

Information Tribunal

Appeal Number: EA/2008/0013

Environmental Information Regulations (EIR)

Preliminary hearing upon the Papers

25th July and 19th August 2008

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Fiona Henderson

And

LAY MEMBERS

Rosalind Tatam

And

Jenni Thomson

BETWEEN

AJ MAIDEN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

BOROUGH COUNCIL OF KING'S LYNN AND WEST NORFOLK

Additional Party

JUDGMENT

Background

1. Mr Maiden has made several requests to the Borough Council of King's Lynn and West Norfolk (the Council) regarding legal advice obtained pertaining to the Green and the Pier at Hunstanton. This appeal concerns his request for "*the latest Legal Advice*" which the Council refused relying upon the legal professional privilege exemption set out in section 42 Freedom Of Information Act (FOIA).

2. In his Decision Notice No. FER0120148 dated 8th January 2008, the Commissioner ordered the disclosure of information relating to other requests but upheld the refusal to disclose the “latest Legal Advice”. He found that the request should have been dealt with under the Environmental Information Regulations (EIR) being covered by regulation 2(1)(c) (information affecting or likely to affect the environment or a measure designed to protect the environment) and the appropriate exemption was that set out in regulation 12(5)(b) EIR (disclosure would adversely affect the course of justice).
3. The Commissioner has made applications under rules 9 and 10 of the Information Tribunal (Enforcement Appeals) rules 2005 (the Rules) which provide:

“9. - (1) ... where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out...”

Summary disposal of appeals

10. - (1) Where, having considered-

(a) the notice of appeal, and

(b) any reply to the notice of appeal,

the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith it may, subject to the provisions of this rule, so determine the appeal.”

4. The Tribunal first considered the applications under rules 9 and 10 of the Rules at a paper hearing on 25th July 2008 (Mr Maiden having been notified of his right to make oral submissions to the Tribunal). The preliminary hearing was adjourned to seek further information from all parties as to whether the provisions of section 50 FOIA had been complied with. From the Decision Notice it was unclear:

- when the Council had received a request for this latest Legal Advice and if so the exact terms of the request,
 - whether the Council had issued a refusal,
 - whether a review had been requested or conducted,
 - whether the Commissioner had received a complaint pursuant to section 50 FOIA pertaining to this request.
5. Upon receipt of further material pursuant to the Adjournment directions dated 25th July 2008 the Tribunal reconvened the preliminary paper hearing on 19th August 2008 to consider the applications under rules 9 and 10.

Chronology

6. From the chronology set out in the Decision Notice.
- Mr Maiden's original request on 22 February 2006 (Request 1) was for the instructions given to Graham Sinclair and Guy Featherstonhaugh (the Council having already supplied Mr Maiden with the ensuing legal advice).
 - Mr Maiden's request was extended (the new requests being highlighted by the Tribunal) on 3 April 2006 (request 2) in which he asked:

*"It has become even more important that I obtain **access to the evidence and instructions** provided to Graham Sinclair (on 2 separate occasions), Guy Featherstonhaugh, **Phillip Kratz and the latest external barrister**".*
7. Upon refusal and review of these requests, the Council had relied upon section 42 FOIA exemption; Mr Maiden complained to the Commissioner. From the papers before the Tribunal it would appear that whilst the Commissioner was investigating this complaint Mr Maiden made a 3rd request for the information which is the subject of this appeal.

8. It is not clear from the Decision Notice how the 3rd request came to be before the Commissioner. The request is not referred to in the chronology and appears to be dealt with as though it formed part of request 2 e.g. at paragraph 21:

*“..all information in relation to requests 1 and 2 had now been disclosed, except the instructions to the latest barrister **and the opinion that followed**”.* (highlighted by the Tribunal).

This opinion did not form part of either request 1 or 2. At no stage in the Decision Notice does the actual wording of the 3rd request appear. Whilst the Tribunal is satisfied that in this case this omission was not material (the disputed information being clearly identified in the minds of all parties) it cannot be good practice to write a Decision Notice without recourse to the wording of the original request.

9. The request appears first to have been made in writing by email sent on 17 September 2006 to Mr Richard Mann (Information Assistant at the Council). It is not clear that this email was ever copied to the Commissioner at any stage, which might be the source of much of the confusion. In this email Mr Maiden noted:

“Earlier this year it was announced that [the Council] was seeking Counsel’s opinion on matters relating to The Green and the Pier at Hunstanton.

Is this latest Legal Advice available to the public under the FOI Act? When it is made public, please send me a copy.”

It is not in dispute between the parties that this latest Legal Advice sought was the product of the instructions to the “latest external barrister” asked for in request 2.

10. Mr Mann refused this request for the latest Legal Advice, by email entitled “legal opinion” dated 29th September 2006 in which he stated:

“The Counsel’s opinion is not publicly available, and will not be available under the Freedom of Information Act, by virtue of s.42 Legal Professional Privilege.

s.42 is a “qualified” exemption; the council considers the exemption is justifiable because the Council must be able to obtain frank and candid legal advice safely and sufficiently.”

Mr Maiden was provided with a fuller explanation for the Council’s assertion that the public interest lay in withholding the advice in an email dated 3rd October 2006 which set out the response of Mrs Nicola Leader the Council’s Legal Services Manager and Monitoring Officer.

11. Mr Maiden requested an internal review on 5th October 2006 and the Council upheld its refusal on the same grounds. The Council notified both Mr Maiden and the Commissioner of the results of the review on 22nd January 2007.

12. From the papers before the Tribunal, the chronology set out in the Decision Notice is erroneous. Throughout the Decision Notice, the Commissioner has treated request 3 (for the latest Legal Advice) as forming part of request 2 (the evidence and instructions to Counsel). Consequently most of the references in the Decision Notice to the chronology concerning request 2 actually refer to request 3 and as such the Decision Notice provides no information as to whether there was for example a review of the refusal decision of request 2 and if so when. Since request 2 is not the subject of this appeal the Tribunal considers this aspect of the Decision Notice no further.

13. When dealing with the chronology of request 2, the Commissioner refers at paragraph 7 to:

“An internal review was requested on 5th October 2006 and the review decision dated 19 January 2007 was sent to the complainant. This upheld the original decision not to disclose the information citing section 42 of the Act and reaffirmed the public interest arguments previously addressed.”

The Tribunal is satisfied that this review related to the 3rd request only. However, the Tribunal notes that if as would appear, the Commissioner was never furnished with a

copy of the 3rd request, his Office and the other parties may well have been proceeding under a mutual misapprehension.

14. Mr John Moss for the Commissioner, sought clarification of the status of any request for the latest Legal Advice in an email to Mr Maiden dated 7th March 2007 in which he questions:

...”(the Opinion of course wasn’t part of your original request) (sic).

In his response dated the same day, Mr Maiden does not clarify the status of the third request.

15. In his letter to the Council dated 15th March 2007 Mr Moss on behalf of the Commissioner notes:

“Opinion of external barrister – This did not form part of Mr Maiden’s initial request as subsequently amended. However for the sake of completeness following on from the view I have taken on the Instructions and with a view to assisting both parties I can indicate that had it been part of the request I can see no ground for taking the view that the section 42 exemption or regulation 12(5) exception would not apply.

...In any event as the Opinion does not form part of the request it could not form part of my decision without agreement from both parties...

...If the Council is prepared to release the information [i.e. request 2] then that will be an end to my involvement at this time. Mr Maiden would then be able if he so wished to make a further request under the Act for the outstanding Opinion...

...I have to say that if I were required to proceed with the Decision Notice at this time it would make sense subject to the agreement of both parties for me to deal with the Opinion aspect of the case as well.”

In light of the above, it was unfortunate that neither of the other parties sought to clarify to the Commissioner that the “further” information request had already been made, refused and reviewed by this stage. Indeed the confusion surrounding the

matter is such that Mr Maiden makes a fresh information request for the information already the subject of the 3rd request around this time.

16. There had been considerable correspondence between the Commissioner, Mr Maiden and the Council prior to a formal complaint being made to the Commissioner in relation to request 3. Indeed Ms Suzanne Higgins who took over the case on behalf of the Commissioner reiterated Mr Moss's understanding of the position in a letter to the Council dated 10th May 2007:

“Opinion of External Barrister

This did not form part of Mr Maiden's request and as such we have no jurisdiction to deal with the matter. However, Mr Maiden would be able to submit a separate request for this information to yourselves and thereafter to the Commissioner if he so desires”.

17. The Tribunal is satisfied that the email from Mr Maiden to Ms Higgins on 24th May 2007 constitutes a request to the Commissioner to investigate the refusal of the third request:

...I must now ask for your intervention in order to read the advice of the most recent Counsel appointed by the Borough Council...

18. In light of the confusion surrounding the above chronology, the Commissioner has argued variously that:

- The Tribunal has jurisdiction, because no party seeks to argue that they do not,
- The third request appears by way of the implicit consent of all parties,
- The Commissioner has discretion under section 50(2) FOIA to include matters in the Decision Notice even if the provisions in section 50 FOIA have not been followed.

19. Taking into account the chronology set out above, the Tribunal is satisfied that the provisions of section 50 FOIA had been followed and that as such no discretion or consent was required to include the third request within the Decision Notice. Consequently the Tribunal makes no findings in relation to the aforementioned submissions, and is satisfied that it has jurisdiction under section 57 FOIA to consider this appeal.
20. The Tribunal notes that the investigating officer at the Commissioner's office changed part way through the investigation of this case. It was unfortunate that no party was able to provide an uninterrupted chronology of how the 3rd information request came to be before the Commissioner and that Mr Maiden was unable to provide a copy of his original 3rd information request. The history of this case has been one of a number of information requests with no clear delineation being kept by any party of which part of which information request was being dealt with at any time. Whilst the inaccurate and incomplete chronology as set out in the Decision Notice does not affect the Tribunal's findings of fact, it is a source of concern to this Tribunal that the Commissioner was seeking to investigate the matter by "consent" without reference to there being a properly defined information request, or the provisions of section 50 FOIA before receiving a formal application from the information requestor. Further in the absence of any explicit consent being forthcoming from the Council once a formal request was made by Mr Maiden, the Commissioner appears to have continued to investigate the matter without explicitly stating to the Council that it was doing so in response to a formal complaint.

The grounds of appeal

21. Mr Maiden's grounds of appeal dated 16th February 2008 were accompanied by a document setting out his grounds. These were more of an explanation of why he wanted the disputed information rather than why he felt that the Commissioner had erred in fact or law. Within that document he states inter alia:

"...I am appealing against that part of the decision which currently prevents me from knowing whether or not [the Council] is acting in accordance with the legal advice

provided by the barrister in response to the evidence and instructions supplied to him ...

By refusing to release the legal opinion of the latest external barrister to be consulted, [the Council] is guilty of going back on a commitment given in writing... some two years ago, when he [its Chief Executive] was unequivocal in stating that the opinion would be published.”

The Commissioner in his reply asserted that the grounds were inadequately set out and applied for the appeal to be struck out pursuant to Rule 9 of the 2005 Rules.

22. By order dated 19 March 2008 Mr Maiden was directed to provide further and better particulars which he did by email dated 6th April 2008. The Commissioner amended his reply and maintained his application to strike out in relation to the amended grounds.

23. The Commissioner argues at paragraph 11 of his submissions in support of the applications under rules 9 and 10 that “*The only ground of appeal is whether the decision of the Commissioner that the Opinion was withheld under regulation 12(5) (b) EIR is correct*”. The Tribunal disagrees and notes that the grounds of appeal were further clarified at the telephone directions hearing of 13th May 2008 in which the issues that fell to be determined by the Tribunal were limited at paragraph 4 to the following:

- a) *Whether privilege (or the ability to withhold the information) was waived by the repeated assurances by the Additional Party that they would disclose the disputed information (namely the 5th legal opinion).*
- b) *Whether the fact that the Additional Party had already disclosed 4 previous advices on the same or a closely related issued deprives them of the right to “cherry pick” and withhold this disputed information.*

- c) *Whether it is more likely than not that disclosure of the legal advice would adversely affect the course of justice.*
- d) *Whether the Commissioner was correct to find that the public interest in maintaining the exemption under Regulation 12(5)(b) of the Environmental Information Regulations outweighed the public interest in disclosure.*

24. Also in the directions of 13th May 2008 at paragraph 1, the Council were ordered to:
“...serve [a reply indicating whether they opposed the appeal and if so on what grounds] by 4pm on 25th May 2008 or the Tribunal will presume that they do not contest this appeal and consent to disclose the disputed material.

25. The Council did not serve a reply but in an email dated 23rd May 2008 to the Commissioner and copied to Mr Maiden but not the Tribunal, Mrs Leader (the Legal Services Manager and Monitoring Officer) stated:

“I have become increasingly concerned about the resources needed to deal with Mr Maiden’s appeal... Legal services in a small borough council such as ours is a finite resource. I do not consider that diverting resources from projects that are of benefit to the whole community [to deal with this appeal]...is an appropriate use of taxpayers money or a sustainable use of our services. Whilst I stand by the Council’s original decision and support the ICO’s decision, limited resources means that I have made the decision to release the information to Mr Maiden...”

26. The disputed information, namely the opinion of Alexander Booth dated 24th January 2006 instructed on behalf of the Council in relation to the erection of the Pier Building at the Green, Hunstanton, has now been disclosed to Mr Maiden.

27. In response to the Tribunal’s enquiry as to whether he wished to withdraw his appeal in light of this disclosure Mr Maiden provided a list of questions on 22nd June 2008 that had arisen having read the disclosed legal opinion (the numbering is added by the Tribunal for ease of reference):

- i. *“Did [Mrs Leader] take up Mr Booth’s offer to discuss any matters relating to his Opinion?”*

- ii. *Did [Mr Booth] subsequently amend his original Opinion?*
- iii. *Did the Council obtain further external advice relating to The Green and the Pier at Hunstanton before endorsing [Mrs Leader's] report to Cabinet on February 5th 2008*
Until these questions are answered to my satisfaction I would be unwilling to withdraw my appeal...
- iv. *The Council is adamant that [the policy decision relating to the Pier] is based on legal advice, but since Mr Booth appears not to have included this advice on 24th January 2006, I need to know from whence it came; or if any such advice was actually given at all?"*

Mr Maiden adds that he realises he could ask the above questions by way of a new request for information but feels it would take too long in light of the delays already experienced in obtaining Mr Booth's advice.

28. In an email to the Tribunal dated 14 July Mr Maiden also adds that in light of Council assertions that their policy is based on legal advice that it is very important for him to know:

"if the Opinion provided to the Council by Alexander Booth on 24th January 2006 really was the final external legal opinion which the Council claims to base its current policy with regard to Hunstanton Pier".

The Tribunal is satisfied that this is a reworking of the question numbered iv above.

29. In his application under rules 9 and 10 dated 30th June 2008 and his submissions dated 16 July 2008, the Commissioner argues that the Tribunal has no jurisdiction under section 57 FOIA to hear the matter insofar as it relates to questions i-iv because:

- a) The questions are fresh information requests raised as a result of having seen the disclosed material.
- b) The time limit for the Council to respond under EIR has not yet expired.
- c) No application has therefore been made to review the Council's decision on these points.
- d) The questions are not matters which were considered by the Commissioner in the Decision Notice that is the subject of this appeal (post dating the Decision Notice by 6 months).

- e) There has been no investigation or Decision Notice in relation to these new questions.
- f) The request was made after the commencement of this appeal.

30. The Tribunal must first consider whether questions i-iv as set out above constitute fresh requests or whether they formed part of the 3rd information request.

31. In his email of 30th June 2008 Mr Maiden states:

“I am still waiting to hear if Mrs Leader took up the offer in the final paragraph on page 21 of Mr Booth’s Opinion. Without that information it is impossible to say whether or not I am now in possession of all the advice obtained in response to the 672 pages of evidence and instructions ..”

In this email, Mr Maiden appears to be suggesting that it may be that he has not received all of the disputed material. The Tribunal looks at the wording and context of his original 3rd information request which stated that the Council was seeking “*Counsel’s opinion*” and asked “*Is this latest Legal Advice available to the public...*” and asked to be sent “*a copy*”. The Tribunal reminds itself that an applicant is not entitled to a specific document, under the EIR but the information contained within a record. The Tribunal is satisfied that Mr Maiden is identifying the document that contains the information that he is seeking (namely the opinion dated 26th January 2006 authored by Mr Booth) by:

- his use of the word “opinion”,
- the use of capital letters in relation to Legal Advice,
- the expectation that the information would be publicized and a copy could be provided means that Mr Maiden is asking for a document and not e.g. the fruits of a conversation.

32. Mr Maiden’s own correspondence adds support to this definition of his request, in the same email of 30th June 2008 to the Tribunal he notes:

*“..my appeal was against the decision of the Information Commissioner that I should be denied access to **the opinion**,”* (Tribunal’s emphasis).

33. The Tribunal is satisfied that the questions i-iv are fresh information requests. To take the questions in turn:

- i. Did she take up Mr Booth's offer to discuss any matters relating to his opinion?

The answer to this question would be "yes" or "no". By definition, the answer to the question would not constitute legal advice, and by the nature of the question, the answer could not therefore form part of the third information request.

34. In relation to the suggestion in the email of 30th June that maybe additional advice was given by Mr Booth in a discussion relating to matters arising out of the opinion; there is no evidence before the Tribunal to suggest that any such conversation took place, nevertheless the Tribunal is satisfied that:

- As set out in paragraph 31 above, the subject matter of the third information request was the opinion already disclosed,
- Any discussions "arising from" the advice would not form part of the opinion, but would constitute a separate transaction, as information passes 2 ways in a discussion.

35. ii. Did he subsequently amend his original opinion?

There is no evidence to suggest that Mr Booth did subsequently amend his opinion. However, the Tribunal is again satisfied that were this to have happened it is implausible that this would have arisen without some additional intervention and that consequently it would be a separate transaction and thus not part of the original 3rd information request.

36. iii. *Did the Council obtain further external advice relating to The Green and the Pier at Hunstanton before endorsing her report to Cabinet on February 5th 2008? and The Council is adamant that [the policy decision relating to the Pier] is based on legal advice, but since Mr Booth appears not to have included this advice on 24th January 2006, I need to know from whence it came; or if any such advice was actually given at all?*

These questions deal with additional legal advice sought beyond Mr Booth's advice and cannot therefore fall within the third information request which is the subject of this appeal.

37. In light of the Tribunal's findings that these are all fresh information requests, the Tribunal agrees with the Commissioner that the Tribunal has no jurisdiction to decide

matters relating to these information requests. The Commissioner argues that these grounds of appeal should therefore be struck out under rule 9. The Tribunal does not agree that these fresh requests constitute grounds of appeal. For the reasons set out by the Commissioner in paragraph 29 above (with which the Tribunal agrees) they could not and do not form part of the grounds or subject matter of this appeal. In light of the above they are neither struck out or dismissed as they are not before the Tribunal.

38. In the event that the Tribunal is wrong, and these fresh requests are before the Tribunal because of Mr Maiden's reference to them in connection with his current appeal, the Tribunal would strike them out under rule 9 as for the reasons set out in paragraph 29 above an appeal does not lie to, or cannot be entertained by the Tribunal.

The grounds of appeal as set out in paragraph 4 of the directions dated 13th May 2008

39. The question of Mr Maiden's remaining grounds of appeal as set out in paragraph 4 of the directions remains. The Commissioner argues that the appeal should be struck out or dismissed:

"as the Appellant has received the disputed information, there is no matter to be determined by the Tribunal in respect of the Decision Notice and Notice of Appeal".

Mr Maiden in his email of 30th June 2008 to the Tribunal argues that:

"the decision [to withhold the latest Legal Advice] was perverse and I would expect the Commissioner to acknowledge that an error of judgement was made in arriving at that conclusion..... no reasonable explanation for this cherry-picking exercise [releasing 4 legal opinions but not the 5th] has been forthcoming from the Commissioner.

I look forward to receiving your judgment on this matter".

Application to strike out pursuant to Rule 9

40. The Commissioner (on 16 July 2008) reverts to the arguments set out at paragraphs 10-15 of his original reply in support of his application under rule 9. These can be summarized as:

- the grounds of appeal are inadequately set out,

- Mr Maiden has not set out why the Commissioner's decision was incorrect,
- No discernible error of law has been identified,
- There is no challenge to the Commissioner's analysis of LPP or the public interest balance.

41. These arguments do not take into account:

- The increased particularisation of the grounds of appeal, as set out during the directions hearing of 13 May 2008, and
- The fact that the Council have now disclosed the disputed information to the Appellant (which suggests that the adverse affect on the course of justice and the public interest balance merits re-examination).

42. Additionally, further to the 2 applications to strike out the grounds of appeal set out in the Commissioner's replies, paragraph 6 of the directions dated 13th May 2008 provided that:

"If the Commissioner still wishes to apply to have any of the grounds in paragraph 4 above struck out, he shall notify the Tribunal and all parties in writing of the fact by 4pm on 20th May 2008. Such notice to specify to which grounds the application relates and the grounds in support of the application."

No such application was made by the Commissioner who therefore signified that he accepted that the grounds as set out in paragraph 4 of the directions did not merit striking out.

43. The Tribunal is not persuaded therefore that there are before the Tribunal no reasonable grounds of appeal. The grounds of appeal as they are currently constituted (as set out in paragraph 23 above) remain unchanged, the only difference is that Mr Maiden has now had disclosed to him the disputed material. This does not weaken the arguability of any of the legal grounds upon which he has sought to challenge the Commissioner's decision. The decision that is challenged remains unaltered, it is only that now that disclosure has been made, the appeal has become an academic exercise.

Application for summary dismissal pursuant to Rule 10

44. The Tribunal agrees with the approach in *Tanner v Information Commissioner and HMRC (EA/2007/0106)* in which The Tribunal (differently constituted) concluded that the appropriate test was analogous to the test under *Part 24 of the Civil Procedure Rules 1998*. This makes provision for a claim which has no real prospect of success to be summarily dismissed. In **Swain v Hillman**[2001] 1 All ER (CA) the words “*no real prospect of succeeding*” were said not to need any amplification as they spoke for themselves, and the Court must decide whether there is a "realistic", as opposed to "fanciful", prospect of success.
45. The Tribunal is satisfied that the points of law to be determined as set out in paragraph 4 of the directions dated 13th May have a realistic prospect of success and are not fanciful and does not strike them out.

Other Matters

46. It is not apparent to the Tribunal that continuing these proceedings as an academic exercise would overall constitute a reasonable expenditure of public time and money. The Tribunal (differently constituted) has already considered the applicability of legal professional privilege to the EIR (e.g. *Kirkaldie v IC EA/2006/0001*, and *Archer v IC and Salisbury District Council EA/2006/0037*). On the facts currently before the Tribunal, this case would not appear to involve a novel point of law, but be an exercise in applying existing law to the facts of this case. Additionally the Tribunal has had the opportunity in this judgment of highlighting areas where information requests could be processed and made with more efficiency and with better clarity.
47. If upon being asked to determine the appeal, the Tribunal were to conclude that Mr Maiden had acted unreasonably in continuing with his appeal for no reasonable purpose, the Tribunal reminds itself of the Tribunal’s powers to award costs as set out in the *Information Tribunal (Enforcement Appeals) Rules 2005*:

29. - (1) *In any appeal before the Tribunal, including one withdrawn under rule 12 above, the Tribunal may make an order awarding costs -...*

(c) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of any other.

Conclusion

48. The Tribunal does not strike out or summarily dismiss the grounds of appeal as set out in paragraph 4 of the directions dated 13th May 2008. For the reasons set out above, in the event that the Tribunal is asked to determine this appeal, the Tribunal will not consider any of the matters raised by Mr Maiden as set out in paragraphs 27 and 28 above.

Directions

49. Mr Maiden is hereby ordered to inform the Tribunal and all other parties in writing within 7 days of the date of this judgment whether he wishes to continue in his appeal, in relation to the grounds set out in paragraph 4 of the directions dated 13th May 2008.

Fiona Henderson
(Deputy Chairman)

Dated this 2nd day of September 2008