



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER  
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal No. EA/2015/0262**

**BETWEEN:**

**GRAHAM LAW**

**Appellant**

**-and-**

**INFORMATION COMMISSIONER**

**Respondent**

**Before**

**Brian Kennedy QC**

**Gareth Jones**

**Michael Hake**

**Date of Hearing: 15 March 2016, Court 7, Wolverhampton, West Midlands.**

**Date of Promulgation 30<sup>th</sup> March 2016**

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**DECISION**

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Application of section 42(1), a qualified exemption for Legal Professional Privilege and the application of public interest test under section 2(2)(b) of the Freedom of Information Act 2000.

Conclusion: The Tribunal dismisses the appeal.

## **REASONS**

### **Introduction:**

1. The decision concerns an appeal of a Decision of the respondent (“the Commissioner”) dated 28 July 2015, reference: FS50582987 (“the DN”).
2. In the DN the Commissioner held that the Public Authority, in this case, the North Yorkshire County Council (“the Council”) had correctly withheld requested information from the appellant pursuant to s 42(1) of Freedom of Information Act 2000 (“the FOIA”).
3. The Tribunal is provided with a bundle of documents referred to herein as the Open Bundle, (“OB”) and a closed bundle containing the requested information, (“CB”).

### **Background concerning requested information:**

4. This is set out clearly in paragraphs 7 – 21 of the Commissioner’s’ Response at pages 26 - 29 of the OB. The pertinent facts and Chronology is as follows;
5. In April 2008 the English National Concessionary Travel Scheme (“ENCTS”) was introduced, affording free travel to holders of ENCTS passes under certain conditions. It is administered by Travel Concession Authorities, such as county councils. In 2009 the scheme was amended to exclude certain types of travel such as for the purpose of tourism or for the vehicle historical interest. In March 2011 North Yorkshire County Council (‘NYCC’) received legal advice from external counsel regarding its public transport policy. In 2015, NYCC following surveys and a consultation removed the Sunday Dales Bus Services. This removal was the subject of an executive report, which NYCC released to the Appellant. This report mentioned legal advice provided by counsel, and the Appellant then requested a copy of that legal advice.

**Chronology:**

6.

- a) 31 March 2015: Appellant's request for information
- b) 17 April 2015: NYCC refusal of request citing s42 FOIA
- c) 11 May 2015: NYCC internal review revises position, stating it does not hold any information relating to advices received from internal legal advisors, but information about the advices from external counsel is exempt under s42
- d) 21 May 2015: Appellant's complaint to the Commissioner.
- e) 22 October 2015: Commissioner's DN upholding NYCC refusal and rejection of complaint, with reasons.
- g) 16 November 2015: Appellant's Notice of Appeal
- h) 15 December 2015: Commissioner's Response
- i) 25 January 2016: Appellant's Reply to the Commissioner's Response

**The Applicable Law:**

Section 42(1) FOIA provides a qualified exemption for information subject to legal professional privilege.

**The Commissioner's Decision:**

- 7. The Commissioner decided;
  - a) NYCC has correctly applied section 42(1) to the information because it is subject to legal professional privilege; and that
  - b) The public interest favours withholding the information.

**Issues under Consideration:**

(i) Exemption

The requested information constitutes legal advice, and as confidentiality has been maintained the information attracts legal professional privilege and is exempt under s42.

(ii) Public Interest

The Appellant advanced the following arguments:

- None of the services withdrawn by NYCC from ENCTS meet Department for Transport conditions on withdrawal i.e. tourism and sightseeing;
- Sight of the advices is necessary to mount an effective challenge to the decision or weaknesses in the ENCTS legislation;
- Additional costs have been unjustly imposed on ENCTS pass holders;
- No reservations or caveats expressed by counsel have been referenced by NYCC, and if the withdrawal of services was legally ‘rock solid’ then there is no reason to withhold advices;
- If legal advice revealed a genuine deficiency in ENCTS legislation to permit an overly wide interpretation of ‘tourism sightseeing services’ there is a public duty on NYCC to share the advices.

(iii) NYCC made the following points:

- Due to severe budget cuts, it needs to be certain of the legality of its decisions;
- There is a strong public interest in maintaining legal professional privilege;
- These advices have been relied upon more than once and are likely to be relied upon in future;
- It acknowledges the general public interest in transparency in the allocation of public funds especially regarding schemes to assist the less able;
- The surveys revealed the majority of ENCTS users of these services were for leisure travel and users came from outside the immediate Dales and North Yorkshire area;

- Whilst there is a significant individual interest, overall public impact is limited;
- There is no need to disclose advices as many documents have already been disclosed, including a summary of the advices in the executive report;

(iv) The Commissioner held for the Council, noting:

- There does not need to be an exceptional circumstance to favour disclosure in s42 cases, following *Pugh v ICO* (EA/2007/0055) at 41;
- Additional weight is afforded to the advices as they are live, albeit not recent;
- The Respondent disagreed with NYCC in that he held that there was a wider public interest in disclosure, as the scheme affects a significant proportion of the population of North Yorkshire (estimating perhaps 25%);
- There is no need for disclosure of the advices, as the public interest has been served by the consultation process, and the disclosure of the summary in the executive report.

### **The Grounds of Appeal:**

8. The Appellant identifies “serious deficiencies” in NYCC’s actions, claiming that most responses to the consultation criticised the survey methodology and analysis, and as the surveys failed to provide reliable data the conclusions must therefore be unreliable. He has summarised these responses in a document attached to the Notice.
9. He further asserts that the public interest is not confined to the population of North Yorkshire but of the wider Yorkshire, Lancashire and Durham areas as well as any ENCTS pass holders. These stakeholders were not proactively engaged by the consultation, contrary to Cabinet Office guidance on good practice.
10. The Appellant sees the disclosed summary in the executive report as insufficient. The legal advice seems to relate to an open-top seafront bus service, and the Appellant questions how this could justify withdrawing local services.

**The Commissioner's Response:**

11. The Commissioner expressly disagreed with NYCC in holding there to be a wider public interest in disclosure, but held that on balance it did not warrant disclosure of privileged information. The Commissioner was also aware of potential deficiencies in the survey, noting in particular the timing of the survey as a concern. However, the Cabinet Office guidelines are not binding, and the survey did not appear, despite the deficiencies, to lack enough transparency to warrant disclosure.
12. Disclosure of the advice would not, reasoned the Commissioner, contribute to the effectiveness of the survey methods and consultation, and sufficient information has been conveyed through the executive report. The correct interpretation of 'tourism' can be resolved through mechanisms other than FOIA.
13. The advice remains relevant and current.
14. The Commissioner discovered that the NYCC had received two emails from internal legal advisors containing draft versions of the report, and states that this should have been included in the Decision Notice. However, he considered that they constituted confidential legal advice and are subject to the s42 exemption. He continues to maintain his position that disclosure is unnecessary, as there has been sufficient transparency despite criticisms of methodology, and there are more appropriate mechanisms to debate the issue of the definition of 'tourism' in this context than FOIA divulgence of information to the world at large.

**The Appellant's Response:**

15. The Appellant argues that the Commissioner's conception of the public interest is misconceived. In re-interpreting 'tourism' more widely this could have a potential

impact across other members of the Local Government Association in encouraging them to limit their services accordingly.

16. The immediate impact on current service users includes North Yorkshire residents, but 89% of users are not resident in North Yorkshire. The Appellant contends that, under the present interpretation of ‘tourism’ as encompassing all leisure travel, NYCC will be acting unlawfully if it does not withdraw all other services that meet the same criteria.
17. The survey contained many more deficiencies than that identified by the Commissioner, and the Appellant feels that the Commissioner did not attach sufficient weight to these deficiencies beyond that of the timing of the survey.
18. NYCC’s decision-making process took into account the impact on service users. The Appellant contends that this is irrelevant if, as NYCC claim, they were merely applying the legislative mandatory exclusion of tourism services from ENCTS. It did not appear to have considered its discretionary powers.
19. The advices and their contents have been so widely publicised that there is a strong argument that they are no longer privileged, and disclosure would not prevent NYCC relying on the advice in future.
20. The Appellant attaches a letter sent to his local MP and an update on correspondence with said MP and the Minister for buses in DfT.

**Discussion:**

21. The merits of decisions made by NYCC and the adequacy or otherwise of their approach to the evidence relied on are not matters for us. It is clear the Appellant disagrees but equally they could be reasonable decisions that a reasonable public authority faced with difficult financial circumstances might arrive at in a local

democratic context that also provides a mechanism for representation and change if local people do not like them. Neither is the disinclination of NYCC to use discretions under the relevant ENCTS scheme or the use of such discretions by other councils a matter for us. The papers do not indicate any element of wrongdoing and the actions being taken, insofar as we can assess appear to relate to the advice given. Whether the advice is right or adequate are not matters for us: the appellant and others can judge this by reference to the report and the relevant regulations.

22. We are of the view that Legal Advice Privilege (“LAP”) exemption is engaged for all documents.
23. On the Council Draft reports, comments are linked to the Opinion and consist of text amendments and comments seeking clarification. They are technical in nature but LAP attaches to them – they cannot just be considered technical drafting points.
24. The points are generally minor. Public interest considerations in disclosing them are low. Nor are there any significant big changes that might inform public understanding of report preparation or of the issues.

**On Counsels Advice:**

25. This is clearly advice – we find the section is engaged. The issue for consideration is the Public Interest balancing test on which we make the following observations:
  - a) The advice is old – but is still being used and may be used again – suggests no disclosure
  - b) Advice is detailed. It considers bus services which may arise again- suggests no disclosure
  - c) The advice has been referenced and a sort of summary included in the public report at p 71 -72. It might be argued that this meets any public interest



considerations in disclosure. An alternative is that the disclosure is such as to waive privilege but we find this does not appear to be the case.

- d) An argument for further disclosure of part of the opinion does exist in terms of the public interest in transparency and accountability for the framework of decision-making. At the same time a careful reading and analysis of the report and the references to analysis does enable people to see how far this approach matches with the factors outlined in the ministerial correspondence and to challenge it. A public interest balance in some disclosure is demonstrated but not at the level to outweigh the strong public interest in maintaining LAP.
- e) The appellant argues that there is a considerable public interest in knowing the advice that may affect ENCTS scheme used by millions of pensioners strongly favours disclosure.
- f) This interest may be balanced off by the availability of alternative channels to challenge NYCC decisions through either judicial review or through Parliament. The latter has happened and the Appellant has been given the rules on which decisions should be based. He therefore has, and the public interest appears to be met. This potential for legal action would tend to weigh against disclosure.
- g) Overall, we are of the view that the public interest in maintaining the exemption is not outweighed by the public interest in maintaining it in this case.

**Conclusion:**

- 26. The Appellant has failed to persuade us that the DN is not in accordance with the Law, nor that the Commissioner ought to have exercised his discretion differently.
- 27. We find that the requested information constitutes legal advice, received by the council regarding the exclusion of a bus service from the English National Concessionary Travel Scheme (ENCTS) and is subject to legal professional privilege and therefore exempt under s42 (1) FOIA.

28. We agree with and adopt the Commissioners' reasoning on the issues discussed above. Further we looked carefully at the requested information in the CB and are satisfied that the balance, in the Public Interest lies in refusing disclosure of the requested information for the reasons already outlined, and in detail given by the Commissioner.
29. Further we stress that, what we regard as all pertinent aspects of the issues to be addressed by the Council, on foot of the requested information had already been addressed in in of the executive report (referred to at Paragraph 5 above) entitled; ***“North Yorkshire County Council, Executive Members, 30 January 2015., Concessionary Fares – Exclusion of Services: Report of the Assistant Director – Integrated Passenger Transport.”*** (“the report”) which NYCC released to the Appellant. As can be seen therein, particularly at Pages 70 and 72 OB at Paragraphs 6.1, 6.2 and 6.3 the Council have effectively disclosed the substance of the advice relied upon when exercising their powers. We do not accept that it is necessary in the public interest to disclose all options or the process whereby the Council made their decisions when considering the legal advice they had obtained. We are satisfied that all options were carefully considered. That is what the Council members are elected to do, and they have properly done so, and explained their decision and reliance on the requested information in the report. The requested information remains live and in our view properly remains legal advice received by a council regarding the exclusion of a bus service from the English National Concessionary Travel Scheme (ENCTS), subject to legal professional privilege and therefore exempt under s42 (1) FOIA
30. Accordingly we dismiss the appeal.

Tribunal Judge  
30 March 2016.