



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

Case No. EA/2015/0033

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FER0529022
Dated: 19 January 2015**

Appellant: Clive Evans

Respondent: The Information Commissioner

Heard at: Hertford Magistrates Court

Date of hearing: 22 June 2015

Date of decision: 26/06/2015

**Before
Chris Ryan
(Judge)
and
Marion Saunders
Pieter de Waal**

Attendances:

The Appellant appeared in person.
The Respondent did not appear and was not represented.

Subject matter:

EIR Exceptions:
Legal professional privilege Reg 12(5)(b)
Public interest test, Reg 12(1)(b)

Cases: *DCLG v Information Commissioner & WR* [2012] UKUT 10
(ACC),
Foreign and Commonwealth Office v Information Commissioner
EA/2007/0092

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. We have decided that Aylesbury Vale District Council (“the Council”) was entitled to refuse to disclose correspondence passing between a solicitor in its employment (“the Solicitor”) and various members of its planning department. The correspondence was protected by legal professional privilege, so that an exception to the obligation to disclose arises under regulation 12(5)(b) of the Environmental Information Regulations 2004 (“EIR”), and the public interest in maintaining that exemption outweighs the public interest in disclosure.

Background Information

2. In September 2012 the Appellant’s solicitor was in communication with the Council’s Planning Department about planning issues affecting the Appellant’s property. The Appellant had carried out development at the property, which the Council considered was contrary to planning law. By that date the Council’s decision on the matter had been appealed to an Inspector, who had decided that the development had not been authorised. The Council was considering the issue of an Enforcement Notice (requiring the unauthorised construction to be demolished) and the response it should make to any court proceedings challenging the Inspector’s decision. There were also issues between the parties as to the precise scope and effect of the Inspector’s decision.
3. A meeting took place on 9 September 2012 between the Appellant’s legal representative and the Solicitor. As the Appellant made clear to us during the course of the hearing of his appeal the meeting had been proposed by him and its purpose was to see if a lawyer to lawyer dialogue might resolve a difference of opinion as to the meaning of a particular statutory provision.
4. At that time, and over subsequent months, a number of internal emails were exchanged between the Solicitor and his in-house clients and draft documents were prepared by him. The emails recorded advice by

the Solicitor on legal, procedural and evidential issues arising out of arguments raised by the Appellant and his legal representative. These included the Appellant's argument that:

- a. the planning department's original decision had contained errors,
 - b. the Council had been inconsistent in its approach to development at his property (when compared with the planning permission granted to another property in the vicinity);
 - c. members of the Council's planning team had been uncooperative; and
 - d. the Council had shown bias against the Appellant.
5. In October 2012 the Council became aware that the Appellant had issued judicial review proceedings in respect of the Inspector's decision and the Solicitor provided internal advice by email on the Council's legal and procedural position in relation thereto. He also provided advice on correspondence received from the Appellant's solicitor exploring the possibility of the parties reaching a compromise agreement and provided reports of his communications on the subject with the Appellant's solicitor.
6. The Solicitor's work included the preparation of a lengthy letter he drafted and submitted to his colleagues before it was finalised and sent to the Appellant's solicitor on 5 December 2012. He continued to advise, up to at least the end of February 2013, on correspondence received from the Appellant and/or his solicitor complaining about a number of aspects of the Council's handling of planning matters affecting the property. The complaints, which included an allegation by the Appellant's solicitor that a planning officer's report to those who made the decision in dispute was deliberately misleading, were referred by the Appellant to both the head of the Council's legal services and to the Local Government Ombudsman.

The Appellant's request for information

7. In early March 2013 the Appellant inspected the Council's files. By an email sent by the Appellant on 5 March 2013 to a member of the Council's staff, who we will identify only as "planning officer A", the Appellant complained that:

"...there is missing information with you, [planning officer B], [the Solicitor] and [planning officer C]. Accordingly I would now make a Freedom of Information request to search all the e-mail files on your respective computers. It appears that certain specific and relevant information has been deliberately withheld by you and these parties to stop me accessing all the information under the Freedom of Information Act I am entitled to.

I say the above as the draft letter from [the Solicitor] dated 21 November 2012 sent to [planning officer D], [planning officer E], [planning officer C] and [planning officer A] that he was concocting is missing and there is only the final version sent out to my planning lawyer the 5th December 2012 after you all had your input! Also missing is the notes of the meeting he had with you all on that same day.”

8. On 18 March 2013 the Appellant clarified that his information request was for material in the “*period from 1st July 2012 to date...*”. He also highlighted certain correspondence which he would expect to be included. His e-mail on this read:

“We have identified that on the 21st November correspondence between [the Solicitor] and the officers [planning officers A, E, C and D] concerning a draft response with comment in red and their responses.

Correspondence between [the Solicitor] and [planning officer A] – subject Counsel’s opinion – 11th to 21st January 2013”

9. The Council sent its formal response to the information request on 9 May 2013. It disclosed some of the requested materials but declined to disclose that which it said was subject to legal professional privilege, with specific reference to the materials identified in the Appellant’s email of 18th March 2013.
10. The Council interpreted further correspondence from the Appellant complaining about the handling of his information request as an application to the Council to conduct an internal review of its decision, specifically focussed on the refusal to disclose correspondence between the Solicitor and the planning officers on the basis that it was covered by legal professional privilege. On 19 July 2013 a director of the Council wrote to the Appellant to report on the outcome of the internal review. His conclusions were that:
- a. The requested information constituted environmental information and therefore fell to be considered under EIR;
 - b. The Council’s obligations to disclose requested information under EIR did not apply if an exception applied and the public interest in maintaining the exception outweighed the public interest in disclosure;
 - c. The Council relied on the exception provided under EIR regulation 12(5)(b) (disclosure would adversely affect the course of justice), which applied to, among other things, material covered by legal professional privilege;
 - d. The Council had been entitled to rely on that exception as the public interest in maintaining the exception outweighed the public interest in disclosure.

The law applying to the request for information and the Council’s refusal to disclose it.

11. EIR regulation 5(1) requires public authorities that hold environmental information to make it available on request. That obligation is expressed to be subject to various exceptions set out in Part 3 of EIR.
12. The exception relied on by the Council is to be found in regulation 12(5)(b) which entitles a public authority to refuse to disclose environmental information:

*“...to the extent that its disclosure would adversely affect –
...
(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry or a criminal or disciplinary nature...”*

It is accepted that the exception applies to, among other things, information covered by legal professional privilege.

13. Regulation 12(1)(b) provides that a public authority may only rely on an exception to refuse disclosure of requested information if:

“in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

The Information Commissioner’s investigation and Decision Notice

14. The Appellant complained to the Information Commissioner about the way in which the Council had handled his information request and, following an investigation, the Information Commissioner issued a Decision Notice on 19 December 2015, in which he concluded that the Council had been entitled to refuse the information request.
15. The Decision Notice recorded that the requested information constituted environmental information (which is not disputed) and that EIR regulation 12(5)(b) applied to it as it fell within the definition of legal professional privilege and its disclosure would have an adverse effect on the course of justice. Having thus decided that the information requested was subject to an exception the Information Commissioner went on to consider the public interests in favour of maintaining the exception and those in favour of disclosure. He took into consideration:
 - a. The inherent public interest in openness and transparency in respect of a public authority’s activities;
 - b. The importance of disclosure if there were clear indications that a public authority appeared to be pursuing a policy that was unlawful or on which it had ignored legal advice (although he found no evidence of that in this case);

- c. The particular significance of the Appellant's complaint that the Council was biased against him (although he again found no evidence of that);
 - d. The danger that disclosure would weaken the general principle behind the concept of legal professional privilege, particularly in a case, such as this, involving complex and contentious issues in the field of planning control and enforcement;
 - e. The potential harm to the Council's ability to defend itself against any legal challenge brought by the Appellant, if disclosure were made (particularly if it were not reciprocated by disclosure of equivalent communications between the Appellant and his legal representative);
 - f. The fact that the planning appeal process provided mechanisms for addressing concerns such as those that the Appellant had raised, and that the Appellant had availed himself of some of them.
16. Ultimately the Information Commissioner decided that, on the facts of the case before him and on the basis of his own inspection of the withheld information, the public interest in disclosure did not equal the strong public interest in maintaining the Council's right to consult with its lawyer in confidence.

The appeal to this Tribunal

17. On 6 February 2015 the Appellant lodged an appeal against the Decision Notice with this Tribunal. Appeals to this Tribunal are governed by FOIA section 58, adapted to apply to cases falling under EIR. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
18. The Appellant exercised his right to have his appeal determined at a hearing. The Information Commissioner submitted a written Response to the appeal but decided not to be represented at the hearing. He did, however, cooperate in the preparation of a bundle of relevant material which was made available to us. We were also provided with a closed bundle, containing the communications between the Solicitor and his colleagues at the Council, which had been withheld. The obvious need to avoid pre-judging the outcome of this Appeal meant that the closed bundle could not be made available to the Appellant for the purpose of the hearing.
19. The Appellant raised a number of issues in his Grounds of Appeal. He supplemented his submissions in a written Reply to the Information

Commissioner's Response and in the course of discussing his appeal with us during the hearing. We will deal with each issue in turn.

Issue 1: does the withheld information fall within the definition of legal advice privilege?

20. Legal advice privilege applies to communications between a lawyer and his/her client if they are confidential and written to, or by, the lawyer in a professional capacity and for the purpose of getting legal advice or assistance for the client. The Appellant's Grounds of Appeal did not address this issue but in making his submissions at the hearing the Appellant was concerned that the Solicitor, as a member of the Council's staff communicating with his planning officer colleagues, may have strayed beyond his role as lawyer and commented on commercial or political issues, so that privilege under this heading would be lost. In light of that suggestion we have considered the copy communications in the closed bundle and taken particular care to satisfy ourselves that all the advice and assistance provided by the Solicitor may properly be characterised as legal advice given in a professional capacity.

Issue 2: does the withheld information fall within the definition of litigation privilege

21. Communications between a lawyer and either his/her client or a third party are privileged if they came into existence at a time when litigation was contemplated or commenced and were created with a view to such litigation. The Appellant argued that the lawyer to lawyer conversation referred to in paragraph 3 above was the only issue with which the Solicitor was involved and that there was no prospect of that leading to litigation. But his argument was based on an incorrect premise – that the process of appealing a planning decision to the Planning Inspectorate was not the sort of process which could properly be characterised as "litigation" for the purposes of attracting privilege. We believe that it is. Moreover, the correspondence between the parties which we have seen makes it very clear that the Council believed that it was at risk of legal challenge and litigation being instigated against it, and that it was justified in that belief. The correspondence from the Appellant and his solicitor was highly critical of and challenging against the Council's staff, as we have mentioned in paragraph 6 above, and fully justified the Council's belief that litigation was a real prospect.
22. The Appellant again attempted to limit the scope of privilege in this case to just the issue discussed at the lawyer to lawyer meeting. However, it is for a lawyer's client to determine the remit of his advice, not any third party. And, as we have made clear in paragraphs 3-6 above, the Solicitor provided advice and assistance on a wide range of issues relating to the Appellant's planning matter generally, all of which were potentially contentious. In one respect the prospect of litigation became reality when, in October 2012, the Appellant sought judicial

review of the Inspector's decision. The fact that the Council was not named as a party to that application, and chose not to attempt to be joined, does not alter the fact that it had a material interest in the outcome and that its legal advice in that respect was covered by litigation privilege.

23. For these reasons we have concluded that the withheld information is covered by litigation privilege as well as legal advice privilege.

Issue 3: would disclosure have the adverse effect required to justify applying the regulation 12(5)(b) exception?

24. Our attention was drawn by both the Appellant and the Information Commissioner to the Upper Tribunal's decision in *DCLG v Information Commissioner & WR* [2012] UKUT 10 (ACC), which imposes on us an obligation to determine, not just whether one or both of the forms of privilege apply to the withheld material, but also whether disclosure would have an adverse effect on the matters specified in regulation 12(5)(b). The Upper Tribunal's decision included the following passage:

"It is in our judgment clear that the factors which can be taken into account in determining whether the course of justice would be adversely affected by disclosure include adverse effects on the course of justice in the particular case, such as that it would be unfair to give the requester access to the public authority's legal advice, without the public authority having the corresponding benefit.... However, it would of course have to be borne in mind, when considering the significance of an adverse effect on the course of justice in the particular case, that the exception is only engaged if the course of justice would be adversely affected. We agree with the decision in Maiden EA/2008/0013 (15 December 2008) that this means that, at the material time, the adverse effect must be more probable than not."

25. It is evident to us, from reading the communications between the Appellant and the Council, that the Council would be placed at considerable disadvantage, in both any litigation which ensued and in its attempts to deal with the various complaints and criticisms directed at it, if the Appellant were to be provided with details of the legal advice it received during the relevant period. The Appellant has already relied upon a small amount of correspondence, for which privilege was inadvertently waived, as the basis for an attack on the Solicitor for adopting the entirely honest and proper process of discussing a draft letter with his clients before it was finalised and sent to the Appellant's solicitor. We have no doubt that, if the undisclosed confidential advice were also to be disclosed, the Appellant would similarly look for material with which to impugn the honesty and professionalism of the Council's staff. We should add that our own inspection of the withheld

information demonstrated to us that it disclosed nothing that would justify criticism against the Council's internal handling of the matter, and accordingly we perceive that one adverse effect of disclosure would be the unnecessary time and cost that the Council would have to expend to defend itself against such further criticism, for which we can see no basis.

26. Disclosure of this type of internal legal advice material might also set a precedent, which would have a more general adverse effect on the right of all planning authorities to seek and receive legal advice with an expectation that it would remain confidential and would not become available to those who wished to supplement their normal appeal rights with satellite claims designed to put pressure on those making or enforcing planning decisions.

Issue 4: in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosure (regulation 12(1)(b)), bearing in mind the requirement to apply a presumption in favour of disclosure (regulation 12(2)).

27. The Appellant relied on the decision of a differently constituted panel of this Tribunal in the case of *Foreign and Commonwealth Office v Information Commissioner EA/2007/0092*, which included this passage:

“What sort of public interest is likely to undermine the maintenance of this privilege? There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained.”

28. The Appellant presented two arguments arising from that broad guidance. First, he argued that the Council should not be entitled to rely on the exception because it had been guilty of bias and had formed a perverse intention to defeat his planning application. We have carefully reviewed the materials in both the open and closed bundles. We have found no evidence whatsoever to support the Appellant's allegations in this respect and accordingly reject the argument.

29. The second argument put forward by the Appellant was that the Council's own code of conduct and the National Planning Policy Framework imposed on the Council an obligation to adopt a cooperative attitude to planning applications and to seek to resolve problems rather than to create them. The Appellant argued that the Council had failed to comply with those obligations both in general and by particular reference to its refusal to resolve the point of

disagreement between the parties' legal representatives by accepting an opinion which the Appellant obtained from a senior barrister in the planning field. However, we find nothing inappropriate in the stance adopted by the Council in this regard. The parties had not agreed to accept the opinion of a third lawyer as binding, and the Council was not involved in either preparing instructions submitted to him or debating the point with him. It was perfectly open to the Council and in its right to decide that, whatever the standing of the individual, it preferred its own interpretation of a provision which, as the Appellant explained to us, was not the subject of weighty case law authority. Accordingly we reject the Appellant's second argument also.

30. The Appellant also urged on us the requirement to apply a presumption in favour of disclosure and we fully accept that we are required to do so and to consider (as the Information Commissioner did in his Decision Notice) the public interest in the business of a public authority being conducted with openness and transparency. However we also bear in mind that the right of any person or organisation to seek and receive legal advice and assistance in confidence is a fundamental right at common law. On the particular facts of this case the factors we have considered above, when reviewing whether disclosure would create an adverse effect on the course of justice, add weight to those general public interest factors in favour of maintaining legal professional privilege.
31. It was suggested to us by the Appellant that the public interest in maintaining the exception was diluted by the fact that the parties were already well aware of the issues arising from the interpretation of the statutory provision referred to above and that nothing new would be learned if we ordered disclosure. However, that argument takes us back to the Appellant's suggestion, rejected in paragraph 21 above, that we should limit our focus to just the narrow issue which he believes the Solicitor had been brought in to consider. As we have made clear, the Council sought advice on its dealings with the Appellant in general and the withheld material (and its disclosure) would not therefore be limited in the way the Appellant has suggested.
32. Our conclusion, having given careful consideration to the Appellant's arguments, is that we have seen no evidence and heard no argument that leads us to believe that the Information Commissioner fell into any error in his careful analysis of the public interest factors for and against the maintenance of the exception. He was right to conclude that the exception applied to the withheld information and that the public interest in maintaining the exception outweighed the public interest in disclosure.

Conclusion

33. In light of our findings in respect of each of the issues above we conclude that the Council was entitled to refuse disclosure of the

withheld information and that the appeal should therefore be dismissed.

34. Our decision is unanimous.

.....

Judge
2015