



IN THE FIRST TIER TRIBUNAL

Appeal No: EA/2014/0013

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FER0495197 dated 7.1.14

Before

Andrew Bartlett QC (Judge)

Anne Chafer

Andrew Whetnall

Determined on the papers

Date of decision 2 June 2014

APPELLANT:	STEVE EARL
FIRST RESPONDENT:	INFORMATION COMMISSIONER
SECOND RESPONDENT:	THE ENVIRONMENT AGENCY

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7.1.14 and dismisses the appeal.

REASONS FOR DECISION

The request, the public authority's response, and the complaint to the Information Commissioner

1. The applicant was concerned, with some others, with a licence application to the Environment Agency ("EA") concerning hydropower¹. The licence application was refused. The applicant challenged the refusal by means of judicial review in the High Court. The EA conceded that it had acted unlawfully in the way it dealt with the licence application.
2. A report was prepared within the EA into the EA's handling of the licence determination process. This included consideration of the conduct of four employees who had played a role in handling the licence application, and about whom the applicant had made serious complaints. On 12 March 2013 the applicant requested a copy of this report. This request fell to be considered under the Environmental Information Regulations ("EIR").²
3. The EA refused the request, relying on the exemptions in EIR reg 13 (personal data of which the applicant is not the subject), reg 12(5)(b) (prejudice to the course of justice) and reg 12(4)(e) (internal communications). The first of these exemptions is an absolute exemption. The EA considered that the public interest balance was in favour of maintaining the latter two exemptions. On internal review, the EA adhered to its position.
4. The applicant complained to the Commissioner. In his complaint he contended that personal data could be redacted, and the remainder of the report disclosed. During the Commissioner's investigation the EA clarified (in part) what it held, and the applicant in turn clarified that his request (a) related to the internal report which the EA said was dated in January 2012 and (b) did not extend to emails seeking legal advice, notes of meetings held as part of the investigative process, or working documents created for the purpose of obtaining legal advice on the investigation and on responding to the complaints.
5. The Commissioner decided:
 - a. Some parts of the contents of the internal report were the applicant's own personal data. These parts were not disclosable under the EIR, by reg 5(3).

¹ For the purposes of the appeal it is not necessary for us to distinguish between the applicant and those others in association with whom he acted. The complaint to the Information Commissioner was in the name of Mr Barrow. The appeal to the Tribunal was by Mr Barrow on behalf of Mr Earl.

² The request was also made under the Freedom of Information Act. The Information Commissioner subsequently ruled that the applicable regime was the EIR, not FOIA. This is not contested.

- b. The EA correctly applied reg 12(5)(b) to refuse disclosure of the remainder of the report. This was on the basis that the report was the subject of legal professional privilege, and the public interest balance did not favour disclosure.

The appeal to the Tribunal

6. The applicant does not dispute the redaction of personal data, whether his own or that of other persons. What he seeks is the substance of the report. Accordingly we need not concern ourselves with the personal data.
7. The Commissioner maintains the position in his Decision Notice. The EA relies on all three limbs of reg 12(5)(b) and on reg 12(4)(e).
8. It emerged during the course of the appeal procedures that the EA held not only the January 2012 report but also two further iterations of it, dated 1 February 2012 and 2 March 2012. The applicant understandably expressed concern that this had not emerged earlier. All three iterations were contained in the closed bundle seen by the Commissioner and the Tribunal.
9. The internal report was a draft which, after its three iterations, resulted in a final letter to the applicant dated 24 April 2012, setting out the result of the investigation. This letter was sent not under the EIR or FOIA but as a response to the complaints of misconduct.

Analysis

10. We are conscious that sometimes documents are labelled in such a way as to suggest, without sufficient justification, that legal professional privilege applies. It is necessary to consider the substance of the document, and its actual purpose. Having seen the report of January 2012 and its two iterations, we find that the EA's contention that the report is covered by legal professional privilege is genuine and is amply justified. This applies to the whole of the report. There is no part of it which was written for a different purpose and which could be separated off.
11. In our view the application of legal professional privilege is capable of bringing a matter within the terms of regulation 12(5)(b) and does so in the present case.
12. The Commissioner dealt with the public interest balance pursuant to regulation 12(1)(b) in paragraphs 19-25 of the Decision Notice. We have carefully considered the lengthy arguments put forward by the applicant, and we note the forcefulness of the applicant's concerns, but having done so we find ourselves in agreement with the Commissioner's analysis and conclusion in those paragraphs of the Decision Notice.
13. By way of further explanation, we would add that in the present case the seriousness of the allegations made against the employees added to the strength of the case for the maintenance of the exemption, since it is particularly important that a public authority should be entirely open with its advising lawyers when obtaining advice on allegations of misconduct.

14. We also consider that it would have been better if the Commissioner had specifically mentioned the presumption in favour of disclosure (by regulation 12(2)), but our judgment is that in the circumstances of the present case the presumption does not alter the correct outcome.
15. Our decision is not affected by any argument about whether all three iterations of the report fall within the scope of the request or only the first. The differences between the versions are not so great as to affect the application of the same arguments to all three versions, whether as regards the engagement of legal professional privilege or as regards the public interest balance.
16. In view of our conclusion on this issue, it is not necessary for us to consider the other matters on which the EA relies.

Conclusion

17. The appeal is dismissed.

Signed on original

Andrew Bartlett QC, Tribunal Judge