transport assessments on proposals affecting the SRN [Strategic Road Network]. The effect of this advice is that only traffic from committed developments that will be on the network at the time of opening of the development the subject of the application is to be included in assessments rather than treating them as fully built out as had previously been the case.'

13. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because the withheld information consists of legal opinions and advice provided to Highways England by a professional legal adviser on the issue of traffic.
14. As such the Commissioner finds that the requested information is subject to legal advice privilege and also notes that Highways England considers this issue to still be 'live' and would use this advice to guide its thinking in future issues around this subject. The Commissioner consequently finds that the legal professional privilege exemption is engaged.
15. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

16. Highways England identified the public interest arguments in favour of disclosing the information as creating greater accountability and transparency in the decision making process:
- It would promote public debate in respect of proposals affecting the Strategic Road Network
 - Highways England considered that the public interest had been met by the public disclosure of (a) the fact the advice had been taken and (b) the effect of the advice in the wording of the Annex. (See paragraph 12 above.)

- It would further the understanding of the public into the approach of Highways England to planning in respect of the Strategic Road Network
17. The complainant argued that he had made his request because the advice had far reaching effects:
- The advice from the DfT to Highways England was apparently of a generic nature, and so is likely to affect not just this development but almost all future large-scale development in England, whereby developers would no longer be required to provide highway mitigation works arising from development contained in Local Plans. It will, in effect, mean that any such necessary highway works will in future need to be met by public funds through Highways England and/or Local Council Highways Departments; creating a considerable further strain on public finances.

Public interest arguments in favour of maintaining the exemption

18. There is a strong element of public interest inbuilt in this exemption, the central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a very strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence.
19. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.
20. Highways England stated that the legal advice is very recent and relates to an issue which is still relevant and live. Highways England is entitled to a safe space to consider the advice. It also considered the damage caused by loss of frankness and candour in legal advice given by a government department to a government owned company if legal advice of this character is disclosed.

Balance of the public interest arguments

21. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. She also recognises that the public interest had been met by the public disclosure of (a) the fact the advice had been

taken and (b) the effect of the advice in the wording of the Annex. (See paragraph 12 above.)

22. However, as Highways England considers the information to still be relevant and would be relied upon in any future considerations of this issue, the Commissioner considers the privilege attached to the information has not been waived and is still relevant now.
23. The Commissioner's view is that there are stronger public interest arguments in favour of maintaining the exemption. She considers Highways England's arguments that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made to be a strong argument. Disclosure could lead to Highways England being unable to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. The Commissioner is also mindful of the Tribunal's comments in the *Bellamy* case that "*there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest.*"
24. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. She therefore concludes that Highways England correctly withheld the requested information under the exemption at section 42.
25. Highways England stated that it does continue to rely on section 41 (provided in confidence) as cited in the initial response and if section 42 was not upheld by the Commissioner it would also seek to rely on section 35 (formulation of government). As the Commissioner has upheld section 42 she has not gone on to investigate these additional exemptions.

Right of appeal

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

27. 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.
28. 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
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