



Neutral Citation Number:

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

Appeal No: EA/2017/ 0063

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS550630581
Dated: 23 March 2017

Appellant: Terence Andrew

Respondent: The Information Commissioner

2nd Respondent: Department for Transport

Heard at: Exeter Magistrates Court

Date of Hearing: 17 August 2017

Before
Chris Hughes
Judge

and

Gareth Jones and Suzanne Cosgrave

Tribunal Members

Date of Decision: 24 October 2017

Attendances:

For the Appellant: in person

For the Respondent: did not appear

For the 2nd Respondent: did not appear

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 23 March 2017 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant has, for many years, owned a property on the Dart estuary which he uses as a holiday home. It has a significant frontage on the estuary which is protected by a wall and the Appellant owns the foreshore below the wall which is exposed at low tide. For the purpose of building works and maintenance of the wall he has required access to his property from the seaward side and this has led to contact and sometimes conflict with the Dart Harbour and Navigation Authority (DHNA), the statutory body responsible for the management and safety of the harbour. On his account he initially had good relationships with the DHNA and also in the more recent past following a change of personnel. For some years he was in conflict with the DHNA which refused him permission to moor a barge on his foreshore. The Appellant claimed that at the relevant date laid down in the Dart Harbour and Navigation Act 1975 (10 December 1974) a mooring existed. The DHNA disagreed. The Appellant exercised his right under to the Act to refer the dispute to the Secretary of State for Transport in 2007. The DHNA is not a public authority for the purposes of the Freedom of Information Act 2000.
2. The appeal to the Secretary of State was not handled well by the Department and in 2012 it was treated as a complaint rather than an appeal asserting statutory rights. This resulted in a decision on the “complaint” in 2013. From 2013 -2016 the Department considered it as an appeal and issued a decision in May 2016.

The request for information

3. On 11 September 2015 the Appellant made a request for information from the Department for Transport (the Second Respondent, “the Department”):-

“Please provide me with a complete copy of the entire appeal file which I will send to the Ombudsman and also review....

Please advise me who in the Department for Transport, i.e. the senior person, [is] dealing with this appeal...; and

Please also provide me with correspondence from the most senior person dealing with this appeal as to exactly why he is questioning the integrity of [three named individuals] and refers to their assertions rather than their statements of fact.”

4. Certain material was released, the Department relied on s40(1) of FOIA to protect the names of certain individuals and s42 with respect to correspondence between officials and lawyers. The Appellant complained to the Information Commissioner (the First Respondent “the ICO”) who largely upheld the stance of the Department but directed the Department to remove the redactions from the names of Harbour Master and Chair and Board members of the DHNA in documents the which it had released.

The appeal to the Tribunal

5. The Appellant focused in his oral submission on whether s42 FOIA was properly applied to the withheld material and explicitly confirmed that he was not interested in the names of more junior people which had been redacted from the documents disclosed for which s 40 (2) had been claimed by the Department for Transport and that exemption in the main upheld in the Decision Notice. He produced a decision letter from the Independent Complaints Assessor to the Department dated 9 August 2017. This letter considered “the handling of your correspondence by the Department for Transport and your complaint against the Department”. It noted that the Department had repeatedly apologised for the handling of his issues, on 5 July 2013, 5 December 2013, 22 January 2014, 27 March 2014, October 2014, 6 June 2016 and 1 August 2016..
6. In his oral argument he gave a clear account of the history of his relations with DHNA. He explained that he felt that the Department had been “shambolic” he was concerned that the appeal had not been conducted properly, there was not an arms-length relationship between the Department and the DHNA. He felt that the evidence he had produced of an established use of a mooring on his frontage had been solid and any legal advice the Department had taken as to its reliability should have been shown to both parties to the appeal. Two years had passed since the request and the decision made in 2016 was now too far in the past to be the subject of a judicial review. His

MP had suggested that he get all the information he could so that it could be referred to the Parliamentary and Health Service Ombudsman (PHSO).

7. The ICO and Department in resisting the appeal emphasised the importance of legal professional privilege protected by s42. This is a qualified exemption from disclosure where the competing public interests, on the one hand the maintenance of confidentiality between a client and a legal adviser has to be weighed against the public interest in disclosing the information to the world. They emphasised the strong element of public interest inbuilt into the privilege itself and that there should be some clear compelling and specific justification for the disclosure to outweigh the obvious public interest in protecting communications between lawyer and client.
8. The public interest which the Appellant sought to advance by obtaining the legal advice was set out in his notice of appeal:-

“It is submitted that it must be in the public interest for my MP to be able to continue further directly with the Minister for Transport on this matter...it is the overwhelming public interest that my MP is able to directly address with the Minister internal legal advice in the Department for Transport and that in this situation, given his involvement for the past six years, asking a parliamentary question, being more than happy to refer this matter onto the Parliamentary Ombudsman that this should transpire. This appeal process has been entirely unsatisfactory hence my MP’s continuing support”

Consideration

9. The tribunal noted that the request had arisen out of the mishandling of the Appellant’s appeal to the Department for Transport against the decision of the DHNA concerning his disputed right to moor a vessel. He has subsequently taken his complaint of maladministration through the Department and had received apologies and explanations. He has exhausted the internal complaints procedure and his MP is prepared to take the complaint to the PHSO. This route has always been open to him and he has been pursuing it. Since 2013 the Department has repeatedly acknowledged its shortcomings. There is no need for the MP to submit the legal advice to the PHSO to take the issue further.
10. At the time of the request the appeal to the Department was continuing and the time period for judicially reviewing the Department’s decision ran until August 2016 some

11 months after the request. The legal advice related to a dispute which could easily have ended in the courts. While the Appellant indicated that he was aware of circumstances (notably hearings before the General Medical Council) where certain legal advice was released to both parties to proceedings; this related to the specific practice of those disciplinary hearings and is not applicable in other contexts where release of legal advice is more restricted. Furthermore whatever the merits of this approach it is distinct from a disclosure under FOIA where the disclosure is to the whole world.

11. The public interest in disclosure was very limited, it related to a single dispute arising under a private Act of Parliament with only a small number of people potentially affected by that provision. On the other side was the very clear public interest in upholding the administration of justice by ensuring that there is confidentiality between lawyer and client so that clients can obtain full and frank legal advice. It is of great importance that public bodies are able to obtain legal advice in confidence to enable them to discharge their duties correctly. The ICO decision is clearly correct in law and this appeal is dismissed.
12. No consideration was given by the tribunal to the s40(2) exemption relating to some of the names which had been upheld in the DN (para 28) as the Appellant was unequivocal that he was not pursuing an Appeal regarding this exemption and indeed his Grounds of Appeal had made no reference to it although both the first Respondent and Second Respondent had addressed the matter in their submissions.
13. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 24 October 2017