

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

### **Decision notice**

**Date:** 12 May 2023

**Public Authority:** City of York Council  
**Address:** West Offices  
Station Rise  
York  
YO1 6GA

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

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1. The complainant has requested information about access audits in respect of the York Guildhall restoration project. City of York Council (the Council) initially withheld the information requested under sections 22 (information intended for future publication) and 42 (legal professional privilege). During its internal review the Council withdrew reliance on section 22 and disclosed the information withheld but maintained that the legal advice relating to the matter was exempt under section 42 of the FOIA. The Commissioner's decision is that the Council correctly applied section 42 to the request. The Commissioner does not require any steps to be taken.

#### **Request and response**

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2. On 14 October 2022, the complainant wrote to the Council and requested information in the following terms:  
  
"What access audits has the Council or their agents and tenants had carried out in relation to the York Guildhall restoration project in particular with regard to the council chamber following the completion of the restoration and what legal advice have they or their agents sought and received in relation to access".

3. Following a previous decision notice<sup>1</sup> issued by the Commissioner on 13 December 2022, the Council responded on 23 January 2023. It stated that it considered section 22 of the FOIA to apply to the first part of the request relating to access audits and it considered section 42 to apply to the request for legal advice.
4. In its internal review response dated 17 March 2023 the Council acknowledged that whilst the access audit had not been published at the time the request was received, it was published on 27 October 2022. The Council apologised that it did not provide the complainant with a link to the document in its initial response. In relation to the legal advice requested, the Council upheld its position that the information was exempt under section 42 of the FOIA.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 25 March 2023 to complain about the way their request for information had been handled.
6. As the Council provided the information that it originally withheld under section 22 of the FOIA, the scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied section 42 to the second part of the request relating to legal advice.

### **Reasons for decision**

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#### **Section 42 – legal professional privilege**

7. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
8. In this case, the complainant has requested legal advice sought by the Council relating to access to the Council Chamber at Guildhall in York. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential legal advice provided by a qualified legal adviser to their client. This means that the information is subject to legal professional privilege, and the Commissioner is aware of no evidence

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023370/ic-197345-l8w9.pdf>

suggesting that this privilege has been waived. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

9. The Council acknowledged that there is a public interest in disclosure of information relating to its decision making process in order to understand the rationale for the decision. Disclosure would provide the public with information to understand the management of its resources and compliance with statutory duties such as the Public Sector Equality Duty.
10. In favour of maintaining the exemption the Council pointed out that the legal advice is live and forms the basis for ongoing advice to its Executive. It also provides a legal basis on which the Council would seek to rely if it were subject to any legal challenge in relation to access to the Chamber.
11. The Council referred to the strong public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. The Council considers that this is fundamental to the administration of justice.
12. The Council is of the view that it would be detrimental to the public interest to release the legal advice whilst discussions about the subject matter are ongoing, not only to this particular case but also to the wider principle of LPP. This is because disclosure would undermine the confidence that officers and legal advisers have in the ability to seek and provide confidential, independent legal advice, without fear of disclosure. The Council considers that such a risk would cause significant prejudice to the effective conduct of local government, This would not be in the public interest.
13. In balancing the opposing public interest factors under section 42, the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
14. It is well established that where section 42(1) of the FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built

weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

“...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”.

15. Having considered the circumstances of this particular case the Commissioner considers that the balance of public interest lies in withholding the information and protecting the Council's ability to obtain free, frank and high quality legal advice without the fear of premature disclosure. The Commissioner is not aware City of of any public interest arguments that are enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege. The Commissioner has also taken into consideration the fact that the legal advice is still live as discussions are ongoing about the subject matter to which it relates.
16. For the reasons set out above, the Commissioner has concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure in this. This means that the Council was not obliged to disclose the requested information.

## Right of appeal

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17. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

18. 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.
19. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**