



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2013/0050

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER0463490
Dated: 19 February 2013**

Appellant: Dr JEREMY KLEIN

1st Respondent: INFORMATION COMMISSIONER

**2nd Respondent: SECRETARY OF STATE FOR
COMMUNITIES & LOCAL GOVERNMENT
(THE PLANNING INSPECTORATE)**

Heard at: FLEETBANK HOUSE

**Date of hearing: 12 SEPTEMBER 2013 (AND VARIOUSLY
THEREAFTER ON THE PAPERS)**

Date of decision: 6 MARCH 2014

Before

ROBIN CALLENDER SMITH
Judge

and

PIETER DE WAAL and NIGEL WATSON
Tribunal Members

Attendances:

For the Appellant: Dr J Klein in person
For the 1st Respondent: Mr A Sowerbutts, Solicitor for the Information
Commissioner, in a written response.
For the 2nd Respondent: Mr A Bates, Counsel instructed by the Treasury Solicitor

**IN THE FIRST-TIER TRIBUNAL
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Subject matter:

Environmental Information Regulations 2004

Exceptions, Regulations 12 (5)

- Legal professional privilege Regulation (5) (b)

Cases: *Bellamy & IC & DBIS* EA/2009/0070; *O'Brien & IC & DBERR* EA/2008/0011, *FCO & IC* EA/2007/0092; *Fuller & IC & MOJ* EA/2008/0005; *Department for Communities & Local Government v Information Commission and WR* [2012] UKUT 103 (AAC).

IN THE FIRST-TIER TRIBUNAL
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Case No. EA/2013/0050

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 19 February 2013 and dismisses the appeal.

REASONS FOR DECISION

Background and Request

1. During 2012 the Appellant made a complaint to the Planning Inspectorate (PINS) about their handling of a planning appeal under the Householder Appeals Service. An issue material to the complaint was whether or not vehicle crossovers were included in the Householder Appeals procedure in circumstances where they fell outside the curtilage of a dwelling.
2. In the course of correspondence between the Appellant and PINS, PINS referred to a “standard procedure which has undergone the appropriate consideration at senior management level and by the Department for Communities and Local Government.” In response, the Appellant made a request to PINS (under the Freedom of Information Act) for “all documents relevant to your internal consideration and all documents relevant to the consideration of this matter by the DCLG and their alleged approval”.
3. In their response to the Appellant’s request, PINS provided links to certain guidance documents on their website. PINS also confirmed that the inclusion of vehicle crossovers in the Householder Appeal Service (despite lying outside the curtilage of the dwelling) was based on the recollection of their Assistant Director for Planning, discussed with the Department for Communities and

Local Government (“DCLG”) during the development of the Householder Appeal Service, and that it was this recollection on which their earlier correspondence was based. However, they said they held no recorded information relating to this point.

4. The Appellant then asked whether there were any relevant meetings relating to the “recollection” of the Assistant Director for Planning as referred to by PINS, and in respect of which agendas, lists of attendees or minutes were held. PINS treated this as a request for an internal review of their earlier response.
5. In their internal review response, PINS referred, *inter alia*, to internal guidance concerning the suitability of the Householder Appeals Procedure for appeals involving vehicular access proposals. They provided the Appellant with a relevant internal advice note and a relevant extract from “Procedural Desk Instructions”. PINS also confirmed that they held “legal advice which relates to this matter” (the “disputed information” in this Appeal) and that they considered this information to be exempt under Regulation 12(5)(b) of the Environmental Information Regulations 2004 (“the Regulations”). Their reasons were set out in an annexure to their response, in which PINS explained as follows:
 - 5.1 They considered the disputed information to be environmental information for the purpose of the Regulations, and that the Regulations therefore applied to the request (rather than the Freedom of Information Act);
 - 5.2 The exception in Regulation 12(5)(b) permits a public authority to refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
 - 5.3 The disputed information was subject to legal professional privilege (more specifically legal advice privilege), and its disclosure would adversely

affect the course of justice. The exception in regulation 12(5) therefore applied to it.

5.4 In accordance with Regulation 12(1)(b), information in respect of which an exception applies may be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

5.5 In respect of this public interest balance, PINS considered that the public interest in maintaining legal professional privilege was significant and, despite the presumption in favour of disclosure under the Regulations, outweighed the public interest factors in favour of disclosure of the disputed information.

6. In response, the Appellant asked to see the disputed information and he contended that there was a public interest in its disclosure.

7. PINS referred the Appellant to their earlier internal review response, and confirmed that their position in respect of the application of the exception in regulation 12(5)(b) remained unchanged. They also referred the Appellant to relevant guidance published by the Information Commissioner (“the Commissioner”) in respect of this exception. In reply, the Appellant asked PINS to undertake another internal review.

8. PINS provided a further internal review response dealing specifically with the issue of disclosure of the legal advice contained in the disputed information. It explained that the legal advice had been provided by “a lawyer (employed by the Planning Inspectorate) to that lawyer’s client (an employee in the Planning Inspectorate who was tasked with implementing aspects of the Householder Appeals Service)” and it upheld its earlier response on the basis that disclosure of the disputed information would “have a real adverse effect on the course of justice, bearing in mind that in our legal system it is often necessary to safeguard communications between a lawyer and their client to ensure that

the client has access to full and frank advice, which in turn is fundamental to the administration of justice.”

9. In balancing the public interest factors, PINS again considered that the public interest in maintaining the exception in regulation 12(5)(b) outweighed the public interest in disclosure of the disputed information.

The Information Commissioner’s Decision Notice

10. The Appellant made a complaint to the Commissioner (now the First Respondent to this appeal). The Commissioner issued a Decision Notice upholding the decision of PINS to withhold the disputed information on the basis of the exception in Regulation 12 (5) (b). The Commissioner appears to have accepted, on the face of it, that:

- 10.1 The exception in Regulation 12 (5) (b) was “designed to encompass information that would be covered by legal professional privilege”; and

- 10.2 The disputed information “represents legal advice from a legally qualified person” and was “covered by legal professional privilege”.

11. The Commissioner considered that it was more probable than not that disclosure of the disputed information would adversely affect the course of justice and that the exception in Regulation 12(5)(b) applied to it.

12. In respect of the public interest balance, the Commissioner noted that the public interest in maintaining the exception in Regulation 12(5)(b) was particularly strong. To equal or outweigh this inherently strong public interest would in his view require factors such as the involvement of substantial amounts of money, or where a decision would affect a large number of people, or where there was evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. He did not consider that in

this case there were any such factors that would equal or outweigh the strong public interest inherent in maintaining the exception.

13. The Commissioner accepted that, in general, there was a public interest in public authorities being as accountable as possible in relation to their decisions. While the Appellant maintained that PINS was not complying with relevant legislation and that the approach taken by PINS limited representations that could be made by applicants in respect of vehicular crossovers, the Commissioner noted that the disputed information was merely advice given by one person; it was not a definitive statement of the law. PINS could choose to follow the advice or not, as it saw appropriate. It was also beyond the Commissioner's jurisdiction to form a view as to whether or not PINS was acting legally or in accordance with the relevant legislation. That was a matter for the courts to determine.
14. In his complaint to the Commissioner, the Appellant maintained that the public interest in disclosure of the disputed information was strong because it had led to a definitive position being taken by PINS. The Commissioner concluded that PINS was entitled to make decisions about how to implement its own procedures. While members of the public may disagree with such decisions, this did not mean either that such decisions were legally incorrect or that any disagreement warranted disclosure of legal advice received on the subject. Mechanisms existed to challenge decisions taken by public authorities, and the Appellant was free to seek his own legal advice.
15. The Commissioner was also satisfied that the subject of the advice contained in the disputed information remained "live" at the time of the Appellant's request and that the prejudice to be caused by its disclosure remained sufficient to warrant maintaining the exception. The Appellant did not accept that the matter could become contentious in the future, because the issue had already been determined and was not open for review. However, the Commissioner concluded that although particular cases may

have been determined, that did not mean that the issue would not arise again in the future. It could arise again in contentious circumstances, which meant that the legal advice in the disputed information remained relevant to PINS's ongoing procedures. The Commissioner accepted that PINS had been reasonably transparent about its views and the reasons for it, and it had not misrepresented the legal advice received. It was not for the Commissioner to determine whether or not the actions taken by PINS were legally correct.

16. The Commissioner again concluded that in this case there were no factors which equalled or outweighed the strong public interest inherent in the exception in Regulation 12(5)(b), and he decided that in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosure of the disputed information.

The Appeal

17. The Appellant made an appeal to this tribunal against the Commissioner's decision.
18. PINS is not a respondent to this appeal, but the tribunal's registrar issued a Case Management Note joining the Secretary of State for Communities and Local Government "by its agency The Planning Inspectorate" as the Second Respondent to the appeal.
19. The appeal hearing was attended by the Appellant and by Counsel for the Second Respondent. There was no appearance on behalf of the Commissioner.
20. Before the hearing, the tribunal had the benefit of the Appellant's written Grounds of Appeal, the Commissioner's Response, the Appellant's Reply, and written submissions on behalf of the Second Respondent.

21. The Appellant's Grounds of Appeal and his Reply to the Commissioner's Response set out the detail of the matters and factors he relies on in his appeal (as reflected also in the Commissioner's Decision Notice).
22. The main factors which the Appellant believes to favour disclosure of the disputed information are (i) a significant lack of appropriate transparency and (ii) the appearance that PINS is pursuing a policy that is unlawful.
23. The Appellant also contends, *inter alia*, that:
24. There is an obvious divergence between applicable planning legislation and PINS's procedures (as described in the advice note provided by PINS to the Appellant), that this divergence is extreme and a difference of substance rather than degree. Because there are no other documents that might reveal how PINS formulated its position on the subject in dispute between it and the Appellant, the legal advice contained in the disputed information is the only information that could shed light on the rationale for PINS's approach.
25. The methodology in PINS's internal advice note provided to the Appellant is constructed so as to make a successful legal challenge unlikely. PINS's treatment of "crossover applications" has also been confusing at times and it does not seem that their system has yet bedded down completely.
26. The Commissioner did not test the statement made by PINS that the substantive issue in dispute between PINS and the Appellant could become contentious in the future.
27. In the Appellant's view, there is a difference of interpretation of relevant legislation between PINS and the Parliamentary Secretary of State, and the legal advice contained in the disputed information has caused PINS to depart from directions given by the relevant government department. This, the Appellant says, is a matter of public interest.

28. Taken as a whole, the Appellant submits that the public interest arguments advanced against disclosure (i.e. to maintain the exception in respect of the disputed information) are weak and insufficient.
29. In addition to the written submissions received on behalf of the Second Respondent, its primary submission at the hearing was that the Tribunal was bound by *Department for Communities & Local Government v Information Commission and WR* [2012] UKUT 103 (AAC), the leading authority on the application of regulation 12(5)(b) to information which is subject to legal professional privilege.
30. The approach in that case (in considering the public interest balance in the context of Regulation 12(5)(b)) was the same as the approach applied to the qualified exemption in respect of information which is subject to legal professional privilege under section 42 of the Freedom of Information Act.
31. The Second Respondent submits that the Appellant has failed to present sufficiently strong countervailing considerations in this case to outweigh the strong public interest in maintaining the protection of privilege in respect of the disputed information. The Appellant is already aware of PINS's position on the relevant planning procedure to which the legal advice relates. He has been provided with a copy of PINS's internal guidance note, and he has also been referred to the relevant legislation. There has been no lack of transparency about PINS's position in respect of the substantive issues in dispute between it and the Appellant.
32. The Second Respondent further submits that the forum for resolving the Appellant's dispute with PINS about PINS's interpretation of the relevant planning law and processes is the Administrative Court. If the Appellant had issued a timely judicial review claim, PINS would have been required to respond to it by setting out its legal position in its summary grounds of resistance. It would be the contents of those summary grounds (and not the

contents of the legal advice in the disputed information) that would represent PINS's legal position.

33. The Second Respondent also says that disclosure of legal advice obtained in 2009 would be of limited value, even in transparency terms. It would provide some additional transparency beyond what was already in the public domain about the background to PINS's position on the relevant planning issue in dispute between the Appellant and PINS. But the same could be said in relation to almost any legal advice obtained by a public authority. The public interest considerations advanced in this appeal were similar to those in *WR*. That decision made clear that arguments about whether the public authority's position was legally sustainable did not come close to overcoming the strong public interest in upholding legal professional privilege. Accordingly, any complaint that PINS has adopted a legally unsustainable position falls properly within the jurisdiction of the Administrative Court.

Evidence

34. The Tribunal was able to see the disputed information on a closed and confidential basis.
35. Prior to the hearing, the tribunal asked the Second Respondent to clarify:
 - 35.1 Whether the lawyer who gave the advice in the disputed information held a current practising certificate as a solicitor or barrister at the time when the advice was given; and
 - 35.2 The nature of the client relationship between the author of the advice in the disputed information and the person who instructed the author to give the advice.

36. Following further discussion and enquiries made by the tribunal to Counsel for the Second Respondent in the course of the hearing to clarify these points and other aspects of the disputed information, it was agreed that the Second Respondent would provide a written response, after the hearing, to the following questions:
- 36.1 Was the person who gave the legal advice contained in the disputed information a lawyer acting in his or her professional capacity in connection with providing the advice?
- 36.2 Was the person who gave the advice contained in the disputed information in a lawyer/client relationship with the person who received the advice, and who was the client?
- 36.3 Was the lawyer required to hold a legal practising certificate at the time when the advice was given?
37. In addition, the Tribunal also asked the Second Respondent for submissions on the question of the identity of the party who was the recipient of the Appellant's request and the identity of the appropriate party to be joined as the Second Respondent in the appeal (the Secretary of State for Communities and Local Government, DCLG, or PINS). The Appellant was also notified of these questions.
38. After some time had passed following the hearing, the Tribunal was advised by the Treasury Solicitor's Department (on behalf of the Second Respondent) that the delay in providing answers to the Tribunal's questions was due to the fact that it was necessary to consider the questions asked by the Tribunal and to consult and take instructions on the relevant issues raised by those questions, not only from the Second Respondent but also more widely across Government.

39. The Tribunal then received written submissions from the Second Respondent (copied to the Appellant) in response to the Tribunal's questions.
40. The Second Respondent submits that this is determined on the basis of the correct application of the Regulations (or the Freedom of Information Act, where relevant).
41. As far as the Regulations are concerned, the Second Respondent submits that PINS is subject to the Regulations by virtue of Regulation 2(2)(a) because PINS is part of a government department (DCLG). Therefore, it submits, if it were to be considered appropriate to join the body or organisation who was responsible for answering the request, the most appropriate party to be joined would be DCLG, and the Tribunal's case management note joining the Secretary of State for Communities and Local Government as the Second Respondent should be modified to refer to DCLG. However, the Second Respondent also submits that this makes no material difference to the issues raised in the appeal and that it is also immaterial that the Appellant's request was addressed to PINS.
42. In respect of the Tribunal's questions relating to the advice contained in the disputed information, the Second Respondent confirms (supported by documentary evidence subsequently provided to the Tribunal) that the lawyer who gave the advice was a solicitor employed by the Crown who worked at PINS at the time when the advice was given, that the advice was given to another PINS official in the course of the lawyer's employment, that PINS (as an executive agency of DCLG) has no legal personality distinct from DCLG, and that the lawyer's client relationship was with DCLG.
43. The Appellant filed a response to the Second Respondent's submissions, in which the Appellant refers to the Planning Inspectorate Framework Document dated October 2012 ("the Framework"). According to section 3 of the Framework, it was "drawn up and agreed by DCLG, the Welsh

Government and PINS and sets out the formal relationship between them, including arrangements for governance, financial delegations and the payment and expenditure of public money and expectations on monitoring, reporting and exchange of information". The Framework also states that PINS is a joint executive agency of DCLG and the Welsh Government.

44. The Appellant refers to the following sections of the Framework:

45. According to section 14, the Secretary of State for Communities and Local Government is the Minister accountable to Parliament for PINS, and its policies and performance in England.

46. In respect of PINS's governance, section 30 of the Framework states that the PINS chief executive is responsible for providing effective strategic leadership on the following matters:

- ensuring PINS delivers against its strategic objectives
- ensuring an effective business planning and performance management framework is in place
- ensuring sufficient resources are available to achieve those objectives
- setting and communicating PINS's values, purpose and objectives to Inspectors, other staff and stakeholders
- monitoring and continuously improving performance and quality
- ensuring an adequate risk management framework is in place and reviewing strategic risks

- protecting and enhancing PINS's reputation for professionalism, effectiveness, integrity and efficiency
- ensuring that proper accounting procedures are in place
- ensuring that PINS's policies and strategies are consistent with those of DCLG and the Welsh Government and that its affairs are conducted with probity consistent with Managing Public Money.

47. In respect of financial management and reporting, section 39 of the Framework states that each year DCLG sends PINS a formal delegation of its administration budget for the year and a statement of any planned change in policies affecting PINS, including DCLG policy on spending controls, efficiency savings, estate management and adoption of economic shared services.

48. Section 62 of the Framework confirms that PINS staff are civil servants employed by the Crown and are subject to the Civil Service Management Code. Their existing terms and conditions of service continue to apply unless changes are made by the chief executive after prior consultation with staff, trades unions and DCLG, Cabinet Office and the Welsh Government as appropriate. PINS staff share, with other staff of DCLG and the Welsh Government, eligibility to be transferred and to be promoted elsewhere within the DCLG or Welsh Government, as appropriate, or to other Departments where opportunities exist.

49. The Appellant submits that, in view of these provisions, the statement that PINS is "part of DCLG" may be an over-simplification and that it may have been less ambiguous if the Second Respondent in this appeal was PINS itself.

50. In addition to those sections of the Framework referred to by the Appellant, the Tribunal notes that the PINS chief executive is also its accounting officer, that PINS has a board of Directors (including non-executive directors) and that it publishes annual reports and accounts. The Framework also confirms that the PINS accounting officer is personally accountable to Parliament and its Public Accounts Committee, DCLG and the National Assembly for Wales for the stewardship of the resources within PINS's control.
51. According to the Framework, the primary purpose of PINS is to deliver “key elements of the planning system under planning, housing and associated legislation” and its primary areas of activity are:
- The preparation of reports and recommendations to enable the appropriate Secretary of State to make decisions on national infrastructure projects as set out in the Planning Act 2008;
 - Making decisions on planning and related appeals, applications and orders, referring recommendations to the Secretary of State or Welsh Minister where appropriate;
 - The examination of Local Plans in England, Local Development Plans in Wales and Community Infrastructure Levy schedules.
52. The Tribunal notes that PINS is also described on its own website and on the government's website as an executive agency of DCLG and the Welsh Government. In view of PINS's constitutional arrangements and its objectives, functions and accountability as an executive agency, the Tribunal does not agree with the suggestion that PINS has no legal personality distinct from DCLG, that information requests made to PINS are effectively made to DCLG, and that DCLG is the public authority responsible for answering them. This is also inconsistent with the fact that PINS publicly recognises, on its website, its duty to answer information requests under the Regulations and the Freedom of Information Act. In its annual report and accounts it reports

on the number of requests received and handled each year. PINS also has an “access to information” page on its website, explaining how information requests may be made to PINS under the Regulations and the Freedom of Information Act. The PINS page on the government’s website also provides contact details for making information requests to PINS.

53. Accordingly, while PINS is not listed in Schedule 1 to Freedom of Information Act as a public authority for the purpose of that Act, the Tribunal considers that PINS satisfies the criteria for the definition of a “public authority” for the purpose of the Regulations, and in particular the criteria in Regulation 2(2)(c) because it is a body which carries out functions of public administration. The Tribunal also considers that, as a public authority for the purpose of the Regulations, PINS is the responsible party required to answer requests for environmental information made to it and it is also the appropriate respondent for the purpose of any complaint or appeal in relation to the handling of such requests.

Conclusions

54. On the evidence provided to the Tribunal prior to and following the hearing of this appeal, the Tribunal is satisfied that the disputed information attracts legal professional privilege and is exempt from disclosure under the exception in regulation 12(5)(b) because its disclosure would adversely affect the course of justice.
55. The Tribunal accepts that PINS has been transparent in its handling of the Appellant’s substantive complaint and his information request, and has provided him with relevant internal guidance which informs PINS’s approach to the subject of the Appellant’s complaint. The Appellant’s real challenge is against the correctness of that approach and the correctness of PINS’s interpretation of relevant legislation relating to a planning appeal process, which the Appellant may more appropriately pursue by other legal avenues.

56. The Tribunal agrees with the Commissioner that there are no factors in this case which are equal to or outweigh the inherently strong public interest in protecting and maintaining legal professional privilege, and that in all the circumstances of this case the public interest in maintaining the exception in Regulation 12(5)(b) outweighs the public interest in disclosing the disputed information.

57. The Tribunal accordingly finds that the Commissioner's Decision Notice is in accordance with the law, including the Commissioner's description of PINS as the relevant public authority, and the appeal is dismissed.

58. Our decision is unanimous.

59. There is no order as to costs.

Robin Callender Smith

Judge

6 March 2014

27-03-2014: Corrections made to text under Rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.