First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0194

Heard at Leeds Magistrates Court
On 7th October 2019

Before

JUDGE
MISS FIONA HENDERSON

TRIBUNAL MEMBERS
DR MALCOLM CLARKE
MR STEVE SHAW

Between

CLLR ALAN LAMB

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Cllr Lamb represented himself.
Information Commissioner chose not to be represented

DECISION AND REASONS

1. The Appeal is refused for the reasons set out below.

Introduction

2. This is an appeal against Decision Notice FER0810196 dated 14 May 2019 which held that Harrogate Borough Council (the Council) correctly withheld the requested information pursuant to regulation 12(5)(b) of the Environmental Information Regulations (EIRs).

Background

3. The disputed information relates to an outline planning application before the Planning Committee of Harrogate Borough Council for the erection of up to 210 dwellings and associated infrastructure, with access to (but not within) the site considered. The site is within the boundaries of Harrogate Borough Council but is adjacent to Wetherby a town which falls within the boundaries of Leeds City Council. The Appellant is a Councillor for Leeds City Council who represents the ward of Wetherby. At a meeting of the Planning Committee on 14th August 2018 a motion of the Planning Committee was passed to refuse the application on the grounds of:
   1) Health: lack of doctor/dentist provision
   2) Education: lack of education provision
   3) Highway infrastructure being unable to carry more traffic.

4. The Minutes record that "*In the view of the Solicitor to the Council, the determination to refuse the application would result in a situation whereby risks on the Council's part may exist. Therefore, under the provisions of the Special Measures Procedure, the item was to be* ***deferred*** *to a future meeting where an exempt briefing note would be presented which will include further information on the three proposed reasons for refusal listed above"*[1].

5. The consequence of this was that despite the vote to refuse the application being passed, the decision was not recorded as a refusal and the matter was deferred to another meeting. The Committee were provided with a confidential report (the withheld information) and met to reconsider the case at an open meeting on 25th September[2]. There was no closed session and the meeting was shorter than the 14th August Meeting. At this meeting the Committee authorised the Chief Planner to approve the application subject to various conditions including those relating to s106 provision.[3]

6. The Appellant argues that the Committee changed their mind upon essentially the same evidence that was before them on 14.08.18. The only difference that he is aware of is the confidential report that he has not had access to and about which there appears to have been no debate in the absence of a closed session.

7. At the date of the request it was not yet known whether the matter was going to be "called in" by the Secretary of State. Before the Commissioner issued her decision notice it was clarified that the case would not be called in. Nevertheless, no final decision to approve had been made as the meeting on 25th September had deferred the final decision to the delegated authority of the CP subject to specified conditions being met. By the date of the Tribunal hearing in 2019 the developer had appealed the non-determination (because no final decision had been made). This means that the planning decision will now be made by an Inspector from the Planning Inspectorate following a Public Inquiry. As part of the appeal process Harrogate Borough Council will be asked what their decision would have been if they had determined the application. The Appellant's evidence is that the Council have indicated now that they would be minded to refuse the application.

[1] P129 OB
[2] The Appellant was present at both the 14.08.18 and 25.09.18 meetings
[3] P131

Information Request

8. On 28th September 2018 the Appellant wrote to Harrogate Borough Council asking for information relating to a Planning Committee held on 25.9.18:
"*under item 5 (01) – outline application for the erection of up to 210 dwellings and associated infrastructure, with access to (but not within) the site considered. (site Area 13.17 HA) – I would like access to the exempt briefing note considered and containing further information on the three proposed reasons for refusal as set out in the minutes of the Planning Committee held on 14 August 2018."*
The Council refused the request on 26.10.18 relying upon EIRs: regulation 12(4)(e) (internal communications) and regulation 12(5)(d) (confidentiality of proceedings). Following an internal review dated 12th December 2018 the Council upheld the refusal and indicated that they were also relying upon regulation 12(5)(b) (prejudice to the course of justice).

9. The Appellant complained to the Commissioner on 21.12.18. During the Commissioner's investigation she was provided with a copy of the disputed information and the Council confirmed that they relied upon reg 12(5)(b) EIRs in relation to the whole of the disputed information. The Commissioner's decision was that the exemption in reg 12(5)(b) was engaged and the public interest favoured withholding the information. The Commissioner did not go on to consider any of the other EIR exemptions relied upon.

Appeal

10. The Appellant appealed by notice dated 7th June 2019.[4] He did not challenge that the exemption was engaged but argued that the Commissioner had got the balance of public interest wrong. He asked for disclosure of the information under FOIA but indicated that he would also be prepared to keep the information confidential if given access (should the Council agree) as he is already bound by the Members Code of Conduct and would be willing to enter a Non-disclosure agreement to bring closure to proceedings.

11. The Commissioner opposed the appeal and relied upon the decision notice in her response[5]. Harrogate Council were notified of the appeal and did not apply to join. The Tribunal has considered whether it is necessary to join the Council of its own motion and is satisfied that it is not. The Tribunal has a copy of the disputed information and has been provided with the written submissions which were before the Commissioner[6] in which the Council set out their case.

12. The case was listed for an oral hearing at the request of the Appellant. The Commissioner indicated in her response that she did not propose to be represented in person at any oral hearing instead being content to rely upon the contents of her decision notice and written representations. The Tribunal has had regard to the overriding objective as set out in rule 2 in particular:
    - Resources,
    - Delay
    - Flexibility and
    - Proportionality

[4] P16 bundle
[5] P 17 bundle
[6] P62 OB (with unredacted copy in the closed bundle)

and is satisfied that it is not in the interests of justice to require the Commissioner to attend. The facts are not in dispute, the disputed information is available to the Tribunal and arguments relating to the public interest are rehearsed clearly in the written material.

13. In reaching its decision the tribunal had regard to all the oral and written material before it including an open bundle of 143 pages and a closed bundle which contained the withheld information and an unredacted copy of p 62-4 and p66 of the Open bundle. The Tribunal has not provided a closed annex to this decision as it has been possible to outline the reasons in the open document. Where references are made to the closed material, it does not reveal the content and as such can be dealt with in open.

Scope

14. Although the Appellant asked for the information under FOIA in his grounds of appeal, he did not pursue this point at the oral hearing as he conceded that the information was environmental information and consequently the applicable regulations were the Environmental Information Regulations.

15. In terms of his remedy he has indicated that he would also be prepared to keep the information confidential if given access (should the Council agree) as he is already bound by the Members Code of Conduct and would be willing to enter a Non-disclosure agreement to bring closure to proceedings. Whilst there is nothing to stop the Council entering into an agreement such as a NDA, this would be outside of the EIRs which provide for disclosure to the world at large and without conditions. The Tribunal's jurisdiction is limited to determining whether the public authority have complied with EIRs, as such conditional disclosure as envisaged by the Appellant is not a disposal that we are entitled to consider.

16. The Tribunal considered regulation 12(5)(b) EIRs in the first instance as this was the basis upon which the Commissioner had upheld the refusal and was said to apply to the whole of the disputed information. The Appellant was given the opportunity at the oral hearing to make arguments relating to the other grounds relied upon by the Council in the alternative, but in light of the Tribunal's finding that the information is properly withheld pursuant to reg 12(5)(b) EIRs which was determinative of the appeal, the Tribunal has not gone on to address the other exemptions in this determination as to do so would be disproportionate.

The Law

17. Regulation 12 of EIRs provides:

12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a)an exception to disclosure applies under paragraphs (4) or (5); and

(b)in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

…

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose 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 inquiry of a criminal or disciplinary nature;

Is the Exemption Engaged?

18. Although the Appellant has not challenged the engagement of the exemption, he has not had the opportunity to look at the disputed information, consequently the Tribunal has reviewed the withheld information to satisfy itself that the exemption is engaged.

19. The "course of justice" has been interpreted by the Tribunal to include legal privilege and this reasoning has been confirmed in *DCLG v Information Commissioner and WR [2012] UKUT 103 AAC.* We accept the Commissioner's definition of Legal professional privilege as set out in paragraph 13 of the Decision Notice. We have had regard to the disputed information and accept that it is legal advice from a Council Lawyer in their legal capacity as legal advisor to the Planning Committee. The advice was in the form of a memo presented to members of the Planning Committee, for the sole purpose of obtaining and giving legal advice as is apparent from the face of the document which we have reviewed. In this context the members of the planning committee constitute the client and the advice was provided for the purpose of giving and receiving legal advice. We accept the evidence that it was only circulated within the Council's Planning Committee and privilege has therefore not been waived.

20. We are satisfied that there must be an adverse effect resulting from disclosure of the information. In assessing whether there would be an adverse effect *DCLG* confirms that the adverse effect must be "more probable than not".

21. At the relevant date[7] we are satisfied that the case was "live" in that it was still possible to influence the outcome and the potential for legal challenge remained. At the date of the request and its consideration by the public authority, no final decision had been made. The Appellant was frank with the Tribunal that he and others opposed to the development were actively seeking ways to challenge the Council's decision to defer with delegated authority to give permission subject to conditions. They were considering judicial review and at the relevant date were still within the time-limit for lodging a judicial review. At the relevant date it was not clear whether the case was going to be "called in" by the Secretary of state.[8] Although the subsequent appeal by the developer (which means that the matter will now be determined by a Planning Inspector) had not been launched at the relevant date; the fact that it is now known that this is the outcome we rely upon as evidence that it was not concluded at the time. We are satisfied that the risk of an appeal was present and foreseeable at the relevant date, and another way in which the matter remained live.

22. However, in our judgment none of the above outcomes at that date could be said to be more probable than not, however, *DCLG* also requires us to look at whether there would be a weakening in the general confidence in the efficacy of legal professional privilege. In our judgment it is more probable than not that there would. On the facts of this case there is no special or unusual factor which indicated that this case was an exception. The risk

[7]NHS England v ICO and Dean [2019] UKUT 145 AAC para 13 and All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office [2016] AACR 5

[8] Although it was confirmed during the Commissioner's investigation that it was not in fact going to be called in.

of undermining the confidence in the efficacy of legal professional privilege is the risk that public authorities would not seek legal advice when needed for fear of future disclosure, they would not be frank in providing instructions and advisors would be less robust in their advice. Consequently, it is probable that this public authority and others would regard this as setting a precedent in the future and this would be likely to impact upon their approach to future legal advice.

23. We are satisfied that the disputed information is covered by legal professional privilege and that disclosure would undermine the principle of legal professional privilege and that therefore the exemption is engaged.

The public interest test

24. Pursuant to regulation 12(1)(b) where regulation 12(5)(b) is engaged we must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

25. *DBERR v IC & O'Brien [2009] EWHC 164 (QB)* approved the first tier tribunal decision of *Rosenbaum (EA/2008/0035*) as follows:
"……LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place."
DBERR went on to state:
"*the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."*

In favour of disclosure

26. There is a presumption in favour of disclosure (regulation 12(2) EIRs), we give weight to this, but observe that it is not determinative but rebuttable by other public interest factors that outweigh it.

27. The Commissioner accepts and we agree that public scrutiny, transparency and accountability are factors to which some weight should be given. Before the Commissioner the Council accepted (and we agree) that the information:
    i. relates to a significant planning development of housing and that there is a public interest in understanding the reasons behind the Council's decision.
    ii. It is also in the public interest that the public can scrutinise the quality of the legal advice and whether the Committee accepted or departed from that advice.
    iii. It is a significant local matter, namely a cross boundary major housing development.

28. The Appellant argues that the local significance (and hence public interest) is increased because the development is on agricultural land that has previously been deemed unsuitable for development under the local plan. He also argues that the significance is increased because in his view it is contrary to planning principles and the weight of the

evidence before the planning committee as he had set out in arguments to the planning Committee in 2018.

29. The Tribunal observes that the extent of the public interest attached to the local significance is tempered by the fact that the case was not in fact called in by the Secretary of State. Additionally, in raising arguments relating to the merits of the decision, the Appellant is inviting the Tribunal to opine upon the merits of the planning decision. This is outside of the Tribunal's jurisdiction, especially as we are satisfied that there are other ways to challenge the Council's decision making (through the planning process, judicial review and appeal).

30. The Appellant argues that disclosure would help increase the public's understanding of the way decisions are made:
    i. particularly because in this case his evidence is that the public do not understand why the decision was changed.
    ii. The use of the special procedure makes it look as though the Council's decision making has been interfered with by a Council officer.
    iii. Where the appearance is that 2 opposing decisions have been made on what amounts to the same evidence there is an additional need for transparency to reassure the public that the decision is independent and based on planning criteria not other factors.
    iv. It would facilitate their participation in the planning process as it would help them to decide whether to challenge the decision.

31. We agree with points i-iii however, in our judgment the weight attached is reduced by the fact that there is considerable other information relating to the decision making in the public domain already. The Council have provided the advice of their planning officer and the decision that was in existence at the time of the request in effect adopted the reasoning as set out in the planning officer's report thus the basis of the decision was in the public domain.

32. In our judgment point (iv) amounts to a "fishing expedition" we are not satisfied that it is in the public interest that the public should have access to the Council's legal advice to enable it to determine whether to litigate against the Council. Litigation usually includes disclosure of relevant documentation once litigation has been launched. Legal advice would not usually be included in this disclosure but in any event disclosure takes place after the decision to litigate has been made. In our judgment disclosure of legal advice would be unfair and would not prevent the Appellant from taking his own legal advice as to the strengths and merits of his case.

33. The Appellant argues that the public interest is increased because this is one local authority making a decision which affects another local authority. Although he (as the representative of Wetherby) was able to attend and speak at the meeting this was as a member of the public. He argues the citizens of Wetherby were disenfranchised because they had no representative on the committee and no access to the information upon which the decision appears to have been based.

34. Whilst it is factually correct that the residents of Wetherby had no representative upon the Committee, we observe that a Planning Committee does not include a representative from every ward and so citizens of a planning area may have no direct representation on the

Planning Committee deciding an application that affects them even if it relates to a Council on which they do have representation. We further take into consideration that this is not an uncommon situation in light of the reality of area boundaries and take into consideration that this factor is ameliorated to some extent by the fact that the Appellant was able to make representations on behalf of his ward at the August meeting and that Leeds Borough Council was (and always would be) consulted about such a major development adjacent to its boundary as part of the planning process.

35. The Appellant argues that the legal advice must be wrong and must be based on a factual mistake in terms of the housing years and a misapplication of the tilted balance test. He argues that the public interest favours the public having confidence that the Council is getting accurate advice. We are not satisfied that this argument carries significant weight on the facts of this case. It is not our role to decide if the Council's approach was right or wrong in law. In our judgment the public interest lies in the public understanding the approach applied by the Council. This was made clear from the Planning officer's report and has been reiterated by the Council before the Commissioner in the letter dated 7th May[9]. In that letter they are explicit that when the legal advice was drafted the 5 year land supply held by Harrogate Borough Council was 5.02 years and that the legal advice was correct at the time of drafting. In our judgment the public have sufficient information to challenge the correctness of the approach from the material already in the public domain.

36. The Appellant's argument is that the majority of the Planning Officer's advice at the date of the revised decision was the same as it was at the date of the first decision (when it was not followed.) His case is that there must have been something in the withheld information which caused the Council to change their mind because the "open" evidence from the Planning officer is the same and would not give them cause to change their mind.

37. The Tribunal disagrees with this characterisation. When the Council gave their first decision the reasons for the refusal given were in relation to Schools, Health and Highways. The Appellant's case is based upon his view that this was an unsustainable reason and an example of poor decision making. To this extent it appears he agrees with the Planning Officer whose views on the sustainability of this decision are set out in the advice before the Planning Committee in September. The Planning Officer's advice contains his criticism of the rationale for their original decision and could be considered a reminder of the planning factors which it is his opinion they should follow even if they have previously chosen to disregard them. We have had regard to the withheld material to look for what was referred to at the hearing as a "smoking gun" (for example evidence of bad faith, bias or material information being withheld from the public domain). We are satisfied that there is nothing exceptional within the legal advice that would fall within that category.

Against disclosure

38. The Commissioner relies upon the effect of disclosure of the withheld information on the course of justice, in terms of a weakening of confidence in the efficacy of LPP generally. In assessing the weight to attach to this ground we apply the jurisprudence as set out in paragraph 25 above and have had regard to whether there are any "*special or unusual*

[9] P66 OB

factors in this case which justify not giving this factor the very considerable weight which it will generally deserve."[10] In looking at whether there are any such factors we have considered both the legal advice itself and the context and circumstances of the application and decision.

39. We have also considered the unfairness to the Council in this specific case.

40. In assessing the weight to attach to these public interests, the Appellant relies on *Decision Notice FS50796461 27/8/19 relating to Ryedale District Council* where the Commissioner held that a report by the Chief Executive which would disclose the substance or the trend of legal advice and therefore fell within the legal professional privilege exemption[11] should be disclosed. Its status as a Commissioner's decision notice means that it is not binding on the First Tier Tribunal but it was relied upon as an example of a case where the weight attached to the public interest in maintaining legal professional privilege had been outweighed by the other public interests. The Tribunal accepts that Legal Professional Privilege is not an absolute exemption, however, we are satisfied that the case was confined to its facts and that the applicable facts were not equivalent to those in this case. That was a case where the decision-making process had been criticised in relation to a planning decision which had been overturned on judicial review. Substantial costs had been incurred and it was no longer live in light of *"the time which has passed since the issues were directly relevant".* In assessing the weight of that factor the Commissioner appears to have been applying *DCLG v ICO and WR 2012 UKUT AAC*.

41. Unlike the position in *Ryedale*, at the time when the advice was given, and the relevant date we accept that the matter was still live:
    - the developer could appeal
    - those in opposition to the scheme were actively seeking ways to challenge it
    - it was not yet known if the case was going to be called in.

42. With regard to the general public confidence in Legal Professional privilege we have had regard to the withheld information and are satisfied that there is nothing unusual or exceptional that would reduce the public interest attached to its maintenance.

43. On the specific facts of this case we take into consideration that the impact of disclosure would have upon the Council's ability to defend itself in potential related legal challenges. The Council's ability to present its case would be undermined as potential litigants would know the strengths and weaknesses of the Council's case this would create an uneven playing field as the Council would not have similar access to any advice they had received. Without direct reference to the withheld information in this case we observe that as well as assessing the strengths and weaknesses of a case, disclosure of legal advice can also reveal how robust it is (e.g. what research has been done and how firmly it is expressed) the consequences of litigation, the likelihood of success, and thus a party's appetite to fight a case. All or any of these factors would put the Council at a disadvantage and we are satisfied that this is not in the public interest.

Assessment of the competing interests

[10] *DCLG*
[11] Edwardian Group Ltd [2017] EWHC 2805 (Ch)

44. In assessing the competing balance of public interest we are satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.
    i. We are satisfied that the information in the public domain relating to the reasons for the Council's approach (including the factual basis of the legal advice and the planning officer's report) reduces the weight that we attach to disclosure to further the public interests of transparency, scrutiny and accountability.
    ii. We are satisfied that the public interest in maintaining the public confidence in legal professional privilege and the public interest in maintaining fairness when at risk of litigation is substantial and sufficient to rebut the presumption in favour of disclosure.

Conclusion

45. For the reasons set out above we refuse this appeal.

Signed Fiona Henderson

Judge of the First-tier Tribunal
Date: 22nd November 2019
Promulgated: 22nd November 2019