



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights  
Decision notices FER0765686**

**Appeal Reference: EA/2018/0297**

**Heard at Leeds  
On 29 November 2019**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**MALCOLM CLARKE & JEAN NELSON**

**Between**

**MICHAEL HAMMILL**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**CITY OF YORK COUNCIL**

Second Respondent

**Appearances:-**

**Michael Hammill: in person**

**Information commissioner: did not attend**

**City of York Council: did not attend**

**DECISION**

**1. The tribunal allows the appeal and substitutes the following Decision Notice.**

**SUBSTITUTED DECISION NOTICE**

**Dated 31 December 2019**

**Public authority: THE CITY OF YORK COUNCIL**

**Address: West Offices, Station Rise, York, YO1 6GA**

**The substituted decision**

**For the reasons set out in the Tribunal's determination, the exemption relied on by the public authority does not apply to the requested information.**

**Action required**

**The public authority disclose the identified information within 28 days of the date of this notice.**

**Judge C Hughes**

## REASONS

1. A site in Fulford Rd, York is fronted by arches from a former theatre and its owners applied to clear the whole site for a new development. The City of York (the Council) was concerned to preserve these and on 3 March 2017 served a notice on the site owner removing permitted development rights in order to protect them. The site was sold and Mr Hammill, who has been involved with a number of building developments in York was planning to move forward with the demolition of other buildings on the site.
2. Mr Hammill contacted the Council at 11.30 am on 21 March 2017 to explain that the new owners wished to proceed with the demolition of buildings which did not need to be preserved. The Council replied at 2.29 pm :-

*"... I am advised that a further prior approval application would be required for the demolition because the description of development would now differ from that previously applied for. In addition the removal of permitted development rights for the frontage arches has a consequence to the methodology to ensure continued stability of the arches. It is therefore necessary for the Council to confirm suitability of any proposed method of demolition through a fresh application for prior approval for demolition.*

*I would suggest that a method statement..."*

Mr Hammill at 3.18 asked:-

*"Please explain exactly how the description changed necessitating a fresh application?"*

At 3.57 the Council replied:-

*"...I can confirm that officers took legal advice on the status of the prior approval application who deemed that a further prior approval application would be required for the buildings to the rear of the site due to the change of description (which would now omit the frontage building).*

*It is also noted that every document submitted with the original application would have to be amended as the application form has a different applicant and agent, the address submitted was incorrect and the buildings to be demolished do not include the frontage building. Similarly the site notice posted on site is now incorrect as it states all buildings on the site would be demolished and the location plan is also incorrect as it includes the frontage building"*

On 23 March at 7.26 am Mr Hammill replied and asked to see the legal advice:-

*"my lawyers have advised that the Prior Application... was correctly served... Please provide a copy of the legal advice which justifies a request for a new application..."*

3. On 13<sup>th</sup> April he contacted the Council again:-

*"Since the legal advice you have received concerns a matter of Council policy and is therefore in the public interest, please accept this letter as a Freedom of Information request to reveal the letter instructing the advice and the advice itself. I'm happy for any confidential information to be redacted."*

4. The Council withheld the information relying on EIR 12(5)(b) and that on balance the disclosure of the material (which was the advice given since the request for advice had been made by telephone) would not be in the public interest. The request became the subject matter of The Information Commissioner's decision notice FS50689987 of 6 December 2017. The decision notice concluded:-

*31. It is clear that the Council is in the process of negotiations and the legal advice is ongoing as the matter is still live. In view of these factors, the Commissioner recognises that the public could benefit from being reassured that the Council has received and acted on sound advice.*

*32. Following previous decisions of the Information Tribunal however, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is in turn, fundamental to the administration of, and course of, justice.*

*33. In weighing the balance of the public interest arguments in this case, the Commissioner has given due consideration to the specific interests of the complainant as well as any wider public interest. She considers that there is a broader public interest in the smooth course of justice and the protection of such processes from unwarranted adverse effects.*

*34. Having viewed the withheld information and considered the relevant context, the Commissioner is satisfied that the public interest favours maintaining the exception and that the Council has correctly applied regulation 12(5)(b) to withhold the requested information.*

5. On 16 May 2018 Mr Hammill renewed his request:-

*"On 6th December 2017 the Information Commissioner (Reference: FS50689987) ruled on the disclosure of legal advice in respect of my planning application for the above property; in particular the demolition prior notice.*

*However, now that the consent has been granted and the actual buildings on site demolished some many months ago, this argument is now patently redundant.*

*Therefore in the interests of transparency and openness referred to by the Commissioner and which is the Councils stated democratic objective, please now issue me with a copy of the legal advice and its instructing letter as originally requested on 13th April 2017."*

6. The Council responded confirming that a letter instructing the legal advice was not held and that it continued to rely on 12(5)(b). On complaint to the Information Commissioner she concluded that the Council was correct to withhold the information.
7. In the oral hearing Mr Hammill reiterated that he wanted to see the legal advice upon which the Council had acted in requiring a further application to be made.

### Consideration

8. The tribunal notes with concern that in order to fully understand the issues in this case it was necessary to direct that a proper bundle be prepared to ensure that the relevant material was before the tribunal and that the material which should be in the open bundle was accessible to Mr Hammill. It was apparent that neither the Council nor the Information Commissioner had fully considered the scope of the request for information and that if they had much confusion would have been avoided. The request was first made on 23 March 2017 (paragraph 2 above) and was "Please provide a copy of the legal advice which justifies a request for a new application". The request was repeated in a more generalised form on 13 April 2017. During the course of the first investigation the Council told the Information Commissioner (open bundle page 93):-

*"on re-visit I am of the opinion that the information requested and attached (appendix 3) for your reference constitutes legal advice given, which attracts legal advice privilege. I have highlighted in yellow text that relates to the specific legal advice requested regarding Prior Application*

*Advice from external counsel was communicated verbally to a senior solicitor,..., who then relayed the advice to the client – Planning directorate- via e-mail, concerning the requirement for a Prior Application."*

9. An examination of the material (a few brief paragraphs in an e-mail, further described in the confidential annex to this decision) discloses what is in all essentials the information communicated to Mr Hammill on 21 March 2017. He has known the contents of the legal advice since then. The information within scope of the request therefore lacks the quality of confidence necessary to attract legal privilege and accordingly does not fall within 12(5)(b) since its disclosure would not adversely affect the course of justice, since Mr Hammill, had already been told its contents.
10. The appeal is allowed.

Signed Hughes  
Judge of the First-tier Tribunal  
Date: 31 December 2019  
Promulgation date: 6 January 2020