

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 March 2013

**Public Authority:** Architects Registration Board  
**Address:** 8 Weymouth Street  
London  
W1W 5BU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information concerning his complaint about an architect to the Architect's Registration Board ("ARB"). ARB's Investigations Committee (the "IC") had initially taken the view that the case should proceed to a hearing but, following legal advice, the decision was reviewed and the IC decided there was no case to answer. The request was submitted before this review took place. The complainant asked for information concerning the review process, his case file, specific pieces of correspondence (including legal advice received) and data concerning the decisions of the IC and Third Party Reviews over the previous five years. ARB provided some information and applied section 42(1) to the information it considers to be legally privileged. It also explained which information is not held.
2. The Commissioner's decision is that ARB is correct to apply section 42(1) to the legal advice it received. He is satisfied that ARB does not hold the further information outlined by the complainant and that it correctly handled the request in accordance with the FOIA. He does not require any further steps to be taken.

#### **Background to this Request**

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3. ARB is a statutory regulator under the Architects Act 1997 (the "Act") and may investigate misconduct or incompetence on the part of architects either as a result of a complaint or at its own initiative. If ARB considers there is a case to answer, it brings proceedings against the architect in question before the Professional Conduct Committee (the "PCC") set up under the Act. Decisions of the PCC are subject to a statutory appeal to the High Court.

4. In order to promote good administration, ARB established a mechanism by which certain of its processes might be the subject of a third party review. This review is not a form of appeal and may not revisit substantive statutory decisions, but is designed to identify any shortcomings in ARB's processes.
5. The complainant submitted a complaint about an architect to ARB and its IC initially took the view that the case should proceed to a hearing. The Chief Executive of ARB took legal advice with regard to this case and following the provision of this advice, decided to initiate a review of the IC's decision. On review, the IC then decided there was no case to answer.
6. The complainant requested a Third Party Review of the revised decision. He then asked ARB for all relevant information it held so that he could make an informed submission to the Third Party Reviewer.
7. The majority of the information was disclosed but not until the Third Party Review was complete. Some information has been withheld.
8. ARB has explained to the complainant that the Third Party Review is not an adversarial process in which parties make representations. However, the complainant considers that ARB has misused the FOIA to delay providing him with the information he requested before the review took place.

## **Request and response**

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9. On 23 April 2012 the complainant requested information concerning the review procedure / process and asked for a copy of (or an inspection of) the papers relating to his case in the case file. In particular he listed the correspondence he required concerning the case. He also required statistics about cases which had been referred to the IC and the PCC and reviewed by the Third Party Review process over the past five years.
10. On 26 April 2012 ARB informed the complainant that it would handle his request under the FOIA. It explained that the Reviewer would consider whether the procedures / processes were followed correctly in the investigation of the complaint. It also provided him with confirmation about the review process.
11. On 30 April 2012 the complainant asked ARB to handle his request as a matter of urgency as he required the requested information for the Third Party Review. He reiterated his wish to have a copy of (or view of) the case file.

12. On 9 May 2012 ARB confirmed it was handling the request under the FOIA and provided the complainant with a copy of the Third Party Review.
13. It explained that this request for information had no bearing upon the Third Party Review and that the Reviewer had been instructed to prepare a report on whether the Investigations Board followed the correct procedures in investigating the complaint. It explained that there is no provision under the review structure for unrequested submissions to be made by either party.
14. As the Reviewer had confirmed that the IC investigated the complaint efficiently and appropriately, ARB informed the complainant that it considered the matter closed.
15. On 25 May 2012 ARB provided some of the requested information. It explained where information was not held and where it had applied exemptions to requested information under the FOIA.
16. On 8 June 2012 the complainant outlined the information he considered to be missing to the Professional Standards Manager at ARB. He also wrote to the Registrar and Chief Executive at ARB and specifically requested that the Board's solicitor's advice should be provided to him.
17. On 22 June 2012 the Professional Standards Manager at ARB provided some further information and explained why other documents were not provided. The Registrar and Chief Executive also wrote to the complainant and provided an internal review of the initial response.
18. The review upheld ARB's application of section 42(1) of the FOIA (Legal Professional Privilege) to the correspondence that he had specified he required.
19. On 8 July 2012 the complainant wrote again to the Professional Standards Manager at ARB to outline the information he considered to be missing.
20. On 23 July 2012 ARB confirmed that the listed information was not held by ARB.
21. On 12 August 2012 the complainant wrote again to the Registrar and Chief Executive and asked ARB:
  - (i) To confirm whether it held any plans or information relating to his case which a named individual ("individual one") had drawn up and signed. This had been provided to the IC and was referred to in a statement it had made.

- (ii) To provide a copy of the advice to the IC which had been referred to in an email from a named individual ("individual two").
- 22. On 24 August 2012 the Registrar and Chief Executive informed the complainant that ARB could not identify which of the papers were relied upon by the IC in making the statement that they had been 'drawn up and signed by individual one.
- 23. ARB confirmed that all the plans which were considered by the IC had been provided to the complainant. It explained that it considered his request for ARB to go through the information and identify which had been signed or drawn up by individual one went beyond a request for information.
- 24. On 29 August 2012 ARB confirmed that individual two did not recall the specific details but believed that he was not referring to any written advice received but to oral guidance that had been given in relation to a different case.

## Scope of the case

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- 25. The complainant contacted the Commissioner on 3 September 2012 to complain about the way his request for information had been handled. He made 5 complaints:

- 1. Misuse of the FOIA**

He argued that ARB wrongly and deliberately dealt with his request under the FOIA so that it was able to avoid sending him the information he had requested before the Third Party Review.

- 2. Withholding of information relating to ARB Chief Executive's decision to initiate a review of the IC's initial decision.**

This is with respect to ARB's application of section 42(1) of the FOIA (Legal Professional Privilege) to the withheld correspondence and includes:

- i. the legal advice provided by ARB's solicitor to the IC; and
- ii. the correspondence from the Chief Executive that led to the production of that advice.

- 3. Failing in Governance**

The complainant considers that the Chief Executive was not the

appropriate person to conduct the internal review in this case as she was involved in the decision not to progress the initial complaint to a hearing.

**4. Refusal to produce or identify drawings and/or information said to have been prepared or signed by the named architects.**

The complainant has argued that the above information has not been provided to him.

**5. Refusal or inability to respond to a reasonable request for information**

The complainant has argued that ARB may not keep adequate records in order to avoid proper scrutiny.

26. The Commissioner considers this case is concerned with ARB's application of section 42(1) of the FOIA to the withheld legal advice (complaint 2) and its argument that it has provided all the information that it holds with respect to complaint 4. The Commissioner has also considered whether ARB handled the request in accordance with the procedures of the FOIA (complaint 1).
27. The points raised by the complainant concerning the internal review and ARB's record keeping fall under the Codes of Practice and not the FOIA (complaint 3 and 5 above). The Commissioner has therefore considered these points in the Other Matters section of this notice.

## **Reasons for decision**

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### **Complaint 1: Misuse of the FOIA**

28. The complainant has argued that ARB wrongly and deliberately dealt with his request under the FOIA so that it was able to avoid sending him the information he had requested before the Third Party Review.
29. ARB has explained that the Third Party Review is not a form of appeal and may not revisit substantive statutory decisions but is designed to identify any shortcomings in its processes to allow improvement going forward. The review is therefore not an adversarial process in which parties make representations.
30. It has explained that the complainant's request did not identify itself as an FOIA request, however it considered that this was the most appropriate mechanism for the provision of the information sought.

31. The Commissioner cannot comment on ARB's review process, however he has considered ARB's handling of the request and he is satisfied that ARB was correct to respond under the FOIA.
  32. The request was dated 23 April 2012. In accordance with section 10 of the FOIA, ARB responded to the request within 20 working days, on 25 May 2012.
  33. ARB provided the complainant with some of the information requested and in accordance with section 17 of the FOIA, provided him with a refusal notice regarding the information it considered was exempt from disclosure. It explained which exemption it was applying to this withheld information.
  34. The Commissioner's guidance to public authorities considering how to respond to a request can be found on our website at:  
  
[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/guide/receiving\\_a\\_request.aspx](http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/receiving_a_request.aspx)
  35. This does suggest that a public authority may respond to a request as a 'normal course of business' request and does explain that every request does not have to be formally treated as a request under the FOIA.
  36. However it does explain that the provisions of the FOIA need to come into force if:
    - A public authority cannot provide the requested information straight away; or
    - the requester makes it clear they expect a response under the FOIA.
  37. In this case, ARB has explained that given the nature of the request, the material to be provided and the issues arising, it considers that it correctly provided a prompt response in accordance with the FOIA.
  38. For the above reasons, the Commissioner does not consider that ARB has abused the FOIA process.
- Complaint 2: Section 42(1) Legal Professional Privilege**
39. Section 42(1) of the FOIA says that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
  40. In other words, section 42 sets out an exemption for information protected by legal professional privilege ("LPP").

41. LPP is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and to safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.
42. The Commissioner recognises that there are two types of privilege within LPP, litigation privilege and advice privilege.
43. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation (legal action before a court). For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing the case. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
44. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice.
45. In its response to the Commissioner, ARB stated that the category of LPP applied in this case is both advice privilege and litigation privilege. It represents communications between lawyer and client for the purpose of giving or receiving legal advice, and communications between a client or his lawyer and third parties for the purpose of litigation. ARB has explained that for this purpose proceedings contemplated before ARB's PCC are litigation.
46. ARB does not consider this advice to be the complainant's personal data. Although the advice stems from a complaint made by the complainant, the structure of the information held concerns the conduct and competence of the architect. ARB has confirmed it does not hold a file in relation to the complainant and his wife.
47. The Commissioner is satisfied that the dominant purpose of the communication in question was to give legal advice. This was confidential advice between the client (ARB) and their lawyers (the external solicitors). It is therefore covered by LPP and the exemption is engaged.

### **Public interest test**

48. 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 in favour of disclosing the requested information**

49. The Commissioner considers that there is a public interest in ARB being accountable and transparent about the decisions it has made regarding the investigation into the conduct of an architect.
50. It could be argued that disclosure should be made in the interests of transparency regarding the IC's decision to not refer the case to the PCC. ARB has acknowledged that there is a legitimate public interest in ensuring that the decisions of the IC are subject to an appropriate level of scrutiny.
51. The complainant has argued that he does not know if the Chief Executive acted lawfully or not in deciding to initiate a review of the IC's initial decision that the architect did have a case to answer. He does not know the reasons why the review was initiated and he considers that there are possible issues of illegality and misrepresentation.
52. The complainant has argued that the IC gave him and his wife reasons for the IC review but that these contain factual inaccuracies, errors in logic and unwarranted and un-evidenced assumptions. For this reason he regards the decision as "*perverse and unsupported by the evidence before the Committee*".
53. The complainant has explained he understands (from documents he has received) that ARB's solicitor's advice was the most significant element in the IC's considerations and that it is impossible to understand the outcome without knowing the advice given.
54. In addition, the complainant has also explained that with regard to the IC review of this case, a relevant email from the Chairman of the IC refers to "*recent advice to the Committee*" concerning the "*steps clients can reasonably be expected to take to protect their own interests*". The Chief Executive of ARB has confirmed to the complainant that the Chairman has since explained that he did not remember the specific details but does not believe he was referring to written advice received but rather to oral guidance that had been given in relation to a different case.
55. The complainant has argued this demonstrates that advice from one case may be used in considering a second unrelated case. He has argued that there is a definite public interest in ARB disclosing advice which it may rely upon in considering other cases in the future.
56. The complainant has argued that depending on the nature of the withheld advice, it may be applicable to all complainants to ARB, some



or all contracts entered into between the public and registered architects, or some or all contracts entered into by the public and other professions.

57. The complainant has therefore argued that there is a clear public interest in ensuring that public bodies are in fact acting properly.
58. The Commissioner accepts that in some cases, reasoning such as this can weigh heavily in favour of disclosure of legally privileged information in the public interest. However, having viewed the withheld information in this case, he does not consider that such an argument applies here.
59. The Commissioner does not consider that it is in the wider public interest that this legal advice should be disclosed; rather it is in the complainant's personal interests. In addition, the Commissioner has seen no evidence to suggest any impropriety.

### **Public interest in favour of maintaining the exemption**

60. ARB has argued that the complainant has been informed of the reasons why it decided that the architect concerned did not have a case to answer at the PCC.
61. In addition, an independent reviewer has examined all the documentation pertaining to the consideration of the complaint and has found no irregularities in the way the investigation was conducted. ARB has therefore argued there is no suggestion of illegality or misrepresentation surrounding the decision of the IC.
62. ARB has argued that there is a very strong public interest in preserving ARB's ability to function as an effective regulator. This includes the preservation of appropriate confidentiality in relation to regulatory cases and its ability to obtain privileged legal advice on any issues which may arise. This is particularly strong whilst cases are on-going but continues to a lesser degree after cases have concluded.
63. ARB has argued that there is a substantial public interest in it being able to carry out its regulatory functions and obtain advice without such advice and specific information about individual architects being made public. It has argued that investigations would be impeded if those from whom information was sought believed that their responses may subsequently enter the public domain.
64. The Commissioner considers that there is a strong public interest in protecting the established principle of confidentiality in communications between legal advisors and their clients. In dealing with complaints about architects, ARB needs to be able to take legal advice in confidential circumstances in order to inform its decisions. There must

be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future, the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.

65. The above argument is supported by the comments made by the Information Tribunal in the case *Bellamy v Information Commissioner* (EA/2005/0023) in which it stated that disclosure was unlikely to be justified in most cases as:

*"it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."*

66. In this particular case the Commissioner is satisfied that there is a public interest in preserving ARB's ability to seek and obtain full and frank advice regarding the effective conduct of its regulatory business.
67. ARB has explained that it has taken the ICO guidance into account in coming to its public interest decision. It has referenced the factors taken into account by the Information Tribunal in the case *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052) (the "Merseytravel" case). This is one of the relatively few cases concerning LPP when the Commissioner or Tribunal have considered that in all the circumstances, the public interest in disclosure was strong enough to outweigh the public interest in maintaining the exemption.
68. In the *Merseytravel* case, the Information Tribunal outlined some of the factors which weighed in favour of disclosing the information. The Tribunal judged that the number of people affected in that case was significant as the advice affected 80,000 drivers every weekday and could also affect around 1.5 million residents. There was also a large amount of money at stake: around £70 million.
69. In that case, the Tribunal judged that the countervailing considerations in favour of disclosure were strong enough to override the strong public interest arguments in favour of maintaining the exemption. In giving less weight to the arguments inherent in the exemption the Tribunal noted that the advice received was not recent (it was over 10 years old).
70. In this case the Commissioner has seen no evidence to suggest that there is a large amount of public money at stake or that a large number of people are affected. These are therefore not significant factors to weigh in favour of disclosure. In addition, the legal advice is relatively recent (2011). ARB has also argued that even if it could be said the relevant case was closed, information may still be relevant in relation to

other proceedings or disputes relating to the circumstances. It may therefore still be relied upon.

71. The Tribunal also afforded less weight to protecting legal professional privilege in that case because the advice was concerned with matters of public administration rather than "significant private interests". However in the Commissioner's view there is still a public interest in preserving the ability of public authorities to obtain legal advice in connection with their duties and responsibilities. He believes that support for this approach can be taken from the Tribunal's findings in the case of *Fuller v the Ministry of Justice (EA/2008/005)* which stated that the principles behind legal professional privilege "*are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law...*"
72. In view of the above, the Commissioner is satisfied that there are strong public interest arguments in favour of maintaining the exemption.

### **Balancing the public interest arguments**

73. The Commissioner is satisfied that, in this case, the arguments in favour of maintaining the exemption outweigh those in favour of disclosure.
74. In reaching this conclusion the Commissioner has judged that the arguments in favour of disclosure are not strong enough to override the strong public interest arguments in favour of maintaining the exemption. ARB has explained that in order to function as an effective regulator, it must be able to preserve appropriate confidentiality in relation to regulatory cases and it must be able to obtain privileged legal advice on any issues which may arise. In this case, the advice is recent and does not affect a significant number of people. There is no large amount of money involved. There is no suspicion of misrepresentation or unlawful behaviour. The Commissioner is therefore satisfied that there are no factors strong enough to outweigh the public interest arguments in favour of maintaining the exemption.

### **Complaint 4: Refusal to produce or identify drawings and/or information said to have been prepared or signed by the named architect.**

75. The complainant has argued that the above information has not been provided to him. On 12 August 2012 the complainant informed the Chief Executive of ARB that the IC report on this matter had explained "*the Committee notes that much of the prepared information was drawn up and signed by [individual one]*".
76. The complainant therefore required that copies of the drawings and information prepared by the named individual should be provided to him. He explained that he could not find such plans signed by the architect in the bundle sent to him on 23 May 2012.

77. ARB has explained that the IC did not identify the information which it relied upon in making the above statement. It has explained that all of the plans which were considered by the IC are contained in the two bundles provided to the complainant. This applies to the information relating to his case which the architect appears to have drawn up and signed. ARB explained it did not consider it had an obligation to go through the documentation which was held by the complainant and identify which documents it believed had been drawn up or signed by the architect.
78. ARB has explained to the Commissioner that there is only one file which holds the information relevant to this request and that information regarding this case was generated exclusively by the complainant and by the architect. The drawings the complainant refers to can therefore only have been provided by him or the architect and would not be held anywhere else.
79. ARB has also explained that the complainant has been provided with a schedule of all the information ARB holds in relation to his complaint and, other than the exempt information identified, all of this information has been disclosed to him.
80. The Commissioner is therefore satisfied that ARB does not hold the further information required with respect to this part of the request.

## **Other matters**

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### **Complaint 3: Failing in Governance**

81. The complainant has argued that the Chief Executive was not the appropriate person to conduct the internal review in this case as she was involved in the decision not to progress his initial complaint to a hearing.
82. ARB has argued that the decision not to progress the complaint was made by the IC and not by the Chief Executive.
83. Under the FOIA a public authority is not legally required to have an internal review procedure. However, in order to conform to the Section 45 Code of Practice, an authority should have a review procedure in place. Part VI of the section 45 Code of Practice states that a review should be taken by someone senior to the person who took the original decision, where this is reasonably practicable.
84. The Commissioner considers that as the internal review was conducted by an individual senior to the person who provided the initial response, ARB has acted in accordance with the section 45 Code of Practice.

85. The complainant has asked that this guidance be reviewed.

**Complaint 5: Refusal or inability to respond to a reasonable request for information**

86. The complainant has argued that ARB may not keep adequate records in order to avoid proper scrutiny. In particular he has argued that ARB failed to record the advice given to the IC, as referred to in an email from a named individual.
87. ARB has argued that its records in relation to conduct/competence matters are structured to best deal with its statutory regulatory functions. It considers there is no question of records being inadequate in order to avoid compliance with requests. It has explained that the above advice given to the IC was verbal advice and that there was no written record of it.
88. The FOIA is concerned with the provision of recorded information held at the time of the request. Verbal advice is therefore not covered by the FOIA and the Commissioner cannot comment on what information ARB should record in order to fulfil its regulatory function.
89. The Commissioner is satisfied that ARB has responded to the complainant's request in accordance with the FOIA and has applied exemptions to information which it believes is exempt under the FOIA. He has seen no evidence to suggest that ARB's record keeping is not in accordance with the Section 46 Code of Practice.

## **Right of appeal**

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90. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

91. 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.

92. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**