



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0030

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER 0491922
Dated: 22 January 2014**

Appellant: JOHN KUSCHNIR
1st Respondent: INFORMATION COMMISSIONER
2nd Respondent: SHROPSHIRE COUNCIL
On the papers: 3 September and 8 October 2014
Date of decision: 30 October 2014

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and SUZANNE COSGRAVE
Tribunal Members

Representations:

For the Appellant: Mr John Kuschnir in person.

For the 1st Respondent: Ms Clare Nicholson, Solicitor for the Information Commissioner.

For the 2nd Respondent: Mr Robin Hopkins, Counsel instructed by Shropshire Council.

Subject matter: Environmental Information Regulations 2004 (EIR)

- 12 (4) (e)
- 12 (5) (b)

Cases:

DCLG v IC and Robinson [2012] UKUT 103 (AAC).

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22 January 2014 and dismisses the appeal in the light of the further withheld and/or redacted material that has been released to the Appellant after a review of this material by the Second Respondent was requested by the Tribunal before final determination of the appeal.

REASONS FOR DECISION

Background

1. In August 2009 Mr Kuschnir (the Appellant) contacted the Second Respondent (the Council) complaining about problems being caused to his home by water coming through a party wall shared by the adjoining property occupied by Hawk Cycles.
2. Although the Council took action in respect of this complaint the Appellant was not satisfied with the outcome.
3. There was correspondence between the Council and Hawk Cycles that included a Schedule of Works. The Council considered the Schedule had been provided in confidence. The Appellant asked for it to be disclosed to him. The Council refused, relying on Regulation 12 (5) (f).

4. He complained to the Commissioner, who agreed with the Council, but on appeal to the First-Tier Tribunal, the Tribunal (in EA/2011/0273) agreed with him. The Council subsequently disclosed the Schedule.
5. The Appellant – and this is the subject of this appeal – then made the information request detailed below.

The request for information

6. On 16 September 2012 he asked, in particular, for:

....copies of all emails and letters sent or received within Shropshire Council or in correspondence with the Information Commissioner or with anyone else in relation to this matter. Please may I also have a copy of all notes made? This request is made under the Data Protection Act 1998, the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.

7. The Council provided the Appellant with copies of the documents it held containing the information within the scope of his request but had redacted some of the information from those documents. That was on the basis that the information redacted was “internal communications” or “third-party data”.
8. At this stage the response from the Council did not mention Legal Professional Privilege but concentrated on Regulation 12(4) (e).
9. A small amount of the information was withheld under Regulation 12 (3) EIR because it was personal data of individuals other than the Appellant.
10. The Council relied on Regulation 12 (4) (e) EIR on the basis that the documents related to “internal communications”. It relied on that Regulation because it needed safe space in which to discuss freely and frankly how the issues relating to the Appellant’s complaints should be approached and resolved.

The complaint to the Information Commissioner

11. The Appellant maintained that the Council had failed to provide him with information about his key request. He was concerned that the information still held by the Council might include discriminatory comments about him and that it was biased, siding with the third party about the issues he had with his property.
12. The Commissioner considered the issues under Regulation 12 (4) (e) and Regulation 12 (3) but not Regulation 12 (5) (b), and found they were both engaged and concluded that the arguments in support of the information being disclosed did not outweigh the public interest in protecting the privileged or exempted information. Although the Commissioner's Decision Notice discusses the importance of Legal Professional Privilege [paras 24 - 27 and 36 - 37 DN] there was no formal consideration of Regulation 12 (5) (b) as such in the Decision Notice.

The appeal to the Tribunal

13. In his grounds of appeal to the Tribunal the Appellant, over eight pages of typescript, made a series of 66 points. In essence, the Appellant believed that the background circumstances indicated that it was in the public interest that the information he sought was disclosed.
14. In his response to the Commissioner's response dated 13 March 2014 he provided a further ten pages of typescript making a series of 82 points re-emphasising that he did not believe that the public interest in upholding the exceptions, and a late reliance on Regulation 12 (5) (b), outweighed the public interest in disclosing the information he was seeking.

Evidence

15. The Tribunal is necessarily constrained in how much it can comment about the information which remains “closed” after the Council reviewed all of the withheld material and released a considerable number of pages to the Appellant.
16. Much of the originally withheld material contained a high degree of duplication and some matters where reliance on the exceptions claimed were slight and unlikely to stand the kind of rigorous scrutiny, in the public interest balancing test, that the Tribunal would have applied if the review requested by the Tribunal of the Council had not taken place.
17. In the event, the Appellant now has been provided with a further 58 pages of un-redacted information in respect of his original key request.

Conclusion and remedy

18. The documents disclosed in the second round of the review by the Council either did not attract the legal privilege and were primarily administrative in nature – as opposed to containing free and frank deliberation for which a safe space needed to be preserved – or did attract legal professional privilege but, on reflection by the Council, were not such that disclosure would prejudice the course of justice or the Council’s legal rights. This was because they were primarily administrative in nature and those differed from the documents that the Council continued to withhold.
19. The Tribunal looked carefully at the new version of the documents the Council continued to withhold in reliance on Regulations 12 (4) (e) and 12 (5) (b).
20. The Tribunal has also considered the open witness statement of one of qualified lawyers and the Legal Service Managers at the Council, Timothy William Collard dated 16 July 2014.

21. The Tribunal finds that Regulation 12 (5) (b) – legal professional privilege – is the exception that is engaged in the majority of the remainder of the withheld material.
22. Without going into detail, but to give the Appellant an idea of the volume of what the Tribunal has considered, the withheld material is 107 pages.
23. There is duplication in this material. That occurs is because some documents underwent an iterative drafting process meaning, inevitably, that there were different versions with editorial corrections and adjustments.
24. The information contained in the withheld material not only engages the effect of this Regulation but is of the nature where the public interest in maintaining the exception outweighs any public interest in it being revealed.
25. It is the sort of information for which a safe space was required – including at the time of the request – to ensure that the Council could deliberate internally and with the benefit of legal advice on how best to approach aspects of the ongoing case in relation to the Appellant.
26. While the exception under Regulation 12 (5) (b) was claimed at a late stage the Tribunal agrees it is the operative exception for almost all of this information. There are a number of items that have been withheld which also engage Regulation 12 (4) (e) and where the public interest in maintaining that exception also outweighed the public interest in revealing it to the public.
27. The Tribunal is satisfied to the required standard, the balance of probabilities, that the disclosure of the now-withheld information would undermine the confidential space the communications between lawyer and client in ways which would have prejudiced the course of justice and

the Council's legal rights and the space it needed to articulate and consider its internal thoughts.

28. To the extent that the Appellant gets no more information than has been disclosed to him by the Council during the course of this appeal, and the review process, his appeal fails.

29. Our decision is unanimous.

30. There is no order as to costs.

Robin Callender Smith

Judge

30 October 2014