



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2013/0184

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0493009
Dated: 23 July 2013

Appellant: Rosemary de Hussey
Respondent: The Information Commissioner
2nd Respondent: Ashford Borough Council
Heard at: Ashford Hearing Centre
Date of Hearing: 15 May 2014

Before
Chris Hughes
Judge
and

Mike Jones and David Wilkinson
Tribunal Members

Date of Decision: 16 June 2014

Attendances:

For the Appellant: in person
For the Respondent: did not attend
For the 2nd Respondent: did not attend

Subject matter:

Freedom of Information Act 2000
Environmental Information Regulations 2004
Data Protection Act 1998

Cases:

Sugar v BBC and ICO {2012} UKSC 4

REASONS FOR DECISION

1. This case arises out of the planning dispute concerning holiday lets involving Mrs de Hussey and Ashford Borough Council (“the Council”) which resulted in an enforcement notice and litigation.
2. On 29 January 2013 Mrs de Hussey wrote to the Council seeking information (bundle page 55):-

Re: Under Freedom of Information Act and EIR and data protection Act 1998

Case 1CT00798 ABC v Rosemary de Hussey Buttercup Holdings Ltd.

I am making the request under the FOI/EIR and also under the DPA for personal data, for relevant information which constitutes Legal information requested by Geoffrey Searle Planning Solicitors. This FOI/EIR was originally requested on 26th of March 2010 (ref: CR/?DS21-1185-1) which I attach for your information.

To see the Evidence in Ashford Borough Letter 11 January 2010.

Re: Government Guidelines PPG118

We also request Information Under both DPA and FOI/EIR which show that Government Guidelines PPG18 were followed prior to the Enforcement Notice being issued.

3. The Council responded on 30/1/2013 and 20/2/2013 (bundle page 58-50). It addressed arrangements with respect to the DPA and then considered the information requests.
4. With respect to FOIA/EIR it confirmed that the request would be considered under EIR. It disclosed the material relevant to the first request (the evidence referred to in paragraph 4 of the letter of 26 March 2010 from Geoffrey Searle solicitors). It refused the second request (the counsel's advice referred to in paragraph 2 of the letter of 26 March 2010 from Geoffrey Searle solicitors) on the basis of the adverse effect it would have on the course of justice. The Council also refused the third request (Information relating to PPG18 compliance as requested in the complainants letter of 6 February 2011) on the basis that it was manifestly unreasonable:-

Reply of 30/1/2013

...

Your request for information under the EIR related to PPG18 compliance and the information in your letter of 6 February 2011 has been dealt with previously by supplying some of the information and refusing to disclose the remainder. You had the advantage of an internal review of the handling of that request and subsequently complained to the ICO. You then withdrew your ICO complaint. I am minded to decide that the exemption at regulation 12(4)(b) of the EIR is engaged and that your request for that information is manifestly unreasonable. In order to help me reach a decision on that point and to then balance the public interest, would you please explain why you are requesting the information again.

...

Reply of 20/2/2013

Your request for the information at point 3 has been dealt with previously by supplying some of the information and refusing to disclose the remainder. You had the advantage of an internal review of the handling of that request and subsequently complained to the ICO. You then withdrew your ICO complaint and have now repeated your request for the information at point 3. I informed you that I was minded to decide that the exemption at regulation 12(4)(b) was engaged and that your request to the information was manifestly unreasonable. I invited you to explain why you were requesting the information again and you declined to do so.

Dealing with your request again will result in the council incurring additional costs and officers having to spend time on it, which will divert their attention from other matters. As the court proceedings under reference ICT00798 have been discontinued, I consider your request lacks any serious purpose or value. As you gave up the opportunity to secure the information through your complaint to the ICO but have requested the information again from the Council, I consider your request is obsessive and amounts to harassment of the Council. Your request is therefore manifestly unreasonable and the information is exempt from disclosure under regulation 12(4)(b)..

5. Mrs de Hussey complained to the Commissioner who investigated. On 3 May 2013 the Council wrote to Mrs de Hussey with respect to the third request; it sent a bundle of correspondence to those with an interest in the relevant property (including to her) and a copy of the delegated authority authorising the service of an enforcement notice in respect of the property which it had already provided her with.

6. On 7 May 2013 the Commissioner wrote to Mrs de Hussey:-

I am writing in relation to your complaint about Ashford Borough Council's handling of your request for information.

I note that the Council has now, happily, overturned its previous decision to withhold the information specified in part three of your request, namely information relating to PPG 18 compliance. I note that the Council has now provided this information to you.

However, in relation to the legal advice requested in part two of your request, the Council has confirmed that it intends to continue relying upon the course of justice exception....

Having considered the above, my initial view is that any decision notice issued by the Commissioner would be likely to uphold the Council's application of this exception to the withholding of information. In view of this, my recommendation would be that you withdraw your complaint and allow me to close your case.

Please let me know how you would like to proceed within 10 working days..

7. Mrs de Hussey did not reply to this letter. On 29 May 2013 the Commissioner wrote again (bundle page 96)-

Further to my previous e-mails, as I had not heard back from you I am assuming that you are happy for me to close the case. Your complaint to case has now been closed and the Commissioner will not take any further action in this regard.

8. Very belatedly Mrs de Hussey sent an e-mail on 3 July 2013 to the Commissioner. This stated:-

I am far from happy with my papers sent from Ashford Borough Council. There is no basis for using "upon the course of justice exception (regulation 12(5)(b)) to withhold this information", as the legal department are well aware that not only

was the injunction lifted as soon as the holiday let planning was given. The Barn in question was sold about 3rd May which they have been well aware of for the last six months negotiations with them and the receivers. There is therefore no reason not now to give the information that has been withheld.

I would like this to be properly investigated as to why they have refused to send the documents I had asked for.

I have further written to their legal department to request this information and had hoped that would be sufficient.

- 1. Pre-action complaint by neighbours*
 - 2. proof of ABC action to follow the government guidelines PPG18 compliance.*
 - 3. My personal Council Tax refund due to me - no documents have been sent - back to 1993/4.*
9. In the light of this e-mail the Commissioner issued his decision notice on 25 July 2013. In his decision notice he set out the "scope of the case":-
- 7....
- 8. During the course of the Commissioner's investigation the council disclosed the information requested in part of the request, overturning its reliance on the exception for manifestly unreasonable requests.*
- 9. On the basis of the complainant's submissions, the Commissioner has concluded that this investigation should consider whether the Council has correctly applied the course of justice exception to refuse information requested in part 2 of the request.*
10. In his decision notice the Commissioner therefore considered solely the adverse effect on the course of justice caused by disclosing the document. He provided a history of the ongoing dispute, reviewed the law with respect to adverse effect and weighed how the public interest lay.
11. He noted that the document was advice from a barrister to the Council on the legal issues arising from the question of whether or not there had been a breach of planning control. He concluded that the disclosure of the advice raised a real potential that the Council would be discouraged from seeking legal advice in the

context of contentious matters and damage its interests and inhibit the effectiveness of its public function. He concluded that it was more likely than not that disclosure of the withheld information would result in an adverse effect on to the course of justice. The Council argued that the enforcement notice was still in force and the advice was of general applicability and significant since there were other dwellings in the Council's area which could be used as holiday lets. The advice was such that the Council could rely upon it when considering similar alleged breaches.

12. In weighing the public interest, having considered the adverse effect suggested by the Council and the relevant law the Commissioner looked at the public interest in favour of disclosing the information-including the scrutiny of the public authority's decisions and the interest in transparency. He noted that Mrs de Hussey had argued that the Council might not have followed proper procedures.
13. Having taken into account the various arguments he acknowledged that Mrs de Hussey had a personal interest in accessing the information. He concluded he had not been presented with any compelling evidence that the enforcement notice had not been properly issued. He noted that the planning appeal process provided a mechanism to address such issues and that any concerns Mrs de Hussey had about maladministration could be progressed through means other than under EIR. He concluded that the complainant's interest together with the broader public good did not tip the balance in favour of disclosure in this case and the public interest favoured maintaining the exception.
14. There was considerable delay in filing an appeal. Various extensions of time were granted by the Tribunal. Mrs de Hussey finally lodged her Grounds of Appeal in a document variously dated 1 and 2 January 2014. While in the Grounds of Appeal she made various allegations of considerable gravity against the integrity of the officers of the Council the Grounds of Appeal appear to be:
 - The litigation and enforcement notice to which the legal advice related had come to an end therefore the legal privilege argument could not apply.
 - With respect to PPG18 she asserted that the Council "has not been frank with the court by refusing information which should be in the public domain"

- she sought a refund of council tax and raised other matters

15. On 16 January 2014 the Chamber President directed that the notice of appeal stand as the grounds of appeal and restricted the appeal to the first two bullet points.
16. In his response to the appeal the Commissioner maintained his position. He confirmed that he had sought information from the Council about the points raised in Mrs de Hussey's July response and the Council had confirmed (three days before he issued his decision notice) that the enforcement notice had not been withdrawn and would apply to all current and future owners and that the legal advice was not site-specific. He reaffirmed his position with respect to legal advice disclosure. With respect to the second issue the Commissioner replied:-
- 26 It is not now clear what point the appellant seeks to make in relation to the PPG18 information. The appellant suggests that the Council has refused to disclose the PPG18 information and used "legal privilege to block the information". This is not the case. The Council has not sought to claim any exemption in relation to the PPG18 information. The council disclosed the PPG18 information to the Appellant on 3 May 2013 (and on previous occasions).*
17. The Council adopted the Commissioner's argument in its defence and confirmed the factual position that an enforcement notice remains until it is withdrawn and in this case it had not been withdrawn; however an injunction which the Council obtained had been discharged by the Court at the Council's request. In addition the Council applied to strike out the second head of the appellant's case on the basis that:-
- 9. It seems from paragraph 9 of the decision notice that the Appellant's application in relation to part 3 of the request was not included in the decision because it appeared to the Commissioner that the application had been withdrawn or abandoned. As a consequence, the Commissioner was not obliged to make a decision in relation to it by virtue of section 50(2)(d).*
18. Mrs de Hussey resisted the application to strike out on the basis that as a litigant in person she had no knowledge of the ICO or the tribunal and had not understood the implications.

19. Mrs de Hussey applied to the Chamber President for an adjournment to permit attendance of a witness. This was refused on grounds of proportionality and that any evidence could be provided in writing.
20. Mrs de Hussey renewed this application before the Tribunal. She stated that the witness would give expert evidence with respect to planning law in relation to what was expected of a council in deciding to take enforcement action. The Tribunal declined to adjourn for the attendance of the witness on the basis that his evidence concerned the merits of the planning dispute and was not relevant to the issue before the Tribunal.
21. In her evidence and submissions Mrs de Hussey focussed on the merits of the planning dispute. She claimed that she had never been properly served with documents. She claimed that there had been an agreement to exchange legal advice – she based this on an exchange of emails which did not support that conclusion.
22. While the evidence which Mrs de Hussey gave on the point of the PPG18 issue was somewhat confused, the tribunal was satisfied that the underlying issue was that Mrs de Hussey disagreed with the Council's evaluation of the merits of the planning issue. She did not dispute that she had received the communications the Council had sent her, rather she disputed the value or significance of them because she disagreed with the contents. She made allegations of misconduct which seem to flow from her distress at the difficulties the planning dispute had caused her rather than have an objective basis.
23. The Tribunal considered whether the Commissioner had erred in law in his Decision Notice by not considering the issue of PPG18 beyond finding that the Council had complied with the request. The Council interpreted the Commissioner' approach to the issue as being that Mrs de Hussey had withdrawn or abandoned the issue under S40(2)(d). Since the right of appeal to the Tribunal only arises where the Commissioner has issued a decision notice, then as a matter of law no appeal lies to this Tribunal (*Sugar v BBC and ICO*). The Tribunal is satisfied that this is the correct interpretation of the binding authority. The second head of appeal; with respect to PPG18, must fail.

24. However the Tribunal also considered whether, if it had erred in law on this point, Mrs de Hussey had indeed withdrawn or abandoned the issue. Her e-mail of 3 July was a reply to an e-mail setting out the basis upon which the Commissioner was proceeding. Mrs de Hussey did not challenge that and focussed on the issue of legal privilege. She then informed the Commissioner that she had written to the Council about three other issues. The second issue was differently formulated from the original request and placed a different emphasis on it. The way Mrs de Hussey identified it in the 3 July e-mail was to indicate it was a different request from the request which was the subject of the complaint. The previous conduct of Mrs de Hussey in pursuing disclosure and then abandoning the exercise (detailed in the council's response to her on 20/2/2013 above) demonstrated an inconsistency of purpose and a preparedness to abandon her requests for disclosure. The Commissioner was correct in concluding from the reply and its context that Mrs de Hussey was only pursuing the legal privilege issue.
25. With respect to the course of justice her case was that the Council was covering up their wrongdoing. She claimed that she had the advice of two barristers that the Council had got it wrong. She felt that the Council was "covering up". She felt that there was "nothing behind the enforcement notice" (by which she meant that the council had received no complaints) She stated that "a planning lawyer lied to the court." She also stated with respect to the legal advice that "no one is asking for it to be broadcast in the public domain".
26. The tribunal was entirely satisfied that Mrs de Hussey was attempting to re-argue the planning dispute in a different forum. While there is a general public interest in the transparency of the proceedings of public bodies, her argument for disclosure was driven by a personal sense of grievance based entirely on the proposition of serial misconduct by the Council and its officers. She was able to produce not one iota of evidence to support that proposition. She further argued that since the litigation was concluded the legal advice was no longer current. She was unable to accept the fact that an enforcement notice had been made and the enforcement notice was based on the property and its use and therefore the legal advice remained "live". Furthermore subsequent to the hearing the tribunal considered the legal advice in question which, as the Commissioner and the

Council correctly stated, has relevance beyond the specific case in which it was obtained. For that reason to it remains live advice.

27. The tribunal was satisfied that Mrs de Hussey had failed to make out a case and that the decision notice was correct in law. The tribunal accordingly dismissed the appeal.

28. The decision of the tribunal was unanimous.

Judge Hughes

[Signed on original]

Date: 16 June 2014