



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0043

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50509472
Dated: 28 January 2014**

Appellant: DAVID ROBERTS

Respondent: INFORMATION COMMISIONER

On the papers: FIELD HOUSE

Date: 13 JUNE 2014

Date of decision: 7 JULY 2014

Date of Promulgation: 10 JULY 2014

Before

ROBIN CALLENDER SMITH
Judge

and

John Randall and Marion Saunders
Tribunal Members

Written representations:

For the Appellant: Mr David Roberts

For the Respondent: Ms Helen Davenport, Solicitor to Information Commissioner

Subject matter: FOIA 2000

Qualified Exemptions

- s.42 Legal Professional privilege

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 28 January 2014 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr David Roberts (the Appellant) on 16 April 2013 asked the London Borough of Camden (the Council) for advice and reports in respect of a particular property and its perimeter walls. The Council responded providing some information and stated it did not hold any further information.
2. When the Appellant complained to the Commissioner he made it clear that the information that he wished disclosed to him was

copies or summaries of the two sets of professional advices from Messrs Landers for which they invoiced my building the amounts that I specified in my original request.
3. During the Commissioner's investigation the Council confirmed that a "preliminary view of an acceptable schedule of dilapidations" (the Schedule) had been sent by Landers to a Council surveyor on 27 April 2007.
4. If it was held then it would be exempt from the scope of the requests by virtue of s.42 FOIA (legal professional privilege) or by Regulation (12 (5) (b) of the EIRs.

5. The Commissioner concluded that the information relation to the external perimeter walls should have been considered under the EIRs but the party wall information had been correctly considered under FOIA.
6. Section 42 (1) was engaged in respect of the Schedule and the balance of the public interest lay in favour of maintaining the exemption.
7. Having investigated the nature and scope of the search carried out by the Council the Commissioner concluded that it did not hold any further information within the scope of the request other than the Schedule.

The appeal to the Tribunal

8. The Appellant's Notice of Appeal – together with attachments – runs to 48 pages. It includes extensive background detail in relation to the property in question. In summary the Appellant's points are:
 - (1) He objects to the Commissioner's conclusion that the Council could lawfully withhold the information (or not have to obtain copies) of the originals of written advice, related reports and similar documents which the Council had previously commissioned from consultants and experts about an ongoing structural issue effecting an exterior party-wall. This was despite "a majority share of the related cost of obtaining the Information having been directly charged" by the Council under "threat of forfeiture-from the relevant estate's Lessees (including the Applicant) who have a direct and significant interest in the resolution of the on-going structural issue."
 - (2) Legal privilege had been claimed by the Council despite the fact that any future litigation concerning the party-wall arose solely because it also had a legal interest in the estate management of the property on the other, offending side of the wall. The Council had argued that its dual roles created a conflict of responsibilities which could lead to litigation against it by third parties, such as by its Lessees (including the Applicant), if they were given access to the Information.

- (3) In short, The Commissioner had decided that the Council had no obligation to replace information that once existed but had been mislaid or prematurely destroyed.
- (4) The Appellant - an original lessee within the Building since 1972 - won the auction for the Freehold Reversion in 2004 and then purchased the Freehold of the building and its surrounding estate area through a family-owned limited liability company incorporated in England. The Appellant had sought to act in the best interests of - and with the approval of – the majority all the building's residents who relied on the Appellant to supervise Camden's estate management under the terms of the Headlease. The 13 Lessees paid in excess of 70% of all the estate management costs of the building (after estate management charges were taken into account). The Council claimed that this was the only property for which it has responsibility where the interests of its Freeholder and its Lessees were aligned in such a way.
- (5) The Appellant stated that the Council had frequently failed to keep to statutory time limits for issuing information and rarely answered any questions from the Building's Lessees and only rarely agreed under to meet them “normally at the Town Hall rather than onsite” and only for short prescribed time slots which were “insufficiently long for the purpose of the meeting”.
- (6) In autumn 2006, the Appellant arranged for a comprehensive survey of the building to be carried out by a professional surveyor. The Council had been invited to participate but declined to do so. It challenged that Surveyor's comments and his remedial suggestions and said that it would commission its own structural report on the state of the wall.
- (7) It is that situation which – eventually – led to the request for information from the Council. An investigation into who was advised of what, and by whom, and when was of importance to the Lessees. The Appellant believed the Lessees had been “severely financially harmed” by the

Council's conduct and that it would seek to charge the Lessees with the major cost of repairing or reconstructing the wall whenever that is done in the future. For that reason, Landers' report on who was responsible for the on-going damage to the wall was relevant to the Lessees' liability.

- (8) The Appeal in respect of the reasons for keeping the Landers' advice private raised important points of information disclosure policy with wide ramifications.
 - (9) The Appellant wanted a Direction requiring the Council i) to obtain a copy of all the paperwork which is on Landers' file and was sent by Landers to Camden about or relating to the Building's leaning party wall, and ii) to make all such paperwork available to the Building's Lessees who had contributed to their original acquisition cost.
 - (10) The risk of possible litigation only arose because Camden had a material conflict of interests which was the reason that the fullest obligation of disclosure should be applied. That was the reason for the Appeal.
9. The Appellant made further detailed comments – on the same issues - in response to the Commissioner's reply to his Grounds of Appeal.

The questions for the Tribunal

- 10. Whether the public interest in favour of maintaining legal profession privilege outweighed the public interest in disclosure?

Conclusion and remedy

- 11. The existing case law from the Tribunal's cases relating to s.42 FOIA, the EIR equivalent of Regulation 12 (5) (b) and more generally in relation to legal professional privilege is well-established.

12. The Tribunal's consistent approach to the public interest balancing exercise (affirmed in the High Court in *Department of Business Enterprise and Regulatory Reform v IC & O'Brien [2009] EWHC 164 (QB)*) is summarised:

....although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption [44]. Legal advice which is very old or no longer current will carry less weight [45].
13. In another case (*Department of Communities and Local Government v Information Commissioner & WR [2012] UKUT 103 (AAC)*) the Upper Tribunal stated that factors may relate to both the general impact and the impact in a specific case, such as

if the dispute to which the advice relates is still live at the time of the request, it may be considered unfair that the requester should have the advantage of access to the authority's advice, without affording the authority the same advantage [46].
14. In an email dated 14 March 2014 the Appellant stated:

Whilst it would be interesting to see what Landers said in 2007....that Schedule is not of material importance to me. I want to know what Landers *advised* about the outstanding party-wall issue.
15. The Tribunal is satisfied that the Council's response to the Commissioner's questions make it clear that the Schedule was "prepared in contemplation of litigation".
16. The overall history of this matter and the background disagreements between the Appellant and the Lessees on one side and the Council on the other make that particularly likely.
17. This is not a *Mersey Tunnel* situation. There is no substantial impropriety which would engage that case in this context. The Tribunal notes that the Schedule has been superseded by two reports prepared by Ellis & Moore. The first of those has been disclosed to the Appellant. The second is the subject of a separate FOIA request.
18. The Decision Notice in this case rightly accorded a strong public interest to the maintenance of legal professional privilege, as required by *O'Brien*

and *DCLG*. The public interest in disclosure is not outweighed by the strong public interest in maintaining the exemption.

19. The fact that the Council charged the Lessees for the work undertaken by Landers only highlights the fact that there may be actual litigation in the future between the parties and this strengthens the force of the legal professional privilege being claimed in this case.

20. For all these reasons the appeal is dismissed.

21. Our decision is unanimous.

22. There is no order as to costs.

Robin Callender Smith
Judge
7 July 2014